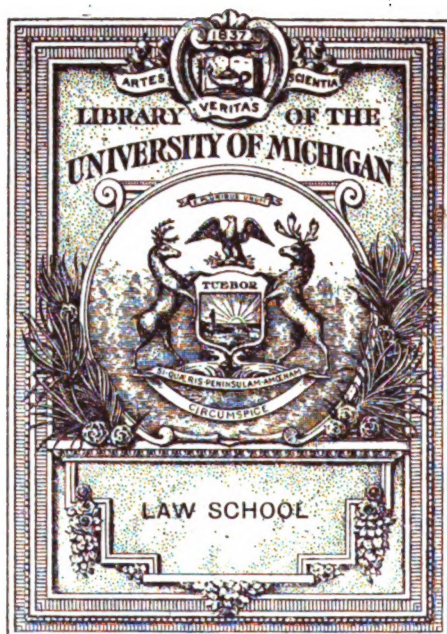


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REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA

May 3, 1921, to August 31, 1922. Also one case decided in January, 1921
and five cases decided in March, 1921

4110

JOSEPH COGLAN

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BY E. J. TAYLOR, SUPREME COURT REPORTER

FOR THE STATE OF NORTH DAKOTA

OFFICERS OF THE COURT DURING THE PERIOD OF
THESE REPORTS

HON. JAMES E. ROBINSON, Chief Justice.

HON. RICHARD H. GRACE, Judge. ¹

HON. LUTHER E. BIRDZELL, Judge. ²

HON. HARRISON A. BRONSON, Judge.

HON. A. M. CHRISTIANSON, Judge.

J. H. NEWTON, Clerk.

JOSEPH COGLAN, Reporter.

¹. Became Chief Justice September 1st, 1921.

². Became Chief Justice May 1st, 1922.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF
NORTH DAKOTA

JOHN C. LOWE, Plaintiff, vs. DISTRICT COURT of Ward County,
and Fifth Judicial District, Honorable K. E. Leighton, Judge there-
of, and T. N. Henderson, Clerk, Defendants.

(181 N. W. 92.)

Criminal law — circumstances held to require supreme court to designate
presiding judge and county for trial.

1. In a proceeding for the exercise of the superintending control of the supreme court, where it appears that the defendant in a criminal action filed a double affidavit of prejudice against both the trial judge and the county and judicial subdivision, and thereupon, the trial judge so disqualified, made an order transferring the criminal cause from Ward county to Ramsey county, without designating the judge who should preside at the trial in the transferred county, as the statute requires, and where, further, it appears upon the showing made at the hearing before the supreme court that a fair and impartial trial in Ramsey county, for either the state or the defendant, is doubtful, and where, further, under the peculiar circumstances surrounding the case involved, as stated in the opinion, it is appropriate that the superintending control of this court be exercised in the interests of justice, to the end that a speedy and early trial be had without remanding the case again to the judge so disqualified

for the consideration of the entry of another proper order herein, subject, possibly, to another application to this court, it is held that the supreme court, under its superintending control, will designate, as required by statute, the county, and will direct the district judges in the judicial district to which the transfer of the cause has been ordered to designate the trial judge to preside at the trial of such criminal action.

Opinion filed January 4, 1921.

Application in the nature of certiorari for the exercise of the superintending control of this court. Minute order entered directing the transfer of the criminal cause to Pierce county and for the designation of a trial judge by the district judges of that judicial subdivision.

McGee & Goss, for petitioner.

F. E. Packard and *E. B. Cox*, Assistant Attorneys General, for defendant.

PER CURIAM: This is an application to this court for the exercise of its constitutional superintending control over inferior courts through a proceeding in the nature of certiorari. The petitioner was arrested on October 30, 1920, at Minot, in Ward county, charged with statutory rape. Before a justice of the peace he waived examination, and thereupon it was ordered that he be held to answer at the next term of the district court in Ward county.

On November 8, 1920, in the district court of Ward county, an information was filed charging the petitioner with such crime. On November 9, 1920, the petitioner filed a demurrer to the information, which was overruled by the Honorable K. E. Leighton, judge of the district court. Thereupon the petitioner entered a plea of not guilty. This was followed by the filing of an affidavit of prejudice against the trial judge and also against the county and the fifth judicial district, pursuant to the provisions of § 10,766, Comp. Laws 1913. On the same date Judge Leighton ordered that further proceedings be held in the district court of Ramsey county, and directed the clerk to send the necessary records in this action to the clerk of the district court of Ramsey county.

Thereupon, the petitioner made application to this court for a writ of certiorari, requesting that this court exercise its superintending control over inferior courts and issue a writ directed to the district court of Ward county, addressed to the Honorable K. E. Leighton, as presiding judge thereof, to cause to be forwarded to this court the record for review, and

to have entered an appropriate order transferring the criminal case against the petitioner to McHenry or Renville counties. In the application it is stated that the petitioner is forty-seven years old, and an attorney at law; that he was a candidate for nomination to the office of judge of the district court of the fifth judicial district at the primary held in June, 1920; that he was then duly nominated for such office; that at the general election held November 22, 1920, he, together with one Geo. H. Moellring, received the plurality of all votes cast for such office; that at such election the Honorable K. E. Leighton and the Honorable F. E. Fisk, now district judges, were candidates and received a less number of votes than those cast for the plaintiff and said Moellring; that the petitioner is qualified by law to assume the office of district judge on the first Monday of January, 1921, and will and intends to qualify and assume such office on the said date. The petition, with the affidavits attached, also states that by reason of the prejudice of the trial judge, and of the people of Ward county, and of the fifth judicial district, the plaintiff cannot, within such judicial district, have a fair and impartial trial. That he demands that the cause be transferred for trial to an adjoining county and judicial district, to wit: to McHenry county or to Renville county. That during the political campaign the candidacy of the petitioner was bitterly assailed by his opponents, and to his best knowledge and his belief of the filing of the charges against him was solely for political purposes; that the petitioner is entirely innocent of the charge, and that the removal of the place of trial so great a distance from Minot, to Ramsey county, would seriously and greatly inconvenience the plaintiff. On November 23, 1920, the matter came on for hearing before this court. The defendant filed a motion to quash and also separate returns. The clerk of the district court, in his return, states that he has forwarded to the clerk of Renville county certified copies of the records in the criminal case pending against the petitioner. The Honorable K. E. Leighton, in his return, denied any knowledge of the jury having been called in McHenry county in the month of November or in Renville county, and alleges that the regular term of court in Renville county is not set until January. Further, he denies that political opposition framed the charge involved, or that the complaining witnesses were induced to make such accusation either in the hope of reward or otherwise, and further he states that the transfer was made where trial could be had at the earliest opportunity, where the train service is excellent, the hotel service good, and a jury already impaneled; that the hotel accommodations are inconvenient at

Towner, in McHenry county, and that the train service to Mohall, in Renville county, is inconvenient, and the court room is exceptionally poor. That the petitioner is not acquainted in Ramsey county, and that he is well known not only in Renville county, but in McHenry county as well. That he was well known as a court reporter when Renville was a part of the eighth judicial district, and was also a court reporter when McHenry was a part of such judicial district, and attended terms of court in those places for many years. To this return is appended the affidavit of the complaining witness to the effect that when she was sixteen years old, in the summer of 1918, the defendant had sexual intercourse with her at various times. At this hearing the defendant submitted an additional affidavit to the effect that at this time at Devils Lake, in Ramsey county, there exists a seething cauldron of political animosity; that the political feeling there was such during the political campaign that it did not subside through the election; that, since this case was ordered transferred in such county, there have been several arrests in that county arising out of the late campaign, and that such publicity and notoriety have been given by both sides of such political campaign, so as to make it less possible for such petitioner to have a fair trial in that county than was possible only a week ago. There is also attached an article showing that various complaints have been filed against the men arrested, charging criminal slander against some who have been opposed to the Nonpartisan League. In his petition, the petitioner recites that he was indorsed by the Nonpartisan League and Organized Labor, for district judge. In this connection the petitioner also presented another affidavit to the effect that conditions so exist in Devils Lake and Ramsey county as to militate against a fair and impartial trial in such county. That such conditions arise from the late political campaign and the preceding primary campaign in which political issues were sharply drawn between those nominees known as Nonpartisan and those known as Anti-Nonpartisan, that Ramsey county is one of the strongest Anti-Nonpartisan League counties in the state; that the great preponderance of sentiment, and especially in the city of Devils Lake, is Anti-Nonpartisan, and that much bitterness exists because of such issues. That in McHenry and Renville counties, on the contrary no such bitterness exists as this. No affidavits are filed by the defendants denying the matter contained in the affidavits of the petitioner presented in such hearing.

The proceedings for removal demanded by the petitioner have been under the provisions of article 5 (§§ 10,756 and 10,768) of the Code of

Criminal Procedure. These statutory provisions existed formerly when there was only one district judge for each judicial district. Under the new redistricting statutory act, there are now two or more judges for each judicial district. Laws 1919, chap. 167. Under this act change of venue may be taken from one judge to another in the same district, or in another district, or from one county to another, or from one district to another, as is now or may hereafter be provided for by law. Laws 1919, § 7, chap. 167. Under the provisions of said article 5, when the petitioner filed a double affidavit directed against the prejudice both of trial judge and of the county and judicial subdivision where the action was pending, it became the duty of the trial judge to order the cause to be removed for trial to some other county or judicial subdivision in this state. (§ 10,766) where the cause complained of did not exist. (§ 10,758), and to request, arrange for, and procure some other judge to preside at the trial of such action, (§ 10,766). It thereupon also became the duty of the judge who was requested by the disqualified judge to preside at the trial of the action, to respond as speedily as might be, and to preside at any trial to which he might be called under the provisions of said article 5. His acts are given the same force and validity as the acts made or done in the judicial district for which he was elected. (§ 10,767). It is plainly evident by simple reference to the statutory provisions, that the order of the trial judge, who was thus disqualified, was at least irregular, and not pursuant to the statutory requisites. The statute specifically requests such disqualified judge to arrange for some other judge to preside at the trial of the action so transferred. In the judicial district to which this case was sent, there are now three district judges. The disqualified judge did not designate which one of the three or what judge should preside. There is manifestly no such designation, expressed or to be implied, as the statute required.

If the parties were not demanding speedy trial, and if the administration of judicial procedure in this state might possibly not be hampered or embarrassed by reason of the proximity of time when the petitioner, as district judge elect, will qualify, these proceedings might then, perhaps, well be remanded to the disqualified judge again for further action. This court has heretofore held that the superintending control of this court over inferior courts was very broad. Ordinarily it will be exercised only in cases of emergency, or when the ends of justice imperatively demand it. The nature and extent of this control is not reflected by the name of the writ that has been used for its exercise. See *State ex rel. Red River*

Brick Corp. v. District Ct. 24 N. D. 28, 32, 138 N. W. 988. In the instant matter, peculiar circumstances exist in accordance with the demands and showing of the parties for an early and speedy trial. Circumstances have also arisen from the later showing made before this court, which serve to indicate that it is questionable whether a fair and impartial trial can be now had in the county of Ramsey. This does not necessarily reflect on the discretion of the disqualified trial judge, who ordered a transfer of the action to that county, since these circumstances, that a fair and impartial trial may not now be there had, have since arisen. Furthermore, the district judge, against whom the affidavit of prejudice was filed, has been placed peculiarly in an embarrassing position in exercising his discretion, by reason of the fact that he was defeated by the petitioner as a candidate for the office of district judge just shortly prior to the hearing had in this case before him. Likewise, the same might be stated of the Honorable F. E. Fisk, the other judge in such district, if, perchance, upon a remand of this cause, the disqualified judge should request the other judge to act.

If perchance, upon a remand of this matter to the disqualified court and judge, proceedings should be taken either through the voluntary action of both of such judges, so requesting the designation of another judge by this court, or if for any reason questions of interest of such judge in the outcome of this criminal litigation should be involved and injected, a further application to this court might be made, and further delay might occur in the hearing and determination of this criminal cause.

The duty of selecting a county free from prejudice is cast upon the presiding judge. *Murphy v. District Ct.* 14 N. D. 542, 546, 105 N. W. 728, 9 Ann. Cas. 170. Under the statute the disqualified judge is not deprived of jurisdiction to order the transfer to another county. *Comp. Laws* 1913, § 10,766; *State v. White*, 21 N. D. 444, 131 N. W. 261. Ordinarily the discretion of such disqualified trial judge will not be overruled unless it has been manifestly abused. *Murphy v. District Ct.*, *supra*, 547. But in the instant case it appears that the order of transfer as made is at least irregular, and must, in any event, be revised so as to comply with the statute, and other circumstances appear which properly, under the circumstances of this case in the administration of justice, may well require the superintending control of this court to be exercised.

Both parties are requesting a speedy trial. Both parties have stated upon oral argument that they desire a trial in a county where it may be

had fairly and impartially. No objection has been urged to a designation of Pierce county. The county seat, Rugby, is nearer to Minot than Ramsey county. A special term may be speedily and conveniently arranged for the disposition of this matter by the judges of the second judicial district. It is therefore ordered that a minute order be entered as follows:

It is ordered that the order made by the district court of Ward county transferring said action for trial to Ramsey county be set aside, and that the district court of said Ward county be, and it is directed to enter an order transferring said action for trial to the district court of Pierce county; and Judge Kneeshaw, the presiding judge of said second judicial district, in which Pierce county is located, be and he is directed to designate one of the three judges in said district to preside upon the trial of said action. It is further ordered that a special term of the district court of Pierce county be called at the earliest possible moment, the exact date to be fixed by the judges of said district in accordance with the rules of practise and statutes in said case made and provided.

ROBINSON, Ch. J., and BRONSON and GRACE, JJ., concur.

BIRDZELL, J. (dissenting). In my opinion the application shows no abuse of discretion whatever in removing the cause to Ramsey county for trial. On the contrary, on the showing made before the district court, it appears *prima facie* to have been a very proper exercise of discretion. Upon the argument in this court, facts were presented by affidavit which were not before the district judge at all, as they occurred subsequent to the original application. It also appeared upon oral argument in this court that one objection the defendant had to the order entered in the district court was that he might be forced to trial in Ramsey county before he had had an adequate opportunity to prepare. In other words, he desired some delay. If sufficient cause for continuance existed, it could, of course, be presented to the court sitting in Ramsey county. However, since the defendant himself desired some delay, the exigency, in my opinion, is clearly not such as to justify this court in an original exercise of discretion in regard to the changing of the place of trial based upon facts which were not before the district judge. This is legislation, nothing more nor less. It is not an exercise of the power of superintending control. It is an original exercise of discretion. The statute requires the application to be made before the district judge, and, in my opinion, this court is not justified in ignoring this statute and ordering a change in the place of trial upon facts which were never presented to the district judge.

The matter should have been remanded to the district court for such action as was deemed appropriate in the light of the facts presented here. This would occasion no delay. Then, if either party should desire a review by this court of the exercise of the legal discretion vested in the district court, it could be promptly secured. The whole matter could readily be accomplished in less than a week. Meanwhile the defendant could be preparing for the trial for which his counsel says he is not as yet prepared.

The action of the majority I regard as an implied criticism on the instrumentalities of justice in this state, in which I am unwilling to join.

CHRISTIANSON, J. (dissenting). In the main I agree with what is said in the dissenting opinion prepared by Mr. Justice Birdzell. By the plain words of the statute, it is the district court—not the supreme court—which is vested with power to designate the place of trial of a criminal action, when the defendant therein demands a change of trial judge and place of trial under § 10,766, Comp. Laws 1913. The power so vested in the district court is concededly a discretionary one, and this court may interfere only when it is clearly shown that the trial court has abused its discretion. Manifestly no abuse of discretion has been shown here. Nor do I understand that the majority members so hold. Their action is based upon matters which have arisen, or at least become apparent, since the trial court made the order which is assailed in this proceeding. It is true this court is, by the Constitution, granted “a general superintending control over all inferior courts,” but the very provision which grants this power attaches to it the condition that it is to be exercised “under such regulations and limitations as may be prescribed by law.” N. D. Const. § 86. And the same Constitution which brought this court into being and gave to it such general superintending control, also created the district courts and vested such courts with exclusive original jurisdiction in causes like that which gave rise to this proceeding. Not only so, but it has been “prescribed by law”—in plain and unmistakable terms,—that the district court is to determine the place of trial of criminal causes when an application is made by a defendant therein such as was made by the plaintiff in this proceeding. I believe that the action of the majority members in this proceeding is wholly unauthorized. If they deem the conditions, which are shown to have arisen after the district court made its order, such as to warrant the entry of an

order different from that which the trial court made, then the matter should be remanded to the district court, as suggested by Mr. Justice Birdzell.

I do not believe, however, that any showing has been made here from which it can reasonably be inferred that the defendant cannot have a fair trial in Ramsey county. It should be noted that the two counties suggested by the plaintiff (McHenry and Renville) as well as (Pierce) the county chosen by the majority members, all lie in the same judicial district as does Ramsey, so apparently plaintiff has no objection to any of the three judges in that district. (And upon the oral argument it was stated that no such objection existed.) So, at the outset it is conceded by all that the trial judge in Ramsey county would be fair and impartial, and afford defendant a fair trial. The crime with which plaintiff is charged has no connection whatever with politics. The plaintiff is not charged with having committed what may be called a "political crime." I do not believe that the people of Ramsey county (or any other county in this state) would desire to see an innocent man accused of rape convicted, or one guilty of that crime acquitted, because he is or is not of a certain political faith. And it is almost unthinkable that because some persons in Ramsey county have been arrested for criminal libel growing out of the recent election campaign, the jurors duly selected and sworn to try a case (from a distant county) wherein the defendant is charged with the crime of rape would violate their oaths as jurors, and permit political bias and prejudice to influence their judgment.

While I disagree with the conclusions reached by the majority members, it is only fair to state that if I deemed it properly a part of my duties to designate a place of trial of the criminal case under consideration, I should have no hesitancy in agreeing that the case might properly be sent to Pierce county. (I am aware of no reason why both parties may not, and will not, receive a fair trial in that county.) Nor am I aware of any reason why a fair trial may not be had in any other county in which the action may conveniently be tried.

LOUISE J. TUTTLE, Appellant, v. WILLIAM P. TUTTLE, Respondent.

(181 N. W. 898.)

Judgment—judgment by court of general jurisdiction having jurisdiction of parties and subject-matter cannot be attacked collaterally.

1. A judgment rendered by a court of general jurisdiction, having jurisdiction of the parties and the subject-matter, imports absolute verity. As long as it stands, it cannot be attacked collaterally by any of the parties thereto, or those in privity with them.

Judgment—losing party cannot maintain suit against successful party for obtaining judgment by fraud as long as such judgment remains in force.

2. As long as the former adjudication remains in force, the losing party cannot maintain an action against the successful party for obtaining the judgment by fraudulent and wrongful practices.

Torts—complaint insufficient to state cause of action for wrongfully obtaining judgment.

3. For reasons stated in the opinion it is held that the complaint in this case fails to state facts sufficient to constitute a cause of action, and that the trial court properly sustained a demurrer thereto on this ground.

ON PETITION FOR REHEARING

Judges—expression of opinion in former suit no ground for disqualification of judge of supreme court.

4. Section 100 of the North Dakota Constitution provides. "In case a judge of the supreme court shall be in any way *interested* in a cause brought before said court, the remaining judges of said court shall call one of the district judges to sit with them on the hearing of said cause." It is *held*, in construing this section, that a party litigant is not entitled to have one of the members of the supreme court adjudged disqualified, and to have the remaining members call a district judge to sit in his stead, on the ground that the member sought to be disqualified, in a former action between the same parties, has expressed an opinion, upon

NOTE.—That there seems to be considerable diversity of opinion as to the effect upon a decision of a judicial tribunal, or of a tribunal acting in a judicial capacity, of the fact that a part of the judges participating therein are disqualified, will be seen by an examination of the cases collated in a note in L. R. A. 1918D, 244, on effect on judgment of disqualification of a part of the participating judges.

the record there presented, which bears upon the rights of the parties in this action.

Opinion filed January 29, 1921. Rehearing denied March 17, 1921.

Appeal from the District Court of Kidder County, *Graham*, Special Judge.

Plaintiff appeals from an order sustaining a demurrer to the complaint.

Affirmed.

L. A. Simpson, and *S. E. Ellsworth*, for appellant.

Lawrence & Murphy, for respondent.

CHRISTIANSON, J. In this action the plaintiff seeks to recover damages in the sum of \$300,000, which she alleges she has sustained by reason of a certain judgment, wrongfully obtained against her by the defendant. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and the plaintiff has appealed.

The sole question presented on this appeal is whether the trial court was correct in ruling that the complaint did not state facts sufficient to constitute a cause of action. The substance of the complaint is as follows: That on and long prior to October 23, 1907, the plaintiff was the wife of the defendant; that on or about that date the defendant, claiming to be a resident of the state of North Dakota, commenced an action in divorce against the plaintiff in the district court of Burleigh county, in this state, —alleging as grounds of divorce extreme cruelty and desertion; that on being served with the papers in such divorce action, the plaintiff employed three firms of attorneys, one in Chicago, Illinois, one at Jamestown, North Dakota, and one at Bismarck, North Dakota; that said attorneys in due time, in her behalf, interposed an answer denying the averments of the complaint, and alleging by way of cross complaint and counterclaim that the defendant had been guilty of extreme cruelty towards the plaintiff, and had wilfully and without cause continued to live apart from her since July, 1905; that in said cross complaint and counterclaim it was further alleged that the plaintiff was without means; that the defendant was possessed of property of the value of about \$1,000,000; that all of said property had been accumulated during the married life of plaintiff and defendant; that in said answer and cross complaint the plaintiff prayed as relief "that she be granted temporary alimony during

the progress of said action, to be used as a means to pay counsel fees and procure the evidence necessary to properly defend the action brought by defendant, and to prosecute the counterclaim and cross complaint interposed by plaintiff herself; that she be granted an absolute divorce, and that she be awarded her just and equitable part of the property accumulated by the plaintiff and the defendant, and for such other and further relief as to the court seems just and equitable." That at the time of the service of said answer, and at the time said divorce action was at issue, plaintiff was prepared with strong, competent, and credible evidence to substantiate all—the allegations of said answer, counterclaim, and cross complaint; that all of said allegations were true; "that said action in divorce was fully at issue and came regularly on for trial at Bismarck, North Dakota, on the 8th day of December, 1908, before" the "then presiding judge of said district court; and *that plaintiff was ready for trial and present at said date* with her attorneys as aforesaid. Depositions of a number of witnesses in support of the allegations of plaintiff's counterclaim and cross complaint in said action had been taken and filed, and there were present at said trial a number of other witnesses on plaintiff's behalf. Commencing on said 8th day of December A. D. 1908, for a period of four days, said trial proceeded, and plaintiff's witnesses were carefully examined and all material information known to them presented to the court. A number of witnesses were called and examined in defendant's behalf, and on or about the 11th day of December, 1908, *the entire case was submitted to said Judge Winchester for determination.*"

That prior to said trial the defendant had wilfully, fraudulently, and unlawfully colluded with, and corrupted and bribed, the presiding judge to decide and determine the material issues in the action, in defendant's favor; that prior to such trial the defendant had paid to said judge the sum of \$1,500, and that it had been arranged and agreed between said defendant and said judge that, upon the conclusion of the trial, a decree should be entered in favor of the defendant. That the said defendant had also approached, tampered with, and influenced W. F. Cochrane, one of plaintiff's attorneys, to disparage plaintiff's cause after the decision of the trial court, and to advise the plaintiff not to appeal from said decree. That at the conclusion of the trial the judge, acting in accordance with the understanding between him and the defendant, made findings of and conclusions of law, and ordered the entry of decree in said action, in which it was found that all the allegations of defendant's complaint were abundantly supported by the evidence; that his application for a divorce

was sustained upon all the grounds alleged in the complaint, and that defendant should be granted a divorce upon the grounds stated in his complaint. That, "in accordance with said findings of fact, conclusions of law, and order for judgment made and entered as aforesaid, *a decree of said district court was entered of record on the 27th day of January A. D. 1909, and is now of record therein, wholly unreleased, unmodified, and unchanged.*" That the evidence offered by the plaintiff on the trial of such divorce action "was in all respects abundantly sufficient not only to refute and defend against disputed allegations of defendant's complaint, but to fully maintain the allegations of plaintiff's counterclaim and cross complaint;" that in deciding the case the trial judge, influenced by defendant's corrupt bargaining, disregarded the evidence introduced by the plaintiff, and gave no weight or credit thereto, and made his findings, conclusions, and order for judgment not in accordance with the weight of the evidence or the right and justice of the cause, but in conformity with his previous arrangement with the defendant. That after the entry of said decree her attorney, one W. F. Cochrane, was left in entire charge of the case; that said attorney disparaged and discouraged an appeal; and that when an appeal to the supreme court was ordered by the plaintiff, said attorney, "in conformity to the corrupt influence, promises, and bribery of said defendant, proceeded so indifferently and in a manner so slack and negligent" that said appeal was dismissed by the supreme court, without a review of the merits of the said appeal. "That if said action had been tried and disposed of justly and impartially, without the exercise of undue influence upon the presiding judge of said court, or upon the plaintiff's attorney, she has reason to believe and does believe that, properly placed upon a preponderance of the evidence introduced, plaintiff would have been given a divorce from said defendant, and awarded a proportion of said property accumulated during the marriage of plaintiff and defendant, to the sum of at least three hundred thousand dollars (\$300,000); that the ground for divorce in her favor set out in her counterclaim and cross complaint would have been sustained, and the testimony of plaintiff and of her witnesses would have been held to be reputable, credible, and truthful." "That by the findings of fact of said court, its conclusions of law, and its order for judgment, induced by the wrongful and fraudulent conduct of said defendant, plaintiff has been caused great humiliation, shame, and insult; has been caused to suffer great distress of mind; has been deprived of valuable property rights and interests in the value of the sum of three hundred thousand dollars

(\$300,000), and has sustained loss, deprivation, and injury to her damage in said sum." "That said wrongful, fraudulent, and collusive conduct of defendant and his bargaining, tampering with, and bribing the presiding judge upon said trial and the attorney acting for plaintiff, was not brought to the notice or knowledge of plaintiff until about the 28th day of January A. D. 1919; and that with all diligence, after being credibly informed of the circumstances constituting said fraud and collusion, plaintiff brought this action for the purpose of asserting her rights against said defendant and obtaining damages for the wrong, loss, and injury done her by said defendant, under the circumstances hereinbefore set forth.

"Wherefore plaintiff prays judgment against said defendant for the sum of three hundred thousand dollars (\$300,000), with interest thereon at the rate of 6 per cent per annum from the 28th day of January, 1909, together with her costs and disbursements of this action."

We are of the opinion that the court was correct in sustaining the demurrer. From the averments of the complaint it appears that plaintiff's cause of action, is predicated upon the alleged wrongful rendition of a judgment against her. She claims that the evidence adduced entitled her to judgment, and that by reason of the misconduct of the trial judge an improper judgment was rendered; that such misconduct was occasioned by the acts of the defendant, and that by reason thereof she has been damaged in the sum alleged in the complaint. From the averments of the complaint, it appears, however, that the judgment which the plaintiff seeks to attack was rendered after trial by a court having jurisdiction of the subject-matter and of the parties.

It is elementary that a judgment rendered by a court having jurisdiction of the parties and the subject-matter, unless reversed or annulled, in some proper proceeding, is not open to contradiction or impeachment, in respect to its validity, verity, or binding effect, by parties or privies, in any action or proceeding, 23 Cyc. 1055.

Freeman in his work on Judgments, says: "A party to a judgment feeling himself aggrieved thereby may, in a proper case, either move that it be vacated, or prosecute an appeal or writ of error, or maintain a suit in equity to enjoin its enforcement. These, unless the judgment is void on its face, are the only remedies open to him, and if he resorts to neither, or resorting to any or all he is denied relief, he cannot avoid the judgment, when offered in evidence against him, by proving that it ought not to have been pronounced, and was procured by fraud, mistake, perjury, or

collusion, or through some agreement entered into by the prevailing party, and which he neglected or refused to perform." Freeman, 4th ed. § 334.

"The settled policy of the law forbidding that a matter once adjudicated shall be again drawn in issue while the former adjudication remains in force does not permit the prosecution of an action for obtaining a judgment by false and fraudulent practices, or by false and forged evidence. Neither can a party against whom judgment has been recovered sustain an action against his adversary and the witnesses for damages occasioned by their conspiring together and procuring a judgment by fraud or perjury, as long as the judgment remains in force and unreversed; because the charges made in the second action are conclusively negated by the former adjudication." Freeman, Judgm. 4th ed. § 289. See also 23 Cyc. p. 1066.

In considering the effect of a judgment which had been pleaded as a defense in an action for malicious prosecution (and in referring to the rule that a judgment, by a court having jurisdiction of the parties and of the subject-matter, in favor of the plaintiff, is sufficient evidence of probable cause for the institution of the action in which the judgment is rendered, even though the judgment is subsequently reversed by an appellate tribunal), the supreme court of the United States, said: "The rule, therefore, has respect to the court and to its judgment, and not to the parties, and no misconduct or demerit on their part, except fraud in procuring the judgment itself, can be permitted to detract from its force. It is equally true and equally well settled in the foundations of the law that neither misconduct nor demerit can be imputed to the court itself. It is an invincible presumption of the law that the judicial tribunal, acting within its jurisdiction, has acted impartially and honestly. The record of its proceedings imports verity; its judgments cannot be impugned except by direct process from superior authority. The integrity and value of the judicial system, as an institution for the administration of public and private justice, rests largely upon this wholesome principle." *Crescent City L. S. L. & S. H. Co. v. Butcher's Union, S. H. & L. S. L. Co.* 120 U. S. 141, 159, 30 L. ed. 614, 621, 7 Sup. Ct. Rep. 472.

When a court of general jurisdiction acts within its jurisdiction, every presumption is in favor of its judgment. This includes the presumption that such courts act rightly and in conformity to law. In other words, where the decree is such a one as the court had jurisdiction to render, the presumptions are all in favor of its regularity and validity until vacated

by some proper proceeding instituted directly for the purpose or avoiding or correcting it. 15 R. C. L. pp. 875, 876; 23 Cyc. 1215 et seq.

Appellant contends that under the recent decision of this court in *Shary v. Eszlinger*, 45 N. D. 133, 176 N. W. 940, a judgment may be impeached, on the ground of fraud, in any proceeding. The portion of the opinion upon which this contention is predicated is the following quotation from *Hutchins v. Lockett*, 39 Tex. 165: "That a judgment rendered by a court of competent jurisdiction cannot be attacked in a collateral proceeding is a rule of almost universal application. Nevertheless a judgment may be impeached in any proceeding upon the ground of fraud or satisfaction. It is said 'that the maxim that fraud vitiates everything applies to judgments' (Freeman, *Judgm.* p. 90); and this rule may be applied to judgments affected by fraud, whether the fraud arises at the time of or after the rendition of the judgment. The court has only to determine that a judgment is founded in fraud, in order to authorize its impeachment as a nullity." 39 Tex. 159.

The question presented in *Shary v. Eszlinger* was, What faith and credit must be accorded in this state to a judgment rendered by a district court in Texas? In order to determine that question, it became necessary to ascertain what effect was given to such judgment in the state of Texas. Or, as stated in the decision in *Shary v. Eszlinger*, the question presented in that case "resolved to this,—Would the facts set forth in the answer, and covered by the proof, be sufficient to authorize the courts of Texas to set aside the judgment or enjoin the enforcement thereof?" The quotations from *Hutchins v. Lockett*, and from other Texas decisions, were set forth for the purpose of showing what force and effect was given in Texas to judgments rendered in that state. By so quoting, we did not necessarily approve of what was said in the Texas decisions. It was not for us either to approve or disapprove thereof. We were concerned only with ascertaining what the law of Texas was as regards the force and effect of judgments rendered by the courts of that state. The quotation, from *Freeman on Judgments*, contained in *Hutchins v. Lockett*, was taken from that portion of *Freeman's* work which deals with the vacating judgments by motion, and hence does not support the contention that a judgment procured by fraud is subject to collateral attack by the parties thereto or those in privity with them. On the contrary, that noted author, elsewhere in his work, lays down the rule: "The parties to an action, and the persons in privity with them, cannot collaterally attack or impeach a judgment for fraud; and any attack must be regarded as col-

lateral which is made in 'any proceeding which is not instituted for the express purpose of annulling, correcting, or modifying' a judgment or decree." Freeman, Judgm. 4th ed. § 336.

In Shary v. Eszlinger, we found that the laws of Texas permitted a judgment obtained by fraud to be vacated or the enforcement thereof to be enjoined. 176 N. W. 939. And we concluded that the requirement of the Federal Constitution, "that full faith and credit shall be given in one state to the judgments obtained in another, will not prevent the courts of this state, in which legal and equitable rights and remedies are administered in one court and in one form of action, from permitting an *equitable* defense to be interposed against a judgment obtained by fraud in another state, where the courts of the state where the judgment was rendered are authorized to vacate or enjoin the enforcement of a judgment obtained by fraud."

In this case the plaintiff seeks to attack the judgment in the divorce action collaterally. It is contended that the demurrer admits that the judgment is wrong, and that it was obtained by the wrongful and unlawful practices set forth in the complaint. This contention ignores the fundamental rules applicable to judgments. The complaint shows that the judgment in question was rendered by a court of general jurisdiction, in an action duly pending and brought to trial before it; that the court had unquestioned jurisdiction of the parties to, and the subject-matter of, the controversy determined by the judgment; that the judgment was rendered more than ten years ago, and that it has not been set aside or corrected in any proceeding provided by our laws for the vacation or correction of judgments. The averments in the complaint charging misconduct and wrongful acts on the part of the trial court contradict the basic provisions of the judgment. The very essence of plaintiff's action is that the judgment is wrong,—that the facts required the rendition of a judgment different from that which was rendered. The judgment cannot be thus impeached. As long as it stands, it imports absolute verity as to every proposition of law and fact essential to its existence against the parties to it. Schultz v. Schultz, 136 Ind. 323, 43 Am. St. Rep. 320, 36 N. E. 126; Freeman Judgm. 4th ed. § 289; VanFleet, Collateral Attack, § 550. Hence, the allegations of misconduct on the part of the trial court and the defendant are for all purposes the same as though they were not contained in the complaint. So far as this action is concerned, they are conclusively denied, and said to be without foundation in fact or in law, by the other allegations in the complaint, which allege that the judgment was render-

ed by a court of competent jurisdiction, having jurisdiction of the parties and the subject-matter. While that judgment remains in full force and effect, the losing party "can never leap over it, treating it as void, and litigate her right anew, by commencing an action, as if it had not been made, and in a collateral manner attack its validity." VanFleet, Collateral Attack, § 550; Freeman Judgm. 4th ed. §§ 289, 334, 337; 15 R. C. L. pp. 875, 876.

The trial court was clearly right in sustaining the demurrer. The order appealed from is affirmed.

ROBINSON, Ch. J., and BRONSON and BIRDZELL, JJ., concur.

GRACE, J. (dissenting). It is our theory of this case, that the decree of divorce was absolutely void, and that it was of no effect. It is also our theory that the court had no jurisdiction to enter the decree. If this be true, it is of no force or effect, and should be wholly disregarded.

There is no objection to the general rule, that where the court has jurisdiction of the parties and the subject-matter of a particular case, its judgment, until reversed or annulled in some proper proceeding, is not open to attack or impeachment in an collateral action or proceeding, on account of errors or irregularities not affecting jurisdiction.

Our objection in this case will be directed to the claim or contention, that the trial court had no jurisdiction to hear or determine proceeding in divorce or render a decree therein. It is, we think, generally admitted that irregularity in process, or in the manner of service, and other such matters as might have been set up by way of defense, are not sufficient to permit a decree or judgment to be attacked collaterally.

These principles, however, have no application where the judgment is wholly void. It may be well at this point to set forth that part of the plaintiff's complaint as set forth in the majority opinion, for the purpose of directing special attention to it. We do not think it necessary to set forth the complaint in full.

"That prior to said trial the defendant had wilfully, fraudulently, and unlawfully colluded with and corrupted and bribed the presiding judge to decide and determine the material issues in the action, in defendant's favor; that prior to such trial the defendant had paid to said judge the sum of \$1,500, and that it had been arranged and agreed between the said defendant and said judge that, upon the conclusion of the trial, a decree should be entered in favor of the defendant. That the said de-

fendant had also approached, tampered with, and influenced W. F. Cochrane, one of plaintiff's attorneys, to disparage plaintiff's cause, after the decision of the trial court, and to advise the plaintiff not to appeal from said decree. That at the conclusion of the trial the judge, acting in accordance with the understanding between him and the defendant, made findings of the fact and conclusions of law, and ordered the entry of decree in said action in which it was found that all the allegations of defendant's complaint were abundantly supported by the evidence; that his application for a divorce was sustained upon all the grounds alleged in the complaint, and that defendant should be granted a divorce upon the grounds stated in his complaint. That, "in accordance with said findings of fact, conclusions of law, and order for judgment, made and entered as aforesaid, a decree of said district court was entered of record on the 27th day of January A. D. 1909, and is now of record therein wholly unreleased, unmodified, and unchanged." That the evidence offered by the plaintiff on the trial of such divorce action "was in all respects abundantly sufficient not only to refute and defend against disputed allegations of defendant's complaint, but to fully maintain the allegations of plaintiff's counterclaim and cross complaint;" that in deciding the case the trial judge, influenced by defendant's corrupt bargaining, disregarded the evidence introduced by the plaintiff, and gave no weight or credit thereto, and made his findings, conclusions, and order for judgment not in accordance with the weight of the evidence, or the right and justice of the cause, but in conformity with his previous arrangement with the defendant. That after the entry of said decree her attorney, one W. F. Cochrane, was left in entire charge of the case; that said attorney disparaged and discouraged an appeal; and that when an appeal to the supreme court was ordered by the plaintiff, and said attorney, in conformity to the corrupt influence, premises, and bribery of said defendant, proceeded so indifferently and in a manner so slack and negligent that said appeal was dismissed by the supreme court, without a review of the merits of the said appeal. That if said action had been tried and disposed of justly and impartially, without the exercise of undue influence upon the presiding judge of said court, or upon the plaintiff's attorney, she has reason to believe and does believe that, properly placed upon a preponderance of the evidence introduced, plaintiff would have been given a divorce from said defendant, and awarded a proportion of said property accumulated during the marriage of plaintiff and defendant, to the sum of at least \$300,000."

Further allegations of the complaint are set forth in the majority opinion. To the complaint a demurrer was interposed. It is a well-settled rule of pleading, that the demurrer admits all the allegations of the complaint, well pleaded. That is, that all such allegations of the complaint must be taken as true.

For the purposes of this appeal, the demurrer admitting the allegations of the complaint which sets forth the fraud and bribery of the trial judge, and the fraud of the attorney, the situation is practically the same as if a trial had been had upon those questions, and it had been found, as a fact, by a trial court, that the trial court before which the trial occurred had been guilty of fraud and bribery, as alleged in the complaint, and one of the attorneys guilty of fraud, as there alleged. With this situation confronting us, it is well to consider the question of jurisdiction. That question, as presented here, is an abstruse one. It is one, as it presents itself here, that is quite difficult of comprehension and solution.

"The supreme power in each civilized state enacts general laws declaring and fixing the rights of persons under its dominion. It then establishes judicial tribunals for the purpose of declaring and fixing such rights in particular cases. The power given by law to the tribunal to declare and fix such rights is called its jurisdiction. *Jurisdiction is simply power.*" VanFleet, Collateral Attack, § 58.

Jurisdiction is the *power* to hear, determine, and give judgment, not corruptly, but honestly. It was not intended by the Constitution, that the powers delegated to the courts could be used corruptly, and in matters which come before them they have no power to act corruptly. They may decide a case rightly or wrongly, and still their proceedings and the judgment entered may be valid, but this is far from admitting that a court may act in a given matter, in a corrupt manner and from a corrupt motive, and still render a valid judgment. This cannot be. It is against public policy.

"Every litigant, including the state in criminal cases, is entitled to nothing less than the cold neutrality of an impartial judge." 15 R. C. L. 539.

It should be admitted, it would seem, that a trial court which is interested in the case would be wholly disqualified to hear, try, and determine and render judgment in the same. Of course, if the allegations of the complaint are true, and here they must be assumed to be true, the trial court in this case was getting \$1,500 for deciding the case in defendant's favor; that, of course, constituted an interest in the litigation.

It was held in one case that, where the brother of the trial court was one of the leading attorneys in the case, and the matter was to determine his right to certain attorney's fee, and the trial court ordered \$150 counsel fees in his favor, the pecuniary interest of the attorney, in the result of the case, disqualified the judge. *Roberts v. Roberts* 115 Ga. 259, 90 Am. St. Rep. 108, 41 S. E. 618.

Cooley, in his *Constitutional Limitations*, p. 507, says: "There is also a maxim of law regarding judicial action which may have an important bearing upon the constitutional validity of judgments in some cases. No one ought to be a judge in his own cause; and so inflexible and so manifestly just is this rule, that Lord Coke has laid it down that even an act of Parliament made against natural equity, as to make a man a judge in his own case, is void in itself. *This maxim applies in all cases where judicial functions are to be exercised, and excludes all who are interested, however remotely, from taking part in their exercise.* It is not left to the discretion of a judge, or to his sense of decency, to decide whether he shall act or not; all his powers are subject to this absolute limitation; and when his own rights are in question, he has no authority to determine the cause. To empower one party to a controversy to decide it for himself is not within the legislative authority, because it is not the establishment of any rule of action or decision, but is a placing of the other party, so far as that controversy is concerned, out of the protection of the law, and submitting him to the control of one whose interest it will be to decide arbitrarily and unjustly.

"Nor do we see how the objection of interest can be waived by the other party. If not taken before the decision is rendered, it will avail in an appellate court; and the suit may there be dismissed on that ground. *The judge acting in such a case is not simply proceeding irregularly, but he is acting without jurisdiction.* And if one of the judges constituting a court is disqualified on this ground, the judgment will be void, even though the proper number may have concurred in the result, not reckoning the interested party.

"Mere formal acts necessary to enable the case to be brought before a proper tribunal for adjudication, an interested judge may do; but that is the extent of his power."

It is a familiar principle, that a judge cannot sit in the trial of his own case. It cannot be said that, in view of the allegations in this complaint, the trial judge did not have an interest in this case. Indeed, the principle here involved reaches much further than that. Assuming the allegations

of the complaint to be true, he had an interest of \$1,500 in the litigation,—that is, he was to receive that upon a favorable termination of it, and he could terminate it favorably because he was judge in the case of both the law and the fact, and had agreed to decide the case in defendant's favor. Thus, the plaintiff's rights were wholly ignored, disregarded, and given no consideration.

It is our contention, assuming or regarding the allegations of the complaint as true, that the very moment the court agreed to receive the \$1,500 for deciding the case in favor of the defendant, its power absolutely ceased. Its jurisdiction was at an end.

We will assume a case where the court has jurisdiction of the subject-matter and of the person, and the issues are joined. It will be conceded, in such circumstances, that the court has jurisdiction, but, if one of the parties makes and files an affidavit of bias or prejudice against the judge, his jurisdiction immediately ceases. He cannot take another step in the proceeding which will affect the rights of the parties. It will thus be seen that the jurisdiction may be acquired, and in certain circumstances may again depart, without the trial court having any authority or power to retain it.

In this jurisdiction, where such an affidavit is filed, it is not necessary to give any reasons, or produce any evidence of the bias or prejudice of the judge. A simple affidavit of bias or prejudice terminates the power of the judge. Of course, the charge here involved is not bias or prejudice, but corruption of the trial court by bribery; and where that is shown to exist, it just as effectively terminates the power of the court to proceed in the matter before him, as in the case of the filing of an affidavit of prejudice, and this, by reason of § 22 of our Constitution, which, so far as material here, is as follows:

"All courts shall be open, and every man for any injury done him in his lands, goods, person, or reputation shall have remedy by due process of law, *and right and justice administered without sale, denial, or delay.*" This provision of our Constitution is self-executing. Similar constitutional provisions in other state Constitutions have been so held. *Rea v. State* 3 Okla. Crim. Rep. 276, 139 Am. St. Rep. 954, 105 Pac. 385.

In that case the question was an affidavit of prejudice against the judge, or a motion for a change of judge, which was overruled, on the theory that the same was filed after the witnesses in the case had been summoned. The court there said: "This requires a consideration of § 15 of Bunn's Constitution of Oklahoma, which is as follows: "The courts of

justice of the state shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice." Substantially the same clause is contained in the Constitution of Idaho. This provision came before the supreme court of that state for consideration in the case of *Day v. Day*, 12 Idaho, 556, 86 Pac. 531, 10 Am. Cas. 260, and the court said: "It is contended by counsel for appellant that under the provisions of § 18, art. 1, Constitution of Idaho, 'the people have prohibited a court from trying a case in which he is prejudiced by or for either party.' Said section is as follows: 'Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property, or character, and right and justice shall be administered without sale, denial, delay, or prejudice.' They also cite paragraph 40 of the Magna Charta, which reads: 'To none will we sell; to none will we deny or delay right or justice.' They contend through that constitutional provision that the people have declared that justice shall be administered not only without sale, without denial, and without delay, but also without prejudice, and contend that the legislative power to pass laws regulating the change of venue is limited by constitutional provisions respecting the subject. 4 Enc. Pl. & Pr. p. 377. It is contended that said section of the Constitution is self-acting, self-executing, and requires no legislative provision for its enforcement, and cannot be abridged or modified by any legislative or judicial act. There is no question but what said provision is self-operating, and it is regarded as settled in this country that all negative or prohibitive clauses in a Constitution are self-executing. [Citing cases] * * * *The legislature neither by neglect to act nor by legislation can nullify a mandatory provision of the Constitution. * * * Can it be contended, in the face of the command of said provision of our Constitution, that the legislature could legally declare that the bias and prejudice of a judge should be no cause for a change of venue? I think not. And if, in the face of that provision, the legislature neglects to specify in a statute that the prejudice of the judge is a ground for a change of the place of trial, then the very object and purpose of that provision of the Constitution may be nullified and set at naught. Regardless of the statutory provision, where such a state of facts appears as in the case at bar, and a change of place of trial is demanded because of the prejudice of a judge, a change of venue, or at least of judges, should be granted to preserve from discredit the judiciary of the state.*"

It will be noticed that the Constitution of Idaho provided that "right and justice shall be administered without sale, denial, delay, or prejudice," and that the legislature has neglected to specify in the statute that prejudice of the judge is a ground for a change of the place of trial, and the court held that it was error of the trial court not to grant a change of the trial, notwithstanding the omission in the law above referred to, for the reason that not to do so was in contravention of that section of the Constitution of that state thereunder consideration.

If that reasoning is correct—and we see no weakness in it—it is just as applicable here, where, in the state of the pleadings by demurrer to the complaint, it is admitted that justice has been sold, and where there is no law providing in these circumstances, that the trial court shall thereafter not have jurisdiction, as it was in the Idaho case, to prejudice where there was no law which specified that prejudice shall be a ground for a change of venue.

In this state we have no statute of which we are cognizant, which provides that, where a court is bribed or makes a sale of justice in judicial proceedings, that its jurisdiction ceases as soon as those acts occur. But surely no law is needed. Section 22 of our Constitution is self-executing. It is thus sufficient in itself for the prevention of evils mentioned therein. By its very provisions no court has any power to do anything therein prohibited, and courts have jurisdiction to administer justice only, in harmony with the true intent thereof.

We are of the opinion that the decree of divorce was absolutely void and of no effect, for the reason that, assuming the allegations of the complaint as true, it was procured by bribery, and the trial court had no jurisdiction to render it. It was of no validity or verity, in the face of this record. Hence, this proceeding is not a collateral attack, for a collateral attack implies a valid judgment or decree, which does not exist in this case.

A judgment absolutely void is not made valid by the lapse of time. *Heffner v. Gunz*, 29 Minn. 108, 12 N. W. 342; *Feikert v. Wilson*, 38 Minn. 341, 37 N. W. 585; *McNamara v. Casserly*, 61 Minn. 335, 63 N. W. 880.

If the demurrer in this case were overruled, which it should be, and the defendant should thereafter interpose his answer, and the case thereafter proceeded to trial in the ordinary way upon the issues thus formed, it is manifest that, before plaintiff could recover the damages claimed, she would be required to prove, by competent testimony, the allegations

of her complaint. She would be required to prove that the trial court was bribed; that it committed fraud. She would be required to prove that the attorney referred to in the complaint committed fraud. We believe that law and justice require that she should have that opportunity.

Assuming the allegations of the complaint to be true, it would appear that the trial court closed the doors of justice to her, and this, in defiance of § 22 of our Constitution, which requires that all courts shall be open; that every man, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due process of law. There was no due process of law in the trial court, if, as charged by the complaint, that trial court was bribed for \$1,500 to decide the case in defendant's favor. That court was not open, but closed.

It seems so far, that this court, by inadvertence and failure to fully comprehend and consider the seriousness of the charges of the complaint, and by, in effect, holding that a void judgment is made valid by the lapse of time, has, in effect, closed the doors of justice to this court to plaintiff. They have, in effect, said to her, "For the injuries you have sustained, for the loss of your share of the community property, for the humiliation and suffering you have endured, notwithstanding § 22 of the Constitution, this court and no courts are open to you, but all are closed. You have no remedy, notwithstanding that your complaint charges that the trial court was bribed to decide the divorce proceeding for defendant, and notwithstanding that the demurrer interposed to that complaint admits all the allegations and charges of the complaint well pleaded."

How can this plaintiff go hence, except with the belief that she has been granted injustice and no protection for her sacred rights of person and property, and this from those very tribunals she, no doubt, in common with all true citizens, has been taught all her life, to revere?

Of course, it is astounding that a charge of bribery should be made against one holding a high and responsible judicial position. Other judicial officers who are called upon, in the discharge of their duties, to consider such a charge when presented to them in due course of law, are apt to rebel at the thought that such a charge could be thought of. However, judicial officers are only men, mere human beings, who, after they enter on the discharge of their high duties, retain the same frail human nature they possessed before they were elevated to that high and responsible position.

Judicial officers, as a class, perhaps have no higher degree of integrity than the average of any other class of public officers, whose duties

are different in nature, and who are called upon to discharge such official duties, in the interest and to the benefit of the public.

Before judicial officers became such, they were lawyers, and their integrity as judicial officers will not likely be of any higher degree than that possessed by them while they were discharging the office of an attorney and counsel at law.

Man was created in the image and likeness of God, but when he becomes a judicial officer, he does not take on any additional attributes of Divinity. He is yet a mere man, so that it is possible for one invested with the powers of a judicial officer to depart from the paths of rectitude, righteousness, and integrity. If one invested with the high powers of a judicial officer should, in a moment of weakness, depart from the paths of integrity, in the discharge of his duty, to such an extent that his act becomes a venal one, and thus place a stain upon the robe of ermine with which the authority of the Constitution and the power of the people have draped his person, other judicial officers and tribunals will draw no nearer perfection, will become no stronger in the distribution of justice, if, by choice language, fine phrases, and subtle reasoning, they seek to excuse the weakness of their brother judicial officer.

It is to the credit of the judiciary, that actual venality is seldom charged, and perhaps this is by reason that the judiciary of past centuries have taken extra precaution never to exculpate any material venal infraction of judicial integrity. It may be that judicial officers cannot wholly shake off the effects of the environment with which they were surrounded prior to the time they were elevated to the high position of a judicial officer. If prior to their elevation, and during a professional career as attorneys, they were engaged in defending great corporate interests; or had been continually defending or participating in litigation that affected any other particular class of persons, and, professionally, they had always lived, moved, and acted in that environment; it is possible that when they assume to discharge the duties of a high judicial position, to which they may have been elevated, and however honestly and fairly they may endeavor to discharge their duties, that, perhaps, unconsciously, they may be influenced by the unseen power of their previous environment. But, in this, while there may be a weakness in the judicial officer, there is no venality. In his heart, soul, and conscience, he is honest, as a man and a judicial officer, and an honest man is one of the noblest works of God.

The judicial officer, in enunciating decrees and rendering judgment,

is, so to speak, invested with an atom of Divinity, by which, for a brief moment of time, he is authorized to exercise an attribute of the Omnipotent, but, after all, his decrees and judgments are, in their nature, interlocutory. They may be final, so far as time is concerned, but are not so for eternity. For, finally, the actions of men, including the decrees and judgments of courts, must pass a final review before a final tribunal of justice, whose Judge cannot err, whose Decree will pronounce justice, and there, no doubt, the majority opinion will be overruled.

ON PETITION FOR REHEARING

CHRISTIANSON, J. Appellant has petitioned for a rehearing. The petition is based on two grounds:

1. That Mr. Justice Robinson, who sat as a member of the court upon the hearing on the appeal and joined in the former decision, was disqualified, and should not have participated in the hearing or determination of the case; and,

2. That the former decision was erroneous in holding that the complaint did not state facts sufficient to constitute a cause of action.

1. On November 29, 1920, the appellant filed a written petition wherein attention was called to the following statement contained in the opinion prepared by Mr. Justice Robinson in *Tuttle v. Tuttle*, 46 N. D. 79, 181, N. W. 888: "It is shown that in January, 1918, defendant commenced an action against the plaintiff in the district court of Kidder county to recover about \$480,000 (\$300,000, with interest from January, 1909). The basis of the action is that in the divorce suit she should have recovered at least \$300,000. Such an action, in the opinion of the writer, taken in connection with the proceedings in this case, gives to the whole a color of blackmail. It shows an attempt to extort money from the plaintiff, to force him to buy his peace by harassing him with vexatious, groundless, and expensive litigation. The judgment in the case was given after a full and fair hearing. It imports absolute validity and verity. It is not subject to a collateral attack, nor is the plaintiff, in the opinion of the writer, subject to a suit for obtaining the judgment. Hence, no party has a right to commence or prosecute such an action." And it was contended that this evidenced such bias and prejudice on the part of Mr. Justice Robinson in favor of the respondent and against the appellant as to disqualify him from sitting in the case. And it was asked that the remaining judges of this court call one of the district judges to sit in his

place and stead. In consideration, the remaining judges of this court did not deem that the petition presented facts which justified them in calling in a district judge, but that at the most it presented such a state of facts that Mr. Justice Robinson must be permitted to determine for himself whether it was improper for him to sit. He maintained that he entertained no bias or prejudice whatever, and had not even the slightest acquaintanceship with the parties. The case was argued on December 8, 1920. Upon the hearing of the appeal—and before the oral argument commenced,—the conclusions reached by this court upon appellant's said application were announced orally. Appellant's counsel thereupon made a brief argument or statement in connection with said matter; and in connection therewith, Mr. Justice Robinson, from the bench, stated, in substance and effect, that the reference made in the former opinion to this action was made for the reason that the complaint in this case was attached to and made a part of the counter affidavits filed in that case; that while, of course, he had some opinion as to the law relative to the collateral impeachment of judgments, nevertheless he was not only willing and ready to hear appellant's argument, but could and would do so with an open mind; and that the opinion expressed in the decision of the other case would not be permitted to interfere with a fair and impartial consideration and determination of this case. The cause was thereupon argued on the merits, with Mr. Justice Robinson sitting as a member of the court. In the circumstances, we did not deem this question one arising on the record in the case as submitted or of sufficient importance to dignify it by formal discussion in the opinion. In the petition for rehearing, however, this is made the main basis for attack upon the former decision.

In *Tuttle v. Tuttle*, supra, a motion was made to vacate the judgment rendered in the divorce action. The matter was submitted upon affidavits. In one of the affidavits submitted by the defendant, reference was made to the fact that L. C. Pettibone, who made the principal affidavit, had, some time prior to the institution of the proceeding to vacate the judgment, brought two actions to recover large amounts against the defendant, Tuttle, and that one J. S. Greene had instituted an action against said Tuttle to recover about \$10,000 in connection with a land transaction some ten or twelve years old, in which the said Pettibone was interested; also, that on the 18th day of June, 1918, the said Louise J. Tuttle had commenced this action against said Wm. P. Tuttle, to recover approximately \$480,000, upon the claim that if a decree had been granted to her in the divorce case, she would have received from said Wm. P. Tuttle at

least \$300,000; and a copy of the complaint in this action was attached to and made a part of said affidavit. It was contended by counsel for the defendant, Tuttle, that said L. C. Pettibone, who made the principal affidavit, had inspired the institution of the various actions and proceedings. In other words, the showing that these actions had been brought was made as bearing upon motive and credibility. The question of the sufficiency of the complaint was in no manner alluded to either in the affidavits or the argument.

The only basis for challenging the right of a member of the supreme court to sit on the hearing of a cause is § 100 of the Constitution, which provides: "In case a judge of the supreme court shall be in any way *interested* in a cause brought before said court, the remaining judges of said court shall call one of the district judges to sit with them on the hearing of said cause." N. D. Const. § 100. It will be noted that the Constitution makes "*interest*" the ground of disqualification. Nothing is said about "bias" or "prejudice." "Interest" is by no means synonymous with "bias" or "prejudice." The distinction between the two terms has been recognized from the early period of the English common law. Thus, under the common law one having an interest in the litigation was disqualified as a witness. But in applying this rule it was held that "an interest disqualifying a witness must be *legal*, as contradistinguished from mere prejudice or bias arising from relationship, friendship, or any of the numerous motives by which a witness may be supposed to be influenced." Bouvier's Law Dict. Rawle's 3rd Rev. p. 1649.

Cyc. says: "The interest which disqualifies a judge is a pecuniary interest, or one which involves some individual right or privilege. It must be a direct interest in the subject-matter of the litigation." 23 Cyc. 576.

"In the absence of statutory provision, bias or prejudice on the part of the judge does not disqualify him. In many states, however, there now exists statutes which expressly make the bias or prejudice of a judge a ground of disqualification. But disqualifying a judge on the ground of prejudice is so liable to abuse that some states have refused to adopt it." 23 Cyc. 582.

In our constitutional convention there were several lawyers of experience and ability. They were doubtless wholly familiar with the distinction between what is meant when it is said that a party has an "interest," or is "interested," in a cause, and when it said that he is "biased" or "prejudiced" therein in favor of one party or against the other. They were, also, doubtless familiar with what is said in Cyc.,—that there was

grave danger of abuse, if bias or prejudice was made a ground upon which parties litigant might challenge the right of the members of the supreme court to sit. And apparently they determined that the members of the court ought not to be subjected to challenge by parties litigant on such grounds. But even if bias or prejudice constitutes a ground of disqualification, it seems clear that the appellant has failed to establish it.

Cyc. says: "The disqualifying prejudice of a judge does not necessarily comprehend every bias, partiality, or prejudice which he may entertain with reference to the case. And where, under the law, the bias or prejudice of a judge disqualifies him, it must be made to clearly appear not only that the bias or prejudice exists, but that it is of a character calculated to seriously impair his impartiality and sway his judgment." 23 Cyc. 582, 583.

In considering the same subject, Ruling Case Law says: "The basis of the disqualification is that personal bias or prejudice renders the judge unable to exercise his functions impartially in the particular case, and therefore it must be shown that he is biased against, or entertains ill will or hostility toward, the defendant, of such character as might prevent him from giving the defendant a fair trial; and this must be shown as a matter of fact, and not as a matter of opinion of the defendant or any other person. The words bias and prejudice as used in the law of the subject under consideration refer to the mental attitude or disposition of the judge towards a party to the litigation, and not to any views that he may entertain regarding the subject-matter involved. Hence a judge is not disqualified from presiding at a criminal trial by the fact that he looks with abhorrence on the commission of crimes; or to try a contested election because he is an active politician, and one of the parties to the contest is a member of his political party, or because he had expressed his opinion on election day that a challenged voter had a right to vote; or to pass on an application to enjoin registrars from filing a registration list which omits the names of certain persons opposing a faction in which he is interested, and to compel them by mandamus to place such names on the list; or to try a case involving a violation of the liquor laws, because he is strongly opposed to the sale of liquor in any form, though if he has publicly pledged and committed himself to revoke the license of every person arraigned before him having license to sell liquor, and is personally hostile to the licensee, it would seem to be a good reason why he should not try cases involving the revocation of the license. It has also been held that

a judge is not disqualified from sitting in a proceeding to punish a contempt consisting of imputation of his motives and attacks upon his integrity, or to try one who has published a newspaper libel against him. Personal knowledge of a judge, of former proceedings before him, is not a disqualification, nor does any disqualification result from the fact that he is convinced of the guilt of an accused, or that he has been an admirer and friend of one accused, and regards him as scrupulously honest. The fact that a judge conducted the preliminary examination which resulted in the prosecution of accused does not, in the absence of any showing as to any personal bias or prejudice, disqualify him from presiding at the trial." 15 R. C. L. pp. 530, 531. The United States Supreme Court has held that it is no valid objection to a judge trying a cause that before his appointment he was attorney in other matter for some of the parties. But that "in such a state of facts, the judge must be permitted to decide for himself whether it was improper for him to sit in trial of the suit." *Carr v. Fife*, 156 U. S. 494, 39 L. ed. 508, 15 Sup. ct. Rep. 427.

The petition filed by the appellant challenging Justice Robinson's right to sit in this case was not verified. There was, and is, no contention that Justice Robinson had even the remotest interest in the lawsuit, or that he was related to or even acquainted with the parties. The mere fact that a judge entertains, or even has expressed, an opinion upon some question of law, does not disqualify him on the ground of bias or prejudice. If it did, then a trial judge ought not to sit on the hearing of a motion for a new trial based upon errors of law committed during the course of the trial, and the members of this court ought not to sit in the consideration of petitions for rehearings or upon rearguments of causes. "There is no rule or principle," said the supreme court of Vermont (*Martyn v. Curtis*, 68 Ut. 397, 35 Atl. 334) "that disqualifies the judge of a court from sitting in different causes in which the same legal rules and questions of fact, or either of them, are presented for consideration. In many instances, causes involving the same questions are tried by the same judges."

Under the facts presented in this case the remaining members of the court would not be justified in saying that Mr. Justice Robinson should not sit and participate in the hearing and determination of the case. At most a situation is presented in which he must be permitted to determine for himself whether it is proper for him to sit. *Carr v. Fife*, 156 U. S. 494, 498, 39 L. ed. 508, 510, 15 Sup. Ct. Rep. 427. See also *State ex rel.*

Langer v. Kositzky, 38 N. D. 616, 621, 622, L.R.A. 1918 D, 237, 166 N. W. 534.

It is suggested in the petition for rehearing that the fact that Mr. Justice Robinson participated after his right to sit had been assailed will render the judgment of this court of questionable validity. For reasons already stated we are entirely satisfied that a situation does not exist in this case which would justify the remaining members of the court in ruling that Mr. Justice Robinson is disqualified. But even if we were of the opinion that he was disqualified, it would not follow that the former decision, participated in by him, is invalid. That decision was agreed to by a majority of this court, exclusive of Mr. Justice Robinson. Hence, under the rule adopted in this state, the judgment would not be invalid, even though Mr. Justice Robinson was in fact disqualified. See *State ex rel. Langer v. Kositzky*, *supra*.

The other questions presented in the petition for rehearing are merely a reargument of the contentions made upon the former argument. It is again contended that the complaint does state a cause of action; that the demurrer admits that the decree was obtained by fraud and bribery. These contentions were fully considered and determined in the former decision. Further reflection has not changed the views expressed therein.

A rehearing is denied.

ROBINSON, Ch. J., and BRONSON and BIRDZELL, J J., concur.

GRACE, J. (dissenting in part and expressing no opinion in part). In so far as the opinion denying the petition for rehearing asserts that the complaint did not state a cause of action, I dissent from it. As far as the disqualification of Justice Robinson is concerned, it is only necessary to say that it has been the rule of this court that each justice of the supreme court should decide for himself whether or not he is disqualified in a given case. Justice Robinson determined for himself that he was not disqualified.

By reason of this rule, I express no opinion on the disqualification claimed to exist against Justice Robinson.

E. E. HUFFORD individually and on behalf of the property holders and taxpayers of the city of Devils Lake, North Dakota, Appellant, v. EDWARD F. FLYNN, C. A. Dodge, A. V. Haig, W. E. Hocking and M. R. Mayer, as members of the Board of City Commissioners of the city of Devils Lake, a municipal Corporation, Respondents.

(182 N. W. 941.)

Municipal corporations — discretion of city commissioners as to paving streets not subject to restraint by Court of equity.

1. A court of equity cannot properly interfere with, or in advance restrain, the discretion of a board of city commissioners, while such board, in the exercise of powers conferred by the charter or general laws, is considering a proposition as to whether certain streets and alleys in the city are to be paved.

Appeal and error — record transmitted to the Supreme Court cannot be impeached or altered by evidence dehors the record.

2. The record transmitted to this court on appeal cannot be impeached, changed or altered by affidavit or other evidence of matters dehors the record. Such record imports verity, and is conclusive evidence of the proceedings had in the lower court. If the record is incomplete or incorrect, amendment or correction must be sought by appropriate proceedings, and not by impeachment on the hearing in this court.

Opinion filed March 17, 1921.

From a judgment of the district court of Ramsey County, Buttz J. Plaintiff appeals.

Affirmed.

H. S. Blood, for appellant.

Torger Sinness, for respondents.

The appeal in this case is duplicitous, as it attempts to appeal from a judgment dismissing the action and an order refusing to grant a temporary injunction.

National Surety Co. v. Granmer, 27 S. D. 515; 131 N. W. 864. The

regular record on appeal must be accepted as true and cannot be impeached by affidavits or statements outside the record.

4 C. J. 512-514.

The court cannot control a city council in the exercise of its discretionary powers and cannot enjoin the council from passing ordinances within its power.

14 R. C. L. 437-438; 19 R. C. L. 904-906; 22 Cyc. 889-890; New Orleans Waterworks Co. v. New Orleans, 164 U. S. 471; 41 U. S. (L. ed.) 518; Lewis v. Denver City Waterworks Co. 19 Colo. 236; 34 Pac. 993; 41 A. S. R. 248; Stevens v. St. Mary's Training School, 114 Ill. 336; 32 N. E. 962; 36 A. S. R. 438; 3 Abbott on Municipal Corporations, 2511-2515; High on Injunction, 1240-1243; 1 Spelling on Injunction and Extraordinary Relief, Sec. 687; 1 Dillon on Municipal Corp., 4th ed., Sec. 308; State v. Board of Canvassers, (N. D.) 172 N. W. 81.

CHRISTIANSON, J. The plaintiff brings this action for the purpose of enjoining, the defendants, city commissioners of the city of Devils Lake, from procuring plans and specifications for a certain proposed paving project in that city and paying the engineers retained to prepare the same for their services. The complaint alleges, in substance, that the plaintiff is a tax-payer in the city of Devils Lake and owns property which will be liable to special assessment for the construction of a certain pavement proposed to be constructed by the defendants city commissioners; that between October 1919 and January 1st, 1920, the city commission of Devils Lake created paving district No. 1, and constructed therein paving of the approximate cost of \$450,000.00; that on November 23, 1920, the Board of city Commissioners, deeming it necessary to extend the paving into other streets and avenues outside of said paving district No. 1, placed upon its first reading two certain ordinances, one creating paving district No. 2, and one creating paving district No. 3; that at the same meeting the Board of City Commissioners instructed the city engineer and the consulting engineer to prepare plans and specifications and an estimate of the probable cost of extending the paving, already constructed in the city, upon certain specified streets and avenues in said paving districts Nos. 2 and 3, and directed that said plans, specifications and estimates of cost be for certain specified types of paving; that on November 30, 1920, at a regular meeting of said city commissioners, said two ordinances were placed upon their second reading and final passage; that the said engineers proceeded in accordance with the directions of the

city commissioners and began to make a survey of the streets and alleys which it was proposed to pave and to collect the data for the preparation of the plans and specifications; that a large majority of the property holders affected by the proposed paving have protested to the said city commissioners and remonstrated against said paving or any part thereof being constructed, but that in disregard of said protests, the engineers are proceeding with the survey and preparation of their plans and specifications and that they intend to present and file said plans and specifications with the city auditor as soon as they are prepared; and that the city commissioners intend to pay out of the city treasury a large sum to said engineers to compensate them for said work and will do so unless restrained from so doing; that such payment will be made by warrants drawn upon paving districts Numbered 2 and 3, and that said Board will order that the property of said districts, including the property of plaintiff be specially assessed to pay said warrants; that the defendants are threatening to proceed with the procuring of said plans, and with the construction of said proposed paving, and unless restrained from so doing, will incur costs and expenses therefor and cause the same to be paid by warrants drawn upon said paving districts Nos. 2 and 3; that no necessity exists for the making of said proposed improvement or for procuring plans and specifications therefor; that said board has proceeded arbitrarily, knowing that no necessity exists, and that their acts have been and will continue to be against the wishes and desires of the plaintiff and that the cost thereof will be prohibitive. The demand for relief is that the defendants be enjoined from doing any of the acts complained of. The defendants demurred to the complaint upon the ground, among others, that it did not state facts sufficient to constitute a cause of action. The trial court issued an order to show cause why injunction should not issue pendente lite. A hearing was had upon such order, at which affidavits were presented by the respective parties. The plaintiff submitted the verified complaint and his own affidavit stating substantially the same facts, as those set forth in the complaint. The defendants submitted six affidavits, namely, the affidavits of four members of the city commission, the city auditor and the consulting engineer. From these affidavits it appears that the consulting engineer is working under a contract by the terms of which he "will not be entitled to compensation for services in connection with the paving of districts Nos. 2 and 3 of the city of Devils Lake until such time as a contract or contracts are let for the paving of

said districts." It, also, appears that the city commissioners have in no manner decided what to do about such paving, but that the plans and specifications and estimates of cost of construction are asked for in good faith to enable the city commissioners to take up and consider the necessity and desirability of paving certain streets and alleys in said paving districts Nos. 2 and 3.

The trial court made an order denying a temporary injunction. It also made an order that the demurrer be sustained and the action dismissed. Judgment of dismissal was entered, and plaintiff has appealed from such judgment.

It is elementary that the allowance of a temporary injunction rests largely in the sound judicial discretion of the trial court, to be exercised in view of the facts of the particular case, and that an appellate court will not interfere unless it appears that the trial court abused its discretion. We have no hesitancy in saying, upon showing made in this case, that the trial court was wholly justified in denying the application for a temporary injunction, even if the complaint had stated facts sufficient to constitute cause of action. We are of the opinion, however, that the complaint not only fails to state a cause of action, but that it affirmatively shows that plaintiff in fact and in law has no cause of action; and that it would have been an idle ceremony to have permitted the complaint to be amended.

Under our statutes, a city council, or city commission, is authorized to create sewer, paving, water main and water works districts (Section 3698 C. L. 1913) and to pave streets (Section 3702 C. L. 1913). It is provided that when the city council (or city commission) "shall deem it necessary to * * * to pave * * * any street, highway, avenue, alley, lane or other public ground within the city limits * * *, the city council (or commission) shall direct the city engineer, or in case the city has no competent engineer, shall employ a competent engineer, to prepare plans and specifications for such work, including the grading of the street if not already established, if such grade is deemed necessary by such engineer, and all details of the work to be done, and make an estimate of its probable cost, which plans, specifications and estimates shall be approved by resolution of the city council, which approval shall be deemed to establish the grade of the street as shown in such plans and specifications, if the grade of the street has not previously been established by ordinance, providing such grade has been included in such plans and specifications.

In case the improvement shall consist in paving or repaving any street, alley or public place, the city council (or commission) may require such plans, specifications and estimates to be made of such different kinds of pavement as they may deem advisable." (Sec. 3703. C. L. 1913). It is further provided that after such plans, specifications and estimates shall have been filed in the office of the city auditor and approved by the city council (or commission) such council or commission "shall by resolution, declare such work or improvement necessary to be done; such resolution shall refer intelligently to the plans, specifications and estimates therefor, and shall be published, twice once in each week for two consecutive weeks in the official newspaper of the City." Provision is further made for the filing of protest by the owners of a majority of the property liable to be specially assessed and for the hearing of such protest. (Sec. 3704, C. L. 1913). Subsequent sections provide for advertising for bids, the letting of the contract, the procedure relating the assessment of special assessments to pay for the work etc.

Obviously, the situation disclosed by the complaint is not one warranting judicial interference. It appears that the city commission is engaged in consideration of a matter which the statute invests it with power to consider. The matter is still pending before the commission. There can in no event be a judicial review of the acts of the commission until the commission has acted. For it is well settled that under ordinary conditions a court of equity cannot properly interfere with or in advance restrain the discretion of a municipal body while, in the exercise of powers conferred by the charter of the general laws, it is considering a matter of this nature. 14 R.C.L. 437; 19 R.C.L. 905-906; New Orleans Waterworks Co., v. New Orleans, 164 U. S. 471, 41 L. ed. 518; Lewis vs. Denver City Waterworks Co., 34 Pac. 993; Spelling on Injunction (2nd ed.) Sec. 687.

It is contended by the appellant that the demurrer was not properly before the court; that the same had not been noticed for argument and that hearing thereon was not afforded. It is attempted to sustain this contention by an affidavit. The order sustaining the demurrer specifically recites: "The defendants having interposed to plaintiff's complaint in the above entitled action a demurrer, and the questions of law therein placed in issue by said demurrer having *come on regularly to be heard* at Chambers in the County Court House in the City of Devils Lake, Ramsey County, North Dakota, on the 14th day of January 1921 at 10 o'clock in the forenoon of said day, the plaintiff appearing in person and by his at-

torney, H. S. Blood, Esq. and the defendants appearing by their attorney, Arthur R. Smythe, and the respective attorneys for the parties having presented their arguments to this court and the court being duly advised in the premises." The record transmitted imports verity and is conclusive evidence of the proceedings had in the lower court. That record cannot be impeached by affidavits submitted in this court. If the record is incomplete or incorrect, amendment or correction must be sought by appropriate proceedings, and not by impeachment on the hearing in this court. The record cannot be impeached, changed or altered in this court. The record cannot be impeached, changed or altered in this court by affidavit or other evidence of matters dehors the record. 4 C. J. 512-514.

It follows from what has been said that the judgment appealed from is correct and must be affirmed. It is so ordered.

ROBINSON, Ch. J., and BIRDZELL and BRONSON, JJ., concur.

GRACE, J. I concur in the result.

JOHN H. KYLLONEN, Appellant, v. ACME HARVESTING MACHINE COMPANY, a foreign corporation, EMERSON BRANTINGHAM IMPLEMENT COMPANY, a foreign corporation, and ANDREW F. LEHR, Defendants.

ANDREW F. LEHR, Respondent.

(182 N. W. 249.)

Mortgages — Substantial compliance with statutory notice of foreclosure sale sufficient.

1. Following *McCardia v. Billings*, 10 N. D. 373, 87 N. W. 1008, the rule of substantial compliance in the statutory notice of a mortgage foreclosure sale applies.

Mortgages — misspelling of mortgagor's name in foreclosure notice held not to render foreclosure void.

2. A typographical error in the spelling of the name of the mortgagor in a published notice of foreclosure sale, does not render the fore-

closure void where the notice correctly describes the mortgagee, the date of making and filing the mortgage, and the book and page where the same has been recorded, and where further, no prejudice is shown.

Mortgages — dating foreclosure notice one day prior to filing assignment held not to invalidate foreclosure.

3. The dating of a mortgage foreclosure notice one day anterior to the time of filing for record the assignment of such mortgage, which time of filing is described in the notice does not render the foreclosure invalid where it appears that such dating is a mere clerical error.

Opinion filed March 17, 1921.

Action to determine adverse claims in District Court, Logan County, *Allen J.* The plaintiff has appealed from the Judgment and it has demanded a trial de novo.

Affirmed.

A. B. Atkins, and *F. J. Graham*, for the appellant.

"The proceedings in foreclosure by advertisement is one in derogation of common law and the remedy must be strictly and closely pursued."

Clifford v. Tomlison, (Minn.) 64 N. W. 381; 84 N. W. 1024 (Minn.); 16 N. W. 499 (Minn.).

The issuance of the notice of sale was a commencement of the foreclosure proceedings and that under the statute at that time it was essential that an assignment of the mortgage be placed on record showing the record title ownership in the mortgage to be the party signing the foreclosure notice.

3 Dak. page 345, 17 N. D. page 235 and Section 8077, C. L. 1913.

Burfening & Conmy, for respondent.

The true rule is whether or not the inaccuracies in the notice are such as misled or prejudice the parties or the public, and that rule is set forth in *McCardia v. Billings*, 10 N. D. 373; *Inv. Co. v. Shepard*, 66 N. W. 451; *Colgan v. McNamara*, 16 R. I. 554; 18 Atl. 157; *Hoffman v. Anthony*, 6 R. I. 282.

Notice of foreclosure sale which did not properly name the mortgagees was held to comply sufficiently with the statute.

Cook v. Lockerby, 16 N. D. 19.

BRONSON, J. This is an action to determine adverse claims concerning 120 acres of land in Logan County. The plaintiff has appealed from the judgment quieting title in the respondent Lehr, and demands a trial de novo. U. S. patent was issued to the plaintiff in February 1914. In June 1913 he gave a mortgage upon the land to Dean & Company to secure \$400.00. On December 12th, 1916 this Company assigned the mortgage to the Service Company which assignment of mortgage was filed and recorded on Jan. 25th, 1917. Foreclosure proceedings by advertisement were afterwards instituted upon this mortgage by the Service Company. The notice of mortgage foreclosure sale is dated Jan. 24th, 1917; therein it describes the mortgagor as John H. Hyllonen, single, instead of John H. Kyllonen, single, as described and signed in the mortgage. This notice recites that the assignment of the mortgage was filed for record on January 25th, 1917. It otherwise correctly describes the mortgagee, the date of the mortgage, the date of its filing in the office of the Register of Deeds, and the book and page therein where it was recorded. It fixed the date of foreclosure upon March 19th, 1917. This notice of foreclosure sale was published in a newspaper for six successive weeks commencing on February 9th, 1917 and ending March 17th, 1917 without any change. On January 29th, 1917, the attorneys affidavit was filed for record correctly reciting the name of the plaintiff as mortgagor. On March 17th, 1917 sheriff's certificate was issued upon the foreclosure sale had to the Service Company wherein the name of the mortgagor was described correctly as stated in the mortgage.

The affidavit of registered mailing by the Register of Deeds of a copy of the printer's affidavit of the publication of the foreclosure notice (as contained in the abstract stipulated in the record) is dated March 27, 1917, and recites the correct name of the plaintiff. However, in the copy of this affidavit (Exhibit F) offered in evidence, the name of the mortgagor is stated as in the notice of sale. In evidence was offered the record of a registered letter through the post office department which shows that on March 27th, a registered letter was sent to the plaintiff, John H. Kyllonen and was signed by the plaintiff. Evidence was further offered that the plaintiff personally signed the registered receipt for such letter and personally received such registered letter. On March 28th, 1917 the Sheriff's certificate of foreclosure sale was assigned to the defendant Lehr, pursuant to which, on March 25th, 1918, a sheriff's deed was issued for the land involved.

There is also evidence in the record by the plaintiff himself to the effect that he received this registered letter; that he saw an attorney about this foreclosure and attempted to make some settlement concerning such foreclosure prior to the time of the expiration of redemption. The plaintiff contends that the foreclosure proceedings are invalid for two reasons, (1) because of the improper recital of the name of the mortgagor in the notice of foreclosure sale, and, (2) because it appears that the assignment of the mortgage to the Service Company was not filed for record until one day after the date stated in the notice of sale. In this State the rule has been stated by this court that in a foreclosure sale, "the statute is substantially complied with when the notice itself states facts correctly pertaining to the record, which record, if examined would conclusively show the error in the notice" and, further, that the rule of substantial compliance applies instead of strict and literal compliance. *McCardia v. Billings*, 10 N. D. 373, 381; 87 N. W. 1008. 88 Am. St. Re. 729, Sec. 27 Cyc. 1468. This is particularly so when no prejudice is shown or suggested. In the case at bar, it is very apparent that the error in the notice of sale was merely a typographical error. The notice otherwise correctly describes the mortgage, the parties and the land, and a mere reference to the record would conclusively show the fact of the typographical error. Furthermore, subsequent proceedings were had in the foreclosure sale as if the foreclosure proceedings were had throughout against the plaintiff properly described as the mortgagor, and as stated in the mortgage. To him, was mailed the registered letter of foreclosure sale, which was received by him properly addressed in a letter registered to him in his correct name. Prejudice is neither shown nor suggested upon this record.

The statute, Sec. 8080 C. L. 1913 does not require the notice of sale to be dated. It sufficiently appears that the assignment of the mortgage was duly filed and recorded at least two weeks prior to any publication of the notice. Manifestly again the date stated in the notice as the date is a clerical error. We are of the opinion that the foreclosure sale was not invalid upon the contentions made by the plaintiff.

The judgment is affirmed.

CHRISTIANSON, and BIRDZELL, JJ., concur.

ROBINSON, Ch. J. and GRACE, J., dissent.

WALTER A. GARSKE, Respondent, v. S. A. HANN, and MARY HANN, Appellants.

(182 N. W. 933.)

Appeal and error — service of notice of appeal by mail not authorized where parties reside in same city.

Section 7952, C. L. 1913, which authorizes service by mail when the person making the service and the person on whom it is to be made reside in different places, between which there is a regular communication by mail, does not authorize service of a notice of appeal by mail where the party serving it and the party upon whom it is to be served reside in the same city.

Opinion filed March 19, 1921.

Appeal from the district court of Ramsey County, *Burr, J.*

Affirmed.

R. Goer, H. S. Blood, of counsel, for appellants.

Flynn, & Traynor & Traynor, for respondent.

BIRDZELL, J: On July 5th, 1919, the plaintiff obtained a judgment for \$162.26 in the justice court of Ramsey County before W. H. Wilson, Justice of the Peace. A few days thereafter, R. Goer, as attorney for the defendant, prepared a notice of appeal directed to Flynn & Traynor, notifying them that the defendants were appealing from such judgment to the district court. A copy of this notice, together with copies of the undertaking and answer, was inclosed in an envelope and mailed to Flynn & Traynor by registered letter, postage prepaid. The registry receipt shows that the envelope containing the papers was delivered on July 8th, the name of Flynn & Traynor appears in the blank for the signature or the name of the addresses and under this blank in the space set aside for the signature of the addressee's agent appears the name "Edith Webster." Messrs. Goer and Flynn & Traynor all live and practice law in the City of Devils Lake and the registered letter was both mailed and receipted for in Devils Lake. In October, 1919, plaintiff's attorney served notice of motion to dismiss the appeal. The motion came on to be heard before Honorable A.

G. Burr, District Judge, and on November 18, 1919, an order was entered directing a dismissal of the appeal on the ground that no notice of appeal had been served as provided by law, and further providing that a certified copy of the order be filed with the justice of the peace and that "thereupon the said judgment shall have the same force and validity and may be enforced in the same manner in said justice court as if no appeal had in fact been attempted to be taken," and that judgment be entered accordingly. On December 31, 1919, the defendant's attorney served upon the attorneys for the plaintiff a notice of appeal from this order. This notice, together with the undertaking, was filed in the office of the district court on the same date. Thereafter, on January 13, 1920, the defendant's attorney, pursuant to notice and over the objection of plaintiff's attorneys, caused a judgment to be entered in the district court confirming the judgment entered in the justice court; also dismissing the appeal and including costs in the sum of \$13. On July 7, 1920, the defendant served a notice of appeal and undertaking appealing from the judgment which had been entered in January preceding.

In the brief of appellant's counsel it is conceded that there is but one question involved in these appeals; namely, was the notice of appeal from the judgment entered in the justice court properly served upon the plaintiff's attorney? We are of the opinion that it was not. The statute, Section 7952, C. L. 1913, authorizes service by mail when the person making the service and the person on whom it is to be made reside in different places between which there is a regular communication by mail. It does not authorize service by mail where the parties reside in the same place, as in the instant case. The fair implication from this statute is that where parties reside in the same place they should resort to the more reliable method of personal service which is provided for in Section 7951. This court has repeatedly held that an unauthorized service by mail is not the equivalent of personal service. *Rhode Island Hospital Trust Co. v. Keeney*, 1 N. D. 411; *Clyde v. Johnson*, 4 N. D. 92. See also *McKenzie v. Boynton*, 19 N. D. 531-535. It follows that the order and judgment of dismissal was proper, and they are affirmed.

ROBINSON, Ch. J., and CHRISTIANSON, and BRONSON, JJ., concur.

GRACE, J. (concurring specially). § 7952, Comp. Laws 1913 permits service by mail, when the person making the service and the person on

whom it is to be made reside in different places, between which there is a regular communication by mail.

The papers attempted to be served in this case were a certain notice of appeal and undertaking. Plaintiff having appeared by his attorneys, they were the proper parties on whom service should be made of the papers in question. (See § 7959, Comp. Laws 1913.)

They, as well as defendants' attorneys, being all residents of Devils Lake, the papers should have been served upon plaintiff's attorneys in the manner provided in Subdivision 1 of § 7951, Comp. Laws 1913.

It would be superfluous to add, that the service in question does not comply with the requirements of the above statutes.

CITIZENS STATE BANK of Selfridge, North Dakota, a corporation,
Respondent, v. FRANK E. WINMILL, J. C. SWEENEY, and
FIRST STATE BANK OF STANTON, a corporation at Stanton,
North Dakota, Appellants.

(182 N. W. 457.)

Chattel mortgages — lien first in time held prior to subsequent lien.

The plaintiff sues to foreclose a chattel mortgage for \$1500 and interest. Defendants answer that the mortgage has been fully paid and the Stanton Bank claims certain mortgage liens, which this Court holds to be superior to that of the plaintiff. As the pleadings and the evidence did not fairly present the question of payment, the trial court failed to consider it, leaving defendants to bring an action for an accounting. Hence, this court does not attempt to determine that question. It remands the case that the pleadings may be amended and the question of payment determined on further evidence and on amended pleadings.

Opinion filed March 22, 1921.

Appeal from the District Court of Mercer County; *Lembke*, Judge.
Remanded.

Thorstein Hyland, for appellants.

It is not necessary to file certified copies in another state.

Wilson v. Rustad, (N. D.) 75 N. W. 260 and cases cited; *Keenan v. Stenson*, Minn., 20 N. W. 364 and cases cited.

The new note was not a payment of the instrument in absence of an agreement to that effect.

7 Cyc. and cases cited; *Wirtz v. Wolter*, 32 N. D. 364.

Norton & Kelsch, for respondent.

ROBINSON, Ch. J. On September 15th, 1917, at Selfridge, in Sioux County, North Dakota, Frank Winmill and J. C. Sweeney made to the plaintiff a promissory note for \$1500, due November 15th, 1917, and to secure payment of the same made to the plaintiff a mortgage on twenty head of horses and mules. On September 28th, 1917 the same was filed in the office of the Register of Deeds of Sioux County. The plaintiff avers that only \$160 has been paid on the note, and for the balance, \$1340, it brings suit and demands a foreclosure judgment. For this \$1340 Winmill and Sweeney gave a renewal note dated December 28th, 1918, due in six months. The bank did not give up the original note because it was not in its possession. Defendants, by answer, avers that the \$1340 note has been fully paid and that the Stanton Bank has three unpaid mortgages which are a prior lien on the animals, and that the plaintiff had actual or constructive notice of the same. The trial court found in favor of the plaintiff and adjudged a foreclosure for \$1340, and interest, and defendants appeal.

The case presents two questions: (1) Has the \$1340 mortgage been paid? (2) Did the plaintiff take its mortgage with actual or constructive notice of the prior mortgages? On December 12, 1916 Frank Winmill made to the Bank of Stanton a promissory note for.....\$500.00
On December 12, 1916 a note for..... 266.00
On August 5, 1917 a note for..... 400.00
The notes were secured by mortgages duly filed in the office of the Register of Deeds of Mercer County, where the mortgagor resided and

where the property was situated. As the mortgage to plaintiff was made on September 15th, 1917, the mortgages to the Bank of Stanton were prior in time and presumably prior in right. In July of 1917 the mortgagors left Mercer county with the horses and mules, to buy, sell and put up hay in Carson county, South Dakota, and the Bank of Stanton filed in Carson county a certified copy of its mortgages. On the way to Carson county they sojourned a short time in Sioux county and arranged with the plaintiff bank to advance them money to buy, sell and put up hay, agreeing to ship the hay to the plaintiff bank from Tuttle, South Dakota. So on December 28th, 1917 Winmill and Sweeney made the \$1500 mortgage. It is on a printed form which reads thus: "All that certain personal property situated onof Section.....Township.....Rangein Sioux county, North Dakota, now in my possession and owned by me and free from all incumbrances." The property is described thus: "20 head of horses and mules of all sizes, ages and descriptions, being all the horses and mules we own." But in truth, when the mortgage was made, the property was in Carson county, South Dakota, which is south of the state line. Such being the facts, this court holds that the liens of the Stanton Bank were prior in time and prior in right and superior to the liens of the plaintiff.

On the question of payments the pleadings and the evidence are very defective and unsatisfactory. While the answer avers that the \$1500 mortgage is fully paid, it does not state the time, means or manner of payment, and the evidence of payment was left so unsatisfactory that the trial court declined to consider it holding that the remedy of the mortgagors was to bring an action for an accounting. However, it does appear that the plaintiff bank was a kind of partner with the mortgagors in the hay business and it loaned them the money to buy and put up hay and all the hay was put on the railway cars and bills of lading taken in the name of the plaintiff and delivered to it, and it received and sold all the hay. In some manner, either for cash or on time, the plaintiff has sold all the hay and received the proceeds and under the evidence it does seem that the plaintiff has been fully paid, if not overpaid. However, as the trial court did not pass on the question of payment, and as it is not fairly presented by the pleadings, this court will not attempt to determine it. The trial court should have directed the pleadings to be amended and should have determined the question of payment or counterclaim without giving the plaintiff the benefit of a judgment and execution and turning the de-

fendants over to another action for an accounting. When a party goes to trial in an action to foreclose a mortgage, then is the proper time for an accounting concerning the amount due on the mortgage.

The case is remanded for additional evidence on the question of payment, to be submitted under amended pleadings fairly presenting the question which the trial court must hear and determine.

Reversed and remanded for further proceedings in accordance with this opinion.

CHRISTIANSON, BRONSON and BIRDZELL, J J. concur.

GRACE, J. I concur in the result.

STATE OF NORTH DAKOTA ex rel., W. B. KNOX, L. L. TAYLOR, HERMAN KELLER, and WILLIAM TSCHUDI, on Behalf of Themselves and Others Similarly Situated, Appellants, v. FAITH STEVENS, as County Superintendent of Schools of Dickey County, State of North Dakota, Respondent.

(183 N. W. 109.)

Schools and school districts—division of common-school district—withdrawing names from petition—county commissioners had no authority for dividing school district.

1. Where certain school electors undertook to divide a certain common-school district, by attempting to organize a part of it into a new district, and, in pursuance of that object, circulated and had signed a petition by fifty-five electors in the territory proposed to be organized into the new school district, which number was two thirds of the whole number of school electors residing in that territory, which were seventy-eight; and where eleven of such petitioners withdrew from such petition by signing a remonstrance against the creation of a new district, prior to or on the date of hearing on the petition.

It is held the county commissioners had no authority to make the order dividing the school district and creating the new district, for the

NOTE.—For authorities discussing the question of right to withdraw names from petition or remonstrance, see note in 11 L.R.A. (N. S.) 372.

reason that, at the time of the making of the order, the petition was not signed by two thirds of the resident electors in the proposed new district.

Schools and school districts — § 1148, Compiled Laws 1913, construed.

2. During the time of the giving the notice specified in § 1148, Comp. Laws 1913, and until the hearing on the petition, any school elector who signed the petition for the proposed new school district, or a petition such as it contemplated by said section, may withdraw his name from the petition.

Opinion filed May 14, 1921.

Appeal from an order and judgment of the District Court, in the Third Judicial District, dismissing the alternative writ and denying a peremptory writ of mandamus. *McKenna, J.*

Order and judgment affirmed.

F. J. Graham, Jas. M. Austin, and Brickner & Knox, attorneys for appellants.

The petitioners of the original petition should not be permitted to withdraw their names except upon a showing that, at the time they signed their names, they did so under misunderstanding of facts produced by misrepresentation. *School Dist. v. School Dist.* 63 Ark. 543, 39 S. W. 850; *Re. Independent School Dist.* 2 Chest Co. Rep. (Pa.) 132. A motion for withdrawal is insufficient when it merely states that the petition was signed "under mistake and misapprehension," and does not state any facts to show that such was the case. *Sutherland v. McKinney*, 146 Ind. 611, 25 N. E. 1048.

The county commissioners and county superintendent acting jointly is a quasi court, and the filing of a proper petition, is jurisdictional, and gives the joint board jurisdiction to hear the petition on its merits. *McDonald v. Hanson* (N. D.) 164 N. W. 8.

The right of withdrawal ends after the officer, board, or body to whom the petition is addressed, has taken jurisdiction. 28 Cyc. 163; *Sedalia ex rel. Gilsonite Constr. Co. v. Montgomery*, 227 Mo. 1, 127 S. W. 50.

W. S. Lauder, for respondent.

By signing and filing a protest, a petitioner thereby in effect with-

draws his name from the petition. *LaLonde v. Barron County*, 80 Wis. 380; *Littell v. Vermillion County*, 198 Ill. 205; *Hays v. Jones*, 27 Ohio St. 231.

GRACE, J. The plaintiffs presented to Frank P. Allen, district judge of the third judicial district, a petition for an alternative writ of mandamus, based on certain affidavits, which was later heard before George M. McKenna, judge of the district court of the same judicial district of Dickey county.

A statement of the material facts will aid in understanding the issues here presented.

Keystone School District No. 7 is located in Dickey county, and in extent comprises a congressional township. Under the authority of § 1147, Comp. Laws, as amended by chapter 135, Session Laws of 1915, and as amended by chapter 197 of the Session Laws of 1919, and on the 10th day of July, 1920, a petition signed by fifty-five resident electors of the school district was filed with the board of county commissioners of Dickey county, asking for a division of the school district.

Faith Stevens is the duly qualified and acting superintendent of schools of Dickey county, and, as such, acted with the board of county commissioners in determining the desirability and necessity of the organization of the new district, and certain steps were taken looking toward the organization of the new school district.

The petition was set to be heard before the county commissioners on the 20th day of August, 1920, this being the adjourned date of the regular July meeting. The county superintendent published notice of hearing of the petition for six consecutive weeks in the *Farmers' Sentinel*, a weekly newspaper published at Ellendale, Dickey county. The notice was served personally on A. A. Suszycki, Charles Newton, and Florence Golden, all members of the school board of Keystone School District.

There were 172 legal school electors in the school district, and 78 of these resided in the proposed new school district. On the date of the hearing of the petition, August 20th, there was filed with the commissioners a protest or remonstrance against the organization of the new district, signed by 133 school electors, resident in the district. An affidavit of the clerk of the school district was also filed with the commissioners. Eleven of those who signed the remonstrance had signed the original petition for the organization of the new district, and each of them was a resident, tax-

payer, and elector within the territory sought to be included and organized into the new district.

The fifty-five electors who signed the original petition for the new school district constituted two thirds of all the school electors residing in the territory proposed to be organized into the new school district. The total of such electors, as above stated, being 78. If the names of certain of the electors who signed the original petition for the organization of the new school district, and who were resident electors of the proposed new district, and who subsequently signed the remonstrance, being in number, 11, are deducted from the whole number of those who signed the original petition, to wit; 55, there remain 44, and this number is not two thirds of 78, the whole number of electors in the proposed new district.

The county commissioners and the county superintendent on August 20th, acting jointly, found that the organization of the proposed new district, out of district No. 7, was desirable and necessary. This finding was not made until after the withdrawal of the names of the 11 electors residing in the proposed new district, from the original petition.

On August 20th, the commissioners adopted the following resolution:

"Resolved, that all of school district No. 7, Dickey county, North Dakota—save and except sections 4, 8, and 16, and south half of section 8, and south half of section 15, and the village of Monango, in the said south half of section 8, all in township 131, north of range 63, west, in Dickey county, North Dakota, be and the same is hereby separated and divided from said Keystone School District No. 7, as heretofore existing, and is hereby organized into and made a separate school district, with full powers as such; and the prayer of said petitioners for division is hereby granted; and such division is desirable and necessary."

The appellant assigns only two errors.

(1) That the court erred in holding that the signing of the remonstrance petition, by 11 of the signers of the original petition, for a division, was a withdrawal of those names from the original petition.

(2) That it erred in holding that the board of county commissioners and the superintendent of schools, acting jointly, were ousted of jurisdiction to hear the petition on its merits; and in holding that the order entered for the division and organization of the new school district was

wholly void, for the reason that, at the time of the hearing, on August 20th, a remonstrance petition was submitted to the joint board, containing 11 of the signers of the original petition, thereby reducing the number of signers there to less than a two thirds majority of the legal electors in the proposed new school district.

We are of the opinion that this case is governed by the principle contained in the decision of the case of *Rosten v. Board of Edu.* 43 N. D. 46, 173 N. W. 461. That case involved the validity of an order of the board of education of the special school district of the village of Wild Rose, by which certain territory adjacent to that district was annexed to it. There, between the time of filing the petition for annexation and the date of making the order of annexation, the signers of the original petition had withdrawn in such numbers that the board had no jurisdiction to make the order, if such withdrawals were legal.

In that case, § 949, Comp. Laws, which authorizes the annexation in certain conditions, and § 1240, Comp. Laws, which provides for giving of notice of hearing before the board, with reference to the annexation, were before this court for construction.

The latter section required that, in proceedings under § 949, fourteen days' notice of hearing before the board should be given by publication, and that such territory should not become a part of the special district until five days after such hearing.

The section, with reference to the notice required to be given, presented for consideration in the case at bar, is § 1148, Comp. Laws. It provides:

"Whenever the board of county commissioners and county superintendent of schools shall be petitioned to organize a new school district or to change the boundaries of districts already organized, the county superintendent shall give public notice, for at least thirty days, to the residents of the districts whose boundaries will be affected by the organization of the new district, by mailing a notice to that effect to each school officer of such districts, and by publishing the same in the official newspaper of the county published nearest that district."

It is clear that the school board could make no valid order of division until after the giving of the notice, in accordance with the requirements of this section. It is also clear that the board had no authority or jurisdiction to do any act, with reference to division of the school district, from the

time of the filing of the petition, except to give the notice, until the arrival of the day fixed for hearing on the petition.

Whether the commissioners' order for organization of the new district, made on or after the day of hearing, would be valid, would depend on whether or not, at the time it was made, there was before it a valid petition; that is, a petition at that time containing the names of two thirds of the school electors of the territory to be organized into the new school district. If, between the time of filing the original petition, and the day of hearing, electors in sufficient number had withdrawn their names from the original petition, by signing a remonstrance petition, or by making known to the board of county commissioners, before or on the day fixed for the hearing of the petition, the fact that they desired to or had withdrawn their names from the original petition, and such withdrawals were in sufficient number as to reduce the names on the original petition to a number less than the two thirds by law required, it is clear the board of county commissioners, in that event, would have no authority or jurisdiction to make the order.

We stated in *Rosten v. Board of Education*, supra, as follows:

"It seems to us it was the intention of the legislature in amending § 949 to provide a means whereby those who signed a petition to annex territory to a special school district might reconsider their act in signing the petition and withdraw their names therefrom at any time within the fourteen-day period; that, further, it was the intention of the legislature that there should be a sufficient petition at the time of the making of the order annexing the territory; that, if there was not a sufficient petition at such time, then the board of education would not have the authority to make the order annexing the territory."

We think the same reasoning applies here. It is our opinion that those who signed the original petition had all of the thirty-day period, during which notice was being published, and until and including the time of hearing on the petition, to withdraw their names from it.

The appellant concedes that this case is governed either by the case of *Rosten v. Board of Education*, supra, or the case of *Sim v. Rosholt*, 16 N. D. 77, 11 L.R.A. (N. S.) 372, 112 N. W. 50.

The reasons given, in the opinion in the case of *Rosten v. Board of Education*, why the reasoning and decision in *Sim v. Rosholt* did not apply in that case, are equally applicable here.

We hold that the signers of the petition who were resident school

electors within the territory attempted to be organized into a new district had the right to withdraw their names from the petition within the time above stated, and that the signing of a remonstrance within that time constitutes a withdrawal of the names of those who signed it.

We further hold that the board of county commissioners had no authority to make the order which purported to create the new district, it clearly appearing that, at the time such order was made, there was no petition on file with the county commissioners which contained the names of two thirds of the school electors of the territory sought to be organized into the new district.

The order and judgment of the district court from which the appeal has been taken are affirmed.

The respondent is entitled to the statutory costs and disbursements on appeal.

ROBINSON, Ch. J., and BIRDZELL, J., concur.

CHRISTIANSON, J. (concurring). The questions presented on this appeal are: (1) The right of the signers of a petition for the organization of a new school district to withdraw their names therefrom after the petition has been filed with the board having jurisdiction to entertain it, but before hearing has been had and final action taken thereon; and (2) if such right exists, is it exercised by the subsequent signing and filing of a remonstrance against the allowance of the petition?

(1) I agree with Mr. Justice Grace that the decision of this court in *Rosten v. Board of Education*, 43 N. D. 46, 173 N. W. 461, is decisive of the first question. The principle announced and the views expressed therein by the different members of this court, both as to the right of petitioners to withdraw their names from a petition after notice of hearing has been given, but before final action has been taken, and the reason why the rule announced in *Sim v. Rosholt*, 16 N. D. 77, 11 L.R.A. (N. S.) 372, 112 N. W. 50, is inapplicable to a petition like that involved in the *Rosten Case*, are directly applicable here.

(2) We are not dealing with a situation where the statute provides a certain mode in which petitioners may withdraw their names from a petition. For it will be noted that our statute prescribes no particular mode in which petitioners must withdraw their names. And where the right to withdraw exists, and the statute prescribes no mode for the exercise of

the right, it would seem that any mode adopted by a petitioner which specifically calls the attention of the board to the fact that he no longer assents to and joins in the petition, but on the contrary protests against the allowance thereof, is sufficient. See note in 15 Ann. Cas. 1126, 1127.

BRONSON, J., concurs.

W. J. MEYERS, Respondent v. JOHN RAISTY and Farmers Grain Company, a Corporation, Appellants.

(183 N. W. 112.)

Landlord and tenant—when title to crops are to remain in landlord until division thereof, it is not necessary to file contract as chattel mortgage.

Following *Merchants State Bank v. Sawyer Farmers' Co-op. Asso.* 47 N. D. 375, 14 A. L. R. 1353, 182 N. W. 263, it is *held*:

Where a lease of a farm on shares contains a provision to the effect that title to and possession of all crops shall be in the lessor until the conditions of the lease have been complied with by the lessee and a division made of the crop, such provision is effective without filing the contract as a chattel mortgage. An assignee of the tenant is presumed to be acquainted with the terms and stipulations of the lease, and acquires no greater rights than the tenant had to transfer.

Opinion filed May 18, 1921.

From a judgment of the District Court of Ransom County, *McKenna, J.*, defendants appeal.

Reversed.

Ego, Craig, & Thompson, for appellants.

Knowledge of the fact of tenancy is of itself sufficient to charge notice of all the incidents of tenancy: 2 Devlin, *Real Estate*, 3d ed. ¶ 775; Pom.

NOTE.—For authorities discussing the question of necessity of filing lease or contract which reserves title to crops in lessor, see note in 14 A.L.R. 1362.

Eq., 4th ed. ¶ 618-625 and cases cited; *Schumacher v. Truman* (Cal.) 66 Pac. 591; *Aden v. Vallejo* (Cal.) 72 Pac. 905; *Dutton v. McReynolds* (Minn.) 16 N. W. 468; *Lance v. Gorman* (Pa.) 20 Atl. 792.

It was plaintiff's duty to make due and reasonable inquiry. *Betts v. Tetcher* (S. D.) 46 N. W. 193; *Stevenson v. Campbell* (Ill.) 57 N. E. 414; *Crooks v. Jenkins* (Iowa) 100 N. W. 82.

Possession by a tenant is constructive notice of the landlord's rights and equities therein, as well as notice of the tenant's rights and equities. 2 *Devlin, Real Estate*, 3d ed. ¶ 775; *Pom. Eq.* 4th ed. 618-625, and cases cited; *Dutton v. Warschaur* (Cal.) 82 Am. Dec. 765; *Peasley v. McFadden* (Cal.) 10 Pac. 179; *Mallet v. Kaehler* (Ill.) 30 N. E. 549; *Bowman v. Anderson* (Iowa) 47 N. W. 1087.

Kvello & Adams, for respondent.

"A provision retaining title and possession of all crops until division is of the nature of a chattel-mortgage lien on the lessee's share, and such lessor has no greater or different rights thereunder than a mortgagee's under a chattel mortgage." *North Dakota Grain & Land Co.* 170 N. W. 307; *Carlson v. Davis*, 178 N. W. 455.

CHRISTIANSON, J. The sole question presented on this appeal is whether a contract for the cropping of land must be filed in the office of the register of deeds of the county in which the land is situated in order to render effective, as a chattel mortgage, a provision therein reserving title to the crops in the owner of the land. This question was answered in the negative in *Merchants' State Bank v. Sawyer Farmers' Co-op. Asso.* 14 A. L. R. 1353, 182 N. W. 263. The authorities cited and arguments advanced by the respective parties in this case were all considered in determining *Merchants' State Bank v. Sawyer Farmers' Co-op. Asso.* supra, and the views of the members of this court have undergone no change since that case was decided. On the authority of that case the judgment appealed from is reversed and the cause remanded for further proceedings consistent with this opinion.

BIRDZELL and BRONSON, JJ., concur.

ROBINSON, Ch. J. (dissenting). I do hold that any paper which is in

effect a chattel mortgage should be filed as a chattel mortgage. "The law regards form less than substance." Maxim 7262.

GRACE, J. (dissenting). I dissent from the result arrived at by the majority opinion, for the same reasons I dissented in the case of Merchants' State Bank v. Sawyer Farmers' Co-op. Asso. 47 N. D. 375, 149 A.L.R. 1353, 182 N. W. 263.

BEULAH McHENRY AMIDON, Respondent, v. CHARLES W. WALTERS, and Anna Walters, appellants.

(183 N. W. 107.)

Brokers — computation of interest.

In a stipulated action to determine interest payable under a real-estate contract, it is held, for reasons stated in the opinion, that interest should be computed from the date stated in the original contract, and that the preliminary decree entered for a strict foreclosure, in the event of default, was proper.

Opinion filed May 18, 1921.

Action in District Court, Cass County, *Cooley, J.* The defendants have appealed from the preliminary decree.

Affirmed.

Lyman Miller, for appellants.

Pierce, Tenneson, Cupler, & Stambaugh, for respondents.

The liability of a vendee in an executory contract for interest and taxes is determined and measured by his right to the possession of the land, and the rents and profits derived therefrom. 39 Cyc. 1630; *Frits v. O'Brien Land Co.* (Minn.) 136 N. W. 301, and note to the same case in 43 L.R.A. (N. S.) 51.

It is clear from the contract between the parties that they understood and intended that the interest from November 1, 1919, should be com-

puted to the date the deal was closed and paid in cash at that time. 13 C. J. 546; Moore v. Beiseker, 147 Fed. 367; Young v. Metcalf Co. 18 N. D. 441.

It is within the sound discretion of the court to determine under what circumstances a strict foreclosure of the contract will be awarded to the complainant, and the time that will be given the defendant within which to comply with the conditions laid down by the court. 3 Pom. Eq. Jur. 4th ed. § 1227, § 1262, pp. 2947, 2948, 3046; Wiltsey, Mortg. Foreclosures, § 977, p. 1361; Baldwin v. McDonald (Wyo.) 157 Pac. 35.

BRONSON, J. This is a stipulated action to determine interest payable under a real-estate contract. On July 7, 1919, the plaintiff made a written contract to sell to the defendants some 420 acres of farm lands. This contract recites payment of \$1,000 upon the purchase price stated to be \$42,125; that the sale should be closed as soon as Walters could sell his farm upon which he was then living and not later than November 1, 1919; that upon the sale of such farm he should pay at least \$12,125 upon the purchase price; that the balance should be paid on or about ten years from the date of closing the sale; that a warranty deed and notes, secured by a mortgage upon the land for the balance of such purchase price, should then be made; that interest should be at the rate of 6 per cent payable annually on December 1st, interest to begin on unpaid part of purchase price November 1, 1919; that if Walters should be unable to sell his farm by November 1, 1919, the time for closing the sale would be extended until he made such sale, but not later than November 1, 1920; that possession should be taken by the purchaser on November 1, 1919. On May 27, 1920, another written agreement was made between the parties, which recites that Walters has paid \$6,000 on the contract, and that he then assigns to the plaintiff one Salvorsen contract for a deed as collateral security for the payment of \$3,000 on September 1, 1920, and \$3,125 on November 1, 1920.

On November 3, 1920, another written agreement was made between the parties, reciting that whereas the plaintiff claims that the unpaid portion of the purchase price bears interest at the rate of 6 per cent per annum from November 1, 1919, and the defendant claims that it did not bear interest until November 1, 1920, excepting as to interest upon \$3,000 from September 1, 1920; and, whereas the parties desire to limit the issue upon the item of interest to the date from which and the amount upon which

interest should be computed on contract, it is agreed that the defendant should pay the plaintiff \$6,156.50, and the parties otherwise perform concerning the deed, mortgage, and security, and that the plaintiff should commence immediately in the district court a suit for specific performance or strict foreclosure of the contract for the purpose of obtaining an adjudication of the issue in dispute between them speedily and without unnecessary expense.

This action was accordingly commenced for the strict foreclosure of the contract. Trial was had on November 15, 1920, and some evidence was introduced to the effect that in the fall of 1919 the defendant sowed rye on the premises; that from November, 1919, to May, 1920, he occupied some of the buildings on the premises but his family did not move thereupon until May, 1920; that in 1920 the crop was planted and harvested by the defendant. On November 29, 1920, the trial court entered a preliminary decree, upon findings made, to the effect that the plaintiff was entitled to interest from November 1, 1919, adjudicating the amount to be \$2,343.78, and that, in the event of the defendant's failure to pay such amount with interest, the plaintiff might apply, after December 15, 1920, to the court, upon two days' notice, for a final decree terminating the contract.

On December 15, 1920, the defendants filed in the trial court a surety bond in the sum of \$3,000 to pay costs and damages, and, finally, on February 15, 1921, this appeal was taken from the decree. Briefs of the parties were filed on April 27, 1921, and the cause argued before this court on May 6, 1921. The defendants contend that the court erred in its determination concerning the interest; that it had no authority to extend the issues beyond the determination of the fact concerning interest; that the plaintiff has no right to a decree of foreclosure and that the so-called decree entered is void.

We are of the opinion that the court properly determined concerning the item of interest. The original contract specifically provides for interest to be paid from November 1, 1919. Pursuant to this contract, a sale was made and possession taken. In no manner have subsequent agreements modified or limited this original agreement concerning the interest. The other contentions are obviously without merit. The parties stipulated for an action of foreclosure. The decree entered by the trial court was proper. The defendants by this appeal obviously have secured an extension of time. It simply remains for this court, in the interest of the adjudica-

tion made and for a prompt settlement upon such adjudication to fix the time within which the defendants shall make payment. It is accordingly ordered that the decree of the trial court be in all things affirmed, and that the defendants make payment under its terms within fifteen days from the filing of the remittitur in the District Court.

CHRISTIANSON and BIRDZELL, JJ., concur.

GRACE, J. (concurring in part and dissenting in part). I agree that the determination, with reference to interest, as contained in the majority opinion, is correct.

I dissent from the conclusion that a strict foreclosure should be permitted, even though there is a stipulation between the parties to that effect. The stipulation was unnecessary, and it cannot so bind the court as to place it in a position that it is required to lay down a harsh and improper rule of law. That part of the decision is not very material in this case, but it will become a precedent for similar cases arising in the future.

The contract, to cancel which the action was brought, is in effect an equitable mortgage. The purchaser under that contract has paid in excess of \$6,000 of the purchase price. The vendor holds the contract as security for payment of the balance of the purchase price. The proceeding to cancel the contract is in the nature of a foreclosure proceeding. In other words, it is the foreclosure of an equitable mortgage.

The judgment of cancelation is largely similar to a sale of land on execution, in a regular mortgage foreclosure by action.

We see no good reason, in equity or at all, why the statutory redemption period should not be permitted. It may be noticed that, if it had been attempted to cancel the contract by the service of notice, pursuant to the provisions of article 4 of chapter 30 of Comp. Laws 1913, as amended by chapter 180 of the Session Laws of 1915, and as again amended by chapter 151 of the Session Laws of 1917, the vendee of this contract would have had a redemption period of six months in which to pay the amount due and reinstate the contract.

The decision, if it shall become the law of this case and a precedent in future cases, can have largely but one effect, that is, to separate the tiller from the soil, to cause vendees who have made large payments on

land to lose it to the vendor, and, in addition thereto, lose all he has paid in on the land.

Strict foreclosure is a relic of the dark ages. It should have no place nor recognition in an enlightened system of jurisprudence. It is a proceeding designed only for the protection and benefit of the creditor class and for the oppression and detriment of the debtor class.

If it is not a relic of feudalism, it is, at least, nearly such.

ROBINSON, Ch. J., concurs.

J. R. DANIELS, Respondent, v. JOHN BARTON PAYNE, Agent of
the United States Government, Appellant.

(182 N. W. 1010.)

Master and servant — negligence as to railroad carpenter injured by speeder held question for jury.

1. In an action to recover damages for personal injuries, where the plaintiff, while employed by the defendant as a carpenter, was traveling with his foreman on a speeder during a heavy snow storm, and where it appears that a gasoline can had blown off the speeder, and the plaintiff at the foreman's direction, had gone back a short distance to recover it, leaving the foreman in charge of the speeder, with a promise to wait for him; that the foreman, during plaintiff's absence, had undertaken some slight repair work on the speeder, allowing it meanwhile to drift with the wind, the plaintiff being struck by the speeder as he was returning with the can, it appearing that the foreman was unable to stop it by the use of the brakes when within a short distance of the plaintiff, as the brakes were clogged with snow and ice; and where the court submitted the case to the jury for a special verdict, it is *held*:

The record presents substantial evidence upon which to base a finding of negligence.

NOTE.—Where a special verdict is requested, no instructions are proper except such as are necessary to inform the jury as to the issues made by the pleadings, the rules for weighing and reconciling testimony, and whatever else may be necessary to enable the jury to clearly understand its duties concerning such special verdict as will be seen by an examination of the cases collated in a note in 24 L.R.A. (N. S.) 62, on instruction to jury as to special verdict.

Trial — in submitting case for special verdict, it is error to read pleadings or the statutory law to the jury.

2. In submitting a case to a jury for a special verdict, it is error to read the pleadings, stating the issue of fact, the contentions of the respective parties with reference thereto, and to read to the jury the statutory law upon which the plaintiff relies for recovery. Whether such error in all cases be so prejudicial as to necessitate reversal, however, is not decided.

Trial — in action for personal injuries, appeal for damages on basis of what jury would take to be injured in same manner held improper.

3. In an action for damages for personal injuries it is improper, in an argument to the jury, to appeal for an assessment of damages on the basis of what they would take to be injured in the same manner that the plaintiff was injured.

Appeal and error — errors held to require new trial in railroad carpenter's action for personal injury.

4. Where, in connection with the above error in submitting the case for a special verdict, no instructions are given as to the measure of damages, and where the plaintiff's attorney is shown to have made improper appeals to the jury, and the jury, upon conflicting evidence as to the character and permanency of plaintiff's injury, assessed damages at \$4,500, the record does not give the assurance that the defendant has had a fair trial, and a new trial is awarded.

Opinion filed May 2, 1921. Rehearing denied May 27, 1921.

Appeal from the District Court of Hettinger County. *Lembke, J.* Reversed and remanded.

Young, Conmy & Young, for appellants.

The evidence must affirmatively establish circumstances from which the inference arises fairly that the accident resulted from the want of some precaution which the defendant ought to have taken. *Wabash, St. L. & P. R. Co. v. Locke*, 112 Ind. 404; 2 Am. St. Rep. 193, 14 N. E. 391 and cases cited.

There is no proof showing parties were engaged in interstate commerce at the time of the injury. *Illinois C. R. Co. v. Behrens*, 233 U. S. 473; *Delaware L. & W. R. Co. v. Yurkonis*, 238 U. S. 439; *Shanks v. Delaware L. & W. R. Co.* 239 U. S. 558-560.

The court erred in failing to charge the jury fully on the issue of assumed risk. *Putnam v. Prouty*, 24 N. D. 517; *Seekett v. Stone*, 41

S. E. 564; *Robertson v. Burton* (Minn.) 92 N. W. 538, 931; *B. & O. R. Co. v. Lockwood*, 74 N. E. 1071.

Jacobsen & Murray, for plaintiff.

Without a motion for a new trial, this court cannot consider the question of the insufficiency of the evidence. *Erickson v. Wiper*, 33 N. D. 225; *Morris v. Minneapolis, St. P. & S. Ste. M. R. Co.* 32 N. D. 366.

A motion for a directed verdict must specify the particulars wherein the evidence is insufficient. *Yaeger v. South Dakota C. R. Co.* (S. D.) 140 N. W. 690; *Minder & Jorgenson Land Co. v. Brustuen* (S. D.) 140 N. W. 251; *Davis v. C. & J. Michel Brewing Co.* (S. D.) 140 N. W. 694; *Erickson v. Wiper*, 33 N. D. 193.

The insufficiency of the proof establishing interstate commerce was in no shape, form, or manner raised in the lower court. The rule is well settled that the appellate court will consider only the ground urged in the trial court. *Erickson v. Wiper*, 33 N. D. 225.

In any event, failure to establish parties engaged in interstate commerce is wholly immaterial if the plaintiff has established his case under the state statute or common law. *Wabash R. Co. v. Hayes*, 235 U. S. 86, 58 L. ed. 1226, 1230.

The Federal authorities are uniform upon the proposition that going to and from work is just the same as being engaged in that work. *North Carolina R. Co. v. Zachary*, 232 U. S. 246, 58 L. ed. 591; *Southern R. Co. v. Puckett*, 37 Sup. Ct. Rep. 703.

BIRDZELL, J. This is an appeal from a judgment in favor of the plaintiff for \$4,559.50, in an action to recover damages for personal injuries. The plaintiff was in the employ of the defendant as a carpenter on April 7, 1919. On that day he was traveling, with his foreman Jerden, between Mercer and McClusky, on a speeder, a small car propelled by a gasoline motor. They were going east, facing a severe storm of wind and snow. When they were near the station of Pickersville the wind blew a gas can off the speeder. Jerden stopped the car and asked Daniels, the plaintiff, to go back and pick up the can. Daniels walked back a distance, as he testified, of approximately 100 yards (Jerden testifies about 200 feet), picked up the can, and, as he was turning around, the speeder struck him, knocking him down, injuring his back, cutting his head and his chin, and knocking out some of his upper teeth. He was rendered unconscious by the impact, was picked

up by Jerden, and taken to the near-by box-car station of Pickersville. Later he was taken to Turtle Lake, where he received medical attention. He was then taken to a hospital operated by the Northern Pacific Beneficial Association at Brainerd, Minnesota, where he remained for approximately two weeks undergoing treatment for his injuries.

The evidence as to the manner in which the accident occurred is conflicting. The plaintiff and Jerden were the only witnesses giving testimony on this subject. According to the plaintiff, Jerden, at the time of directing him to go back and pick up the can, stated that he would wait; and further, according to his testimony, the car bumped into him just as he was turning after picking up the can. Jerden denied that he had said he would wait, and testified that after the plaintiff left the car he was doing some repair work, fixing the slide lever by tightening the bolt which moves the engine to the gear. While he was tightening this bolt or turning the burr, the wind began to drift the car westward toward the plaintiff. He looked up when he was about 40 feet away from the plaintiff and saw him coming. He continued using the wrench on the burr until he looked up again, when he was about 15 feet from the plaintiff, and, seeing the plaintiff coming along, told him to "look out!" At this time he stepped back on the brake to stop the car, but the brake had gathered snow and ice, and would not take hold. He testified that the car was barely drifting, and that when the plaintiff came to the car he made an attempt to board it, but lost his hold, and the car hit him on the knee, knocking him backward.

At the hospital in Brainerd, plaintiff's teeth were repaired and his wounds generally were attended to. There was a bruised, swollen place in the lumbar region of the back which required an incision for draining off the accumulated blood serum. The plaintiff returned to McClusky about April 22d, but did not go to work at that time. He then went to the vicinity of Mott, where his family operated a farm. He made a second trip to the hospital at Brainerd in the latter part of May, but it seems that he received no treatment. During the latter part of the month of June and the first part of July, the plaintiff took eight treatments of an osteopathic doctor at Mott, named Allen. Plaintiff testified to pains in the head which frequently prevent sleep; to weakness of the back and one knee, rendering him unable to work. But the doctor that gave him attention at the hospi-

tal in Brainerd, and who also examined him at the time of the trial, testified that he could discover no objective pain in the back, but that there was subjective pain manifested when the plaintiff was touched in other regions than that affected by the bruised area; that the knee reflexes were normal, and that the knee of which the plaintiff complained exhibited no swelling or soreness, but that in mobility and flexion there was possibly a little interference with motion. The plaintiff was shown to have made two trips from Mott to South Carolina accompanying shipments of horses, one in December, 1919, and one in January, 1920.

The appellant argues that the evidence of negligence is insufficient to form a question of fact for the jury. This question was presented to the trial court by motion for a directed verdict. We are of the opinion that no error was committed in denying the motion. The jury was warranted in believing the plaintiff's testimony, to the effect that Jerden, at the time of directing him to go back and get the can, stated that he would wait for him. In view of this testimony we are not prepared to say that reasonable men might not find that the defendant, in the exercises of ordinary care for the plaintiff's safety, should have held the car stationary awaiting the plaintiff's return. When the plaintiff turned back, he would be more or less blinded by the storm, and, with Jerden's statement in his mind, would not anticipate meeting the car moving toward him.

It is next argued that there is no proof that the plaintiff was engaged in interstate commerce at the time of the injury. This specification is without merit, as the same rule of liability obtains whether the plaintiff was engaged in interstate or intrastate commerce. No procedural question was raised, the solution of which was contingent upon any provision of the Federal Employers' Liability Act.

In this case there was no motion for a new trial, so the question of the excessiveness of the damages urged by the appellant upon this appeal is not directly involved. There are a number of assignments, however, predicated upon the manner in which the case was submitted to the jury, in connection with which it is proper to refer to the measure of recovery as bearing upon the question of a fair trial. The verdict in this case was a special verdict. Twenty-seven questions were asked, all of which were answered in a manner favorable to the plaintiff. It is unnecessary here to indulge in any criticism of any of these ques-

tions in the light of recent decisions of this court. *York v. Utility Co.* 44 N. D. 51, 176 N. W. 352, and *Nygaard v. Northern P. R. Co.* 46 N. D. 1, 178 N. W. 961. The record shows that the court, in submitting the case to the jury for its special verdict, instructed them fully as to the issues raised by the pleadings, and in addition instructed as to the law bearing upon the plaintiff's right of recovery. The complaint and the answer were read to the jury as outlining the issues, and the court read the provisions of the Federal Employers' Liability Act, upon which the plaintiff relied. In submitting a case to a jury for a special verdict, it has been frequently held to be error to give instructions indicating how the answers to certain questions will affect the outcome of the litigation. *Morrison v. Lee*, 13 N. D. 591, 102 N. W. 223, and cases therein cited; 27 R. C. L. 874; 24 L.R.A. 9, (N. S.) pp. 62 and 70 note. It is the manifest aim of the special verdict statute, §§ 7632 and 7633, Comp. Laws 1913, to enable litigants to obtain the judgment of the jury as to the facts in a case, disassociated from matters of law. As they are not to apply the law to the fact, instructions as to the law can, at best, serve no useful purpose.

While it may be difficult to so frame questions for a special verdict and to give appropriate instructions upon them in such a way as to obscure to the average intelligent juror the effect of the answers, it is scarcely possible to conceive of a more flagrant violation of the policy of the special verdict statute than that which would result from countenancing the full statement of the allegations of fact on the respective sides and the principal provisions of law upon which reliance is placed for recovery. Whether or not this case would be reversed for this reason alone, it is unnecessary to decide; for there are other matters which, to our minds, destroy the assurance of a fair trial.

It appears that while the jury was fully instructed as to the issues of fact joined and as to the law applicable to plaintiff's recovery, there were not only no instructions on the measure of damages, but counsel for the plaintiff, in arguing the case to the jury, appealed to them to base an assessment of damages upon an entirely erroneous standard. He stated to the jury that they would not take \$25,000 to have their teeth knocked out and their head bumped on the rail. Such an argument is unwarranted for the reason that the law authorizes the recovery of compensatory damages, not damages based upon an agreed monetary equivalent for voluntary physical mutilation. *Reid v. Ehr*,

36 N. D. 552, 162 N. W. 903. In view of the unsatisfactory character of the evidence going to establish permanent injuries, the award of damages here appears to be large. We are not to be understood as holding, however, that they are so large as to indicate passion and prejudice if awarded under the evidence here at the end of an assuredly fair trial. Plaintiff's counsel, in the respect indicated and in other respects not necessary to mention, overstepped the bounds of propriety in presenting the case to the jury. This, together with the erroneous practice employed by the court in connection with the special verdict, gives rise to a grave doubt in our minds as to whether the defendant has had the benefit of a fair trial. Altogether, we are of the opinion that in the interests of justice a new trial should be awarded. The judgment appealed from is vacated and a new trial awarded, with costs to abide the event.

Reversed and remanded.

ROBINSON, Ch. J., and CHRISTIANSON, J., concur.

GRACE, J. (dissenting). I am unable to agree with the conclusion arrived at by the majority opinion. With reference to the court reading the complaint and answer to the jury, thus permitting them to understand the issues, if this were error, it was error without prejudice, and hence not reversible.

The counsel for both plaintiff and defendant must have thoroughly stated the issues as formed by the pleadings, in presenting the case to the jury. Certainly, the first thing the counsel for plaintiff would do, in proceeding to present the case to the court and jury, would be to state to the jury the issues formed by the pleadings; and, no doubt, defendant would do the same thing on presenting his side of the case to the jury.

The trial could not well have been had unless this were done. The reference by the court to the pleadings, while giving instructions of law, in the circumstances of this case, was not prejudicial, reversible error.

We are of the opinion that all of the reasons given for the reversal of the judgment are largely technical. The defendant has had a fair

and impartial trial. The negligence complained of has been established by an abundance of evidence.

BRONSON, J., (dissenting). It is difficult indeed to ascertain upon what grounds the majority opinion grants a new trial. This opinion determines that no error was committed in denying the motion for a directed verdict. It admits a meritorious cause of action for submission to the jury. The cause was submitted for a special verdict upon twenty-seven questions. There is no complaint made in the majority opinion that the jury did not answer intelligently this multitude of questions, or that it was in any manner misled by reason of the instructions of the court or the actions of plaintiff's counsel. Neither is it pointed out in any manner that the verdict is excessive or that prejudice to the rights of the defendant occurred. The statement of the pleadings and the principal provisions of the law upon which reliance is placed for recovery, as stated by the court to the jury, are not determined in the majority opinion to be cause for reversal. The majority opinion, however, finds that, in connection with the failure of the court to instruct on the measure of damages, plaintiff's counsel made an unwarranted argument to the jury thereupon. It appears, however, that the court admonished the jury concerning this argument, and further that the defendant has not specified such as error in the assignments of error. Furthermore, the defendant made no motion for a new trial. The majority opinion states that, in the interest of justice, a new trial should be awarded. As a platitude, this is fine sentiment; but, as a reason for reversing a meritorious cause of action where no prejudice, bias, or specific error are shown, it serves, in my opinion, to bring orderly administration of justice into disrepute. This reversal, in this case, is not based on the reception, improperly, of evidence; practically it is based upon the action of the court's officers, namely, the trial judge and plaintiff's counsel. The thought apparently is that this jury, to whom was submitted proper evidence for its consideration, and who were required to, and did fully, answer twenty-seven questions concerning this evidence, were unfairly or improperly influenced by the trial court in stating to them too much concerning the pleadings and some general propositions of law, and too little concerning the measure of damages. In my opinion, the reversal in this case is based purely on technical procedural grounds. It discredits the intelligence

and integrity of the jury in this case, and serves to give added fuel and flame to the public discontent concerning delay and technicality in court procedure.

HENRY BOSSEN, Respondent, v. S. A. OLSNESS. Commissioner of Insurance of the State of North Dakota, Appellant.

(182 N. W. 1013.)

Insurance — state hail insurance—§§ 5, 9, and 11 of chap. 38, Session Laws of Special Session construed—state hail insurance does not apply automatically.

Sections 5, 9, and 11 of chapter 38, Session Laws of Special Session 1919 (the state hail insurance law), are construed, and it is *held*:

1. The insurance provided for in the law does not apply automatically.

Insurance — classification of lands.

2. Where an assessor had not classified land as tillable and had made no return to the county auditor as required by law, showing the number of cultivated acres, and where the owner had not made the affidavit required by § 6 of the hail insurance act, his risk is not covered and he is not entitled to recover indemnity upon an attempted compliance with the law in the month of July after loss has been sustained through hail.

Opinion filed May 18, 1921. Rehearing denied May 27, 1921.

Appeal from District Court of Burleigh County, *Nuessle, J.*
Reversed.

Wm. Lemke, Attorney General, and *George K. Foster*, Assistant Attorney General, for appellant.

“The crops insured under this act shall consist of all crops grown on cultivated land actually cropped, subject to and paying the taxes herein specified.” Chap. 160 of the Laws of 1919 as amended by chap. 38 of the laws of the Special Session of 1919 (§5).

The court will take judicial notice of the fact that in this state there is a large amount of unbroken land. § 7938 subdss. 35, N. D. Comp. Laws 1913.

Sullivan, Hanley, & Sullivan, for respondent.

BIRDZELL, J. This is an appeal from an order overruling the defendant's motion to dismiss a petition for a writ of mandamus, and also overruling a demurrer to the petition. The essential facts set forth in the petition are in substance as follows: The plaintiff is and was, in the spring and summer of 1920, the owner of certain lands in Mercer county. In that year he cultivated a certain acreage of his land and sowed crops thereon as follows: 100 acres of wheat, 25 acres of flax, 20 acres of barley, 35 acres of millet, and 35 acres of corn. The assessor did not return to the county auditor any of the plaintiff's land as tillable land, nor did he file with the county auditor any return or certificate that any of the land was in crop and subject to the hail insurance premium tax, as he is required by law to do. During the month of July the crop was damaged by hail, and the loss was reported to the Hail Insurance Department in the State Capitol at Bismarck. It was subsequently adjusted and the adjustment accepted by the plaintiff. Sometime after the hail storm, the assessor made a certificate as to the number of acres cropped, and filed it with the county auditor. The Commissioner of Insurance, upon ascertaining that the plaintiff's land had not, before the storm, been classified as tillable nor certified as cropped, canceled the adjustment. The petition prays that the defendant be required to place the name of the plaintiff on the list of those who have sustained hail losses to be certified to the state auditor, and to certify also the adjustment as made.

The question presented is whether or not, under chap. 38 of the Laws of the Special Session 1919, land sown to crops is automatically insured against loss without classification and certification by the assessor or the owner. We are of the opinion that the hail insurance provided for under this act does not apply automatically, and that the necessary steps had not been taken to bring the plaintiff's risk within the operation of the law prior to his loss. The reasons for our conclusion may be briefly stated as follows:

The law provides (§6) for a flat rate of 3c per acre per year upon all tillable land, and for an indemnity acreage tax (§7) in sufficient

amount, when added to the flat tax, to cover the losses on all land actually cultivated and cropped and not withdrawn from the operation of the act. The duty of determining the tillable acreage for the purpose of applying the flat tax devolves upon the assessor. In other words, it is made his duty to classify the lands as tillable and non-tillable. This classification is required to be certified to the county auditor on or before June 1st of each year. In addition to the certification of the tillable acreage, the assessor is required to return the number of acres in crop or to be sown or planted to crop during the year (§9). The owner, however, his agent, occupant, or tenant is required to make an affidavit as to the number of acres actually cultivated and in crop, or intended to be cultivated and put into crop (§11). And the owner is bound, in case of loss by hail, to abide by the acreage stated in his affidavit. The assessor is required to file the original with the county auditor and to leave the copy with the owner. It constitutes his policy of insurance. In the absence of the owner the return of the assessor as to the crop acreage, description, etc., is filed with the auditor, and the owner is bound by that return unless by a certain time, June 15th, he withdraws his land from the operation of the law (§§ 11, 12). The county auditor is required to keep the file of the affidavits presented by the assessors and forward duplicates to the Insurance Commissioner, with a tabulated statement showing the number of acres classified as tillable land and cropped land (§ 13). Section 5 of the law provides:

"The crops insured under this act shall consist of all crops grown on cultivated land *actually cropped, subject to and paying the taxes herein specified.*"

Under this law cropped land is only rendered subject to the payment of the taxes specified through the return made either by the owner or the assessor. The *primary* duty of returning the statement of cultivated acreage devolves upon the owner. The assessor cannot exercise any discretion or independent judgment when the owner complies with the law and makes a return. The law has provided no method for increasing the acreage returned by him, and in case of loss he is bound by the number stated in his affidavit. It seems clear that the affidavit is equally conclusive for the purpose of applying the premium or indemnity tax; for a copy of it is certified to the hail insurance department and the tax imposed by that department is an "acreage

tax" sufficient to cover losses. Manifestly the insurance department cannot determine the acreage tax until it knows the number of acres to be subjected to the tax. And this it can only know from the returns made to it by the county auditors. There is no provision for revising these returns, or for assessing any acreage that might have been omitted from affidavits of owners and returns of assessors. If the plaintiff had not sustained loss, it is certain that, under the law, he could not have been rendered liable for any indemnity tax. No method is provided for rendering him liable in the absence of action by the assessor or his own voluntary return. Nothing could be more clear, we think, than that the legislature did not intend to enable owners to speculate by holding their land free from the tax, with the mental reservation that, in the event of a storm, they would submit to the tax and collect for their losses. This would not be insurance, but a fraud on those who, in good faith, co-operate to effect insurance under the law.

Upon the argument, reference was made to some amendments of the Hail Insurance Law adopted at the last regular legislative session (1921). These amendments simply render more clear the intention of the legislature to have the law applied in the manner hereinbefore indicated. In other words, they render absolutely certain that construction which was reasonably certain before the amendments. It follows from what has been said that the order appealed from is erroneous and must be reversed. It is so ordered.

ROBINSON, Ch. J., and CHRISTIANSON and BRONSON, JJ., concur.

GRACE, J. I concur in the result.

THE ROLETTE COUNTY BANK of St. John, N. Dak., a corporation, and FRED E. HARRIS, its receiver, Appellant, v. JOSEPHINE HANLYN, formerly JOSEPHINE HOWE, THOMAS J. CLIFFORD, G. L. PETERSON, FARMERS NATIONAL BANK of Hendricks, Minn., a corporation, WILLIAM H. ALLEN, and all other persons unknown, claiming any estate or interest in or lien or incumbrance upon the property described in the complaint, Respondents.

(183 N. W. 260.)

Mortgages — recording acts apply to executory contracts, mortgages and assignments.

C., the owner of certain land, contracted to sell it to Mrs. H., the latter giving notes for the purchase price. The contract was recorded. C. transferred one of the notes to the plaintiff and subsequently deeded the land to the H. bank. The H. bank obtained a quit-claim deed from Mrs. H., and subsequently sold the land to A. who paid full value for it. It is *held*:

1. Following *Shelly v. Mikkelson*, 5 N. D. 22, 63 N. W. 210; *Henniges v. Paschke*, 9 N. D. 489; *Simonson v. Wenzel*, 27 N. D. 638, 147 N. W. 804, the recording acts in this state apply to executory contracts for the sale of land, to mortgages, and to assignments of mortgages.

Mortgages — claim of purchaser of note failing to record assignments of mortgage inferior to subsequent purchaser in good faith without notice.

2. A purchaser of a note secured by a mortgage upon an equitable interest in land acquires an equitable interest in the mortgage; but, following *Henniges v. Paschke*, supra, upon failure to take and record an assignment of the security his claim is inferior to that of a subsequent purchaser of the land in good faith and for value without notice.

Vendor and purchaser — purchaser may rely upon public records to determine existence of mortgage liens.

3. One purchasing real property may rely upon the public records to determine the existence of mortgage liens, and where such a lien is discharged of record by the person or persons having prima facie authority to discharge it a subsequent purchaser of the property is not bound to inquire as to whether negotiable, secured notes are outstanding in the hands of assignees where there is no record of such assignments.

Opinion filed May 18, 1921.

Appeal from the District Court of Rolette County, *Buttz, J.*

Affirmed.

Fred E. Harris, for appellant.

The positions of the vendor and purchaser, are analagous to that of a mortgagee and mortgagor, and identical with that in which the mortgagee takes a deed as security for the performance of the mortgagor's obligations. *Miller v. Shelburn*, 15 N. D. 182, 107 N. W. 51; *Jewett v. Black*, 82 N. W. 375, 60 Neb. 173, *Dorsey v. Hall*, 7 Neb. 460. In *re Boyle's estate*, 134 N. W. 590, 128 Ia. 551; *Phillis v. Gross*, 143 N. W. 473, 32 S. D. 438; *McCreary v. McGregor*, (Iowa) 167 N. W. 633; *Ried v. Gorman*, 158 N. W. 780, 37 S. D. 314; *Shraiberg v. Hanson*, 163 N. W. 1032, 138 Minn. 80.

Cuthbert, Smythe & Wheeler, for respondents.

The purchaser under a contract for deed, does not hold the legal title, having an equitable interest only. *Pom. Eq. Juris.*, § 367; *Davie v. Williams*, 130 Ala. 530, 30 South 488, 54 L. R. A. 749, 89 Am. St. Rep. 55; *Chappell v. McKnight*, 108 Ill. 570; *Warvelle on Venders*, (2 ed.) § 176.

In a great many jurisdictions the rule is laid down that the implied lien of the vender is a personal privilege merely and is unassignable. 27 R. C. L. § 330, and *Hecht v. Spears*, 27 Ark. 229, 11 Am. Rep. 784; *Baum v. Grigsby*, 21 Cal. 172, 81 Am. Dec. 153; *Avery v. Clark*, 87 Cal. 619, 25 Pac. 919, 22 A. S. R. 272.

"And assuming that it is assignable it has been held that it must be assigned especially and therefore the mere assignment or transfer of a purchase money note does not carry the lien with it." 27 R. C. L. and as a part of § 330.

"The vendor's equitable lien for the purchase price of real estate will not follow the land after it is sold to a bona fide purchaser without notice." *Selby v. Stanley*, 4 Minn. 65; *Bang v. Brett*, 63 N. W. 1067; *McMillan v. Rose*, 6 N. W. 728 (Ia.); *Welburn v. Williams*, 9 Ga. 86, 52 Am. Dec. 427.

BIRDZELL, J. This is an appeal from an order sustaining the separate

demurrer of the defendant, William H. Allen, to the complaint upon the ground that the complaint did not state facts sufficient to constitute a cause of action against him. The action is one brought primarily to charge land purchased by Allen with a lien in favor of the plaintiff, securing a note purchased by the latter from Thomas J. Clifford, the former owner of the land. The facts pleaded in the complaint, so far as material to the legal question presented upon this appeal, are as follows:

On October 5, 1916, Thomas Clifford was the owner of certain lands in Rolette county. On that date he entered into a contract with one Josephine Howe, later Josephine Hanlyn, for the sale of the land to her. The terms of payment were \$300 upon delivery of the contract, \$1200 March 1, 1917, \$11,555.00 according to the terms of 11 promissory notes for \$1000 each, due one each year beginning November 1, 1917, and one note for \$555, due November 1, 1928. Josephine Howe paid \$2500 under the contract, which included all payments due to November 1, 1917. The contract was recorded August 8, 1918. Prior to July 22, 1918, Clifford transferred to the plaintiff bank the \$1000 note which would fall due November 1, 1919, the bank taking the note as a holder in due course. On December 26, 1918, Clifford sold the land covered by the contract to the Farmers National Bank of Hendricks, Minnesota, conveying title by warranty deed. The bank assumed and agreed to carry out the contract with Josephine Howe. Subsequently the grantee bank, through its cashier, G. L. Peterson, procured a quit-claim deed from Josephine Howe Hanlyn, quit-claiming to him all her interest in and to the land, Peterson agreeing, as part of the consideration therefor, "to pay the balance of the purchase price upon said land, then owing by the said Josephine Howe Hanlyn, including the plaintiff's note herein, and the whole of said amount remaining due on account of said contract." (This is the allegation in the complaint; the obligation is not alleged to be contained in the quit-claim deed). The quit-claim deed and all Peterson's transactions concerning the land were taken and had for the benefit of the Farmers National Bank and with its full knowledge, consent and authority. Thereafter, on November 6, 1919, the Farmers National Bank sold and conveyed the premises by warranty deed to the defendant Allen for a consideration of \$18,000.00 and Allen is now the record owner. The plaintiff asks that as to it the conveyance of the property by Clifford to the Farmers National Bank and by the bank to the defendant Allen be adjudged null and void ;

that the plaintiff be adjudged to be the equitable owner of the land by virtue of its ownership of the \$1000 note; and that it be adjudged to have a lien upon the land for the payment of this note, protest fees, interest, costs and disbursements, such lien to be prior and superior to the rights of the defendants.

From the facts pleaded as stated above, certain legal conclusions follow as a matter of course, none of which are open to serious controversy. They are: Upon the sale of the land under the executory contract an equitable conversion was effected, so that in equity the land was regarded as belonging to Josephine Howe and the purchase price to Clifford. The legal title was retained by Clifford as security for the payment of the purchase price. In a sense the equitable owner, Josephine Howe, mortgaged to Clifford her ownership to secure the purchase price notes. When Clifford transferred one of these notes to the Rolette County Bank the security which was incident to the debt was likewise transferred in equity. So that as against Josephine Howe the Rolette County Bank could avail itself of the security to the same extent that Clifford could, had the notes remained in his hands. When Clifford transferred the legal title to the land to the Farmers National Bank of Hendricks, Minnesota, he effected an assignment of his rights under the sale contract, and when Josephine Hanlyn quit-claimed to Peterson, who was acting for the bank, she released the obligation of Clifford and the Hendricks bank to hold either the title or her equitable interest as security for the payment of the notes, and upon payment to convey to her the legal title. The bank, through Peterson, had assumed the payment of the notes as a principal obligation. In short, by the quit-claim deed Mrs. Howe-Hanlyn released her rights under the contract. The simple question presented on these facts, considered in the light of these indisputable, legal conclusions, is this: May Allen, the subsequent purchaser from the bank, safely rely upon the record which shows the chain of legal title running to his grantor and a satisfaction of all equitable claims or liens incident to the land contract by the person in whose favor these equitable claims or liens *prima facie* exist, or is the purchaser, taking the legal title with record notice of the existence of the contract, charged with notice of the disposition of all the negotiable notes for which the land is security?

We have found this question to be more difficult of solution than might appear from the simple statement of it. Its various phases have undergone extended discussion in the various authorities that have had

occasion to consider it and the conclusions arrived at have not been harmonious; nor have the conclusions reached even by individual authorities, at various times when the question has been under consideration, reflected either permanency or consistency. The question has sometimes turned upon doctrines of priority as between successive assignees of equitable interests, where one had drawn to himself the legal title or had acquired a superior right to call for it. The solution in these circumstances has been held to depend upon the application of the maxim that where the equities are equal the legal title will prevail. Under similar facts it has sometimes been thought more appropriate in determining priorities between the assignee of an interest under a mortgage, no assignment being of record, and a subsequent purchaser or encumbrancer, to apply the equitable maxim that, as between equal equities, the one prior in point of time should prevail. In the more recent cases, however, where the question has arisen, it has generally turned upon the construction and application of the recording statutes with relation to assignments of mortgages. It will be seen upon examination of modern recording statutes that they are generally so framed as to embrace assignments of mortgages, both legal and equitable, as well as other instruments affecting legal title or equitable interests in real property. The tendency thus to enlarge the scope of the registry acts is indicated in the 7th ed. of Jones on Mortgages, § 476, as follows:

"Equitable mortgages are generally held to be within the recording acts as much as are legal mortgages. At first a different interpretation was put upon the acts, and a mortgage of an equity or of an equitable estate was not constructive notice when registered. But at an early day in this country it was established, either judicially or by statute, that all rights, incumbrances, or conveyances touching or in any way concerning land, should appear upon the public records, and that conveyances of equitable interests as well as legal were within the registry acts. * * *

Generally the record of an agreement constituting an equitable mortgage is notice to a subsequent purchaser of the legal estate from the same grantor."

See also § 479.

In this state the recording statutes have uniformly been construed in the liberal manner prevalent elsewhere. It is held that a bond for deed may be recorded, *Shelly v. Mikkelson*, 5 N. D. 22, 63 N. W. 210; also that a purchaser under an executory contract has a mortgageable interest

and that a mortgage given by him is within the recording statutes. *Simonson v. Wenzel*, 27 N. D. 638, 147 N. W. 804. The statutes relating to mortgages make specific provision for the recording of assignments. §§ 6742-3, Comp. Laws 1913; *Henniges v. Paschke*, 9 N. D. 489, 84 N. W. 350; *Merrill v. Luce, et al.* 6 S. D. 354, 61 N. W. 43. And the effect of failure to record is elsewhere specifically stated. § 5594, Comp. Laws 1913.

Where the decisions turn upon the recording statutes the assignee of an interest in the mortgage who fails to record it is either considered at fault or not, depending upon the application of the statute. If he is at fault, his interest is not protected as against a subsequent bona fide purchaser who relies upon the record for the reason that, as between the two, he whose omission of duty has made the loss possible should suffer. Our examination of the cases dealing with the question of priority in the general circumstances stated leads us to the conclusion that the best considered ones indicate a trend in favor of supporting titles to real property acquired in good faith and in reliance upon a record, as against equitable claims resulting from transactions not noted on the title records. It would seem that sound policy would require the giving of stability to titles acquired by persons who, in good faith, rely upon the public records. Stability would certainly be impaired if protection is accorded to those whose interests are of an equitable character and who have not been sufficiently diligent to cause to be entered upon the records the evidence thereof. An apt expression of this policy is found in the case of *Williams v. Jackson*, 107 U. S. 478. In that case it appeared that land had been conveyed to trustees in fee in trust for the payment of certain negotiable notes thereby secured. The trust deed was recorded and the notes transferred to an endorsee in good faith and for value. Before the maturity of the notes and while they were thus in the hands of the endorsee, the payee and the trustee released to the grantor of record the trust deed, whereupon the grantor obtained a second loan upon the same property by executing and recording a second trust deed. In disposing of the questions of priority between the holders of the notes secured by the first and second trust deeds, the court, among other things, said:

"It was suggested in argument that as the first deed of trust showed that the notes secured thereby were negotiable and were not yet payable. and that the land was not intended to be released from this trust until all the notes were paid, Williams was negligent in not making further in-

quiry into the fact whether they were still unpaid. But of whom should he have made inquiry? The trustees under the first deed and the original holder of the notes secured thereby having expressly asserted under their own hands and seals that the notes had been paid, and Sweet and wife having apparently concurred in the assertion by accepting the deed of release and putting it on record, he certainly was not bound to inquire of any of them as to the truth of that fact; and there was no other person to whom he could apply for information, for he did not know that the notes had ever been negotiated, and he had no reason to suppose that they had not been canceled and destroyed.

"To charge Williams with constructive notice of the fact that the notes had not been paid, in the absence of any proof of knowledge, fraud, or gross or willful negligence, on his part, would be inconsistent with the purpose of the registry laws, with the settled principles of equity, and with the convenient transaction of business. *Hine v. Dodd*, 2 Atk. 275; *Jones v. Smith*, 1 Hare, 43; S. C., 1 Phill. 244; *Agra Bank v. Barry*, Irish R., 6 Eq. 128, and L. R., 7 H. L. 135; *Wilson v. Wall*, 6 Wall., 83 (73 U. S. XVIII., 727); *Norman v. Towne*, 130 Mass., 52.

"The equity of Williams being at least equal with that of the plaintiffs, the legal title held for Williams must prevail, and he is entitled to priority. The decree appealed from is, in this respect, erroneous and must be reversed."

This doctrine has heretofore been specifically approved in this state in the case of *Henniges v. Paschke*, supra, where the purchaser of a promissory note secured by a real estate mortgage, who neglected to take and place on record an assignment of the mortgage was held to have a right inferior to that of a purchaser of the premises who took title in reliance upon the record together with a satisfaction of the mortgage executed by the mortgagee. The applicable holdings in the case are:

(a) Assignments of real estate mortgages are conveyances within the recording acts and if not recorded are void as to subsequent mortgagees;

(b) Upon the equitable principle that where one of two or more innocent persons must suffer for the wrongful acts of the third, he must suffer who left it in the power of the third person to do the wrong; and

(c) According to this principle (b), the purchaser of a secured note who neglects to take and place of record an assignment of the security must yield to a good faith purchaser of the premises. The following authorities will be found to support the same conclusions: *Newman v.*

Fidelity Savings Ass'n. 14 Ariz. 354, 128 Pac. 53; Ogle v. Turpin, 102 Ill. 148; Howard v. Ross, 5 Bradw. (Ill. App.) 456; Conn. Mut. Life Ins. Co. v. Talbot, et al. 113 Ind. 373 (where the provisions of a recording act authorizing recording of assignments of mortgages led the court to adopt a rule contrary to its previous decisions in Reeves v. Hayes, et al. 95 Ind. 521; Bank v. Anderson, 14 Iowa 545; McClure v. Burris, 16 Iowa 591; Bowling v. Cook, 39 Iowa, 200; Parmenter v. Oakley, 69 Iowa, 389; Livermore v. Maxwell, 87 Iowa 706, 55 N. W. 40; Central Trust Co. of Ill. v. Stepanek, 115 N. W. (Iowa) 891, 15 L. R. A. (N. S.) 1025; James, et al. v. Newman, et al. 126 N. W. (Iowa) 781; Jenks v. Shaw, 99 Iowa, 604; Lewis v. Kirk, 28 Kan. 356; Swasey v. Emerson, 168 Mass. 118; Ferguson v. Glassford, 68 Mich. 36, 47; Whipple v. Fowler, 41 Neb. 675, 60 N. W. 15; Ames v. Miller, 65 Neb. 204, 91 N. W. 250; Schwartz v. Laist, 13 Ohio State, 419; Henderson v. Pilgrim, 22 Tex. 464; Ladd v. Campbell, 56 Vt. 529; Friend v. Yahr, 126 Wis. 291, 104 N. W. 997; Marling v. Nomensen, 127 Wis. 363, 106 N. W. 844; Marling v. Jones, 138 Wis. 82; Note, 15 L. R. A. (N. S.) 1025 and Note, L. R. A. (N. S.) 1915F 554; 19 R. C. L. 364, 365; Jones on Mortgages, 7th ed. § 479 (note change in text between 1 Jones on Mortgages, 4th ed. § 474, and 1 Jones on Mortgages, 7th ed. § 474); 2 Jones on Mortgages, 7th ed. § 820.

For contrary authorities, see Hebert v. Fellheimer, 115 Ark. 366, 171 S. W. 144; Northrup v. Reese, 67 So. (Fla.) 136; Hussey v. Fisher, 94 Me. 301; Jordon v. Cheney, 74 Me. 359; Cooper v. Newell, 263 Mo. 190; 172 S. W. 326.

Up to this point we have dealt with the case in hand as though it were in all ways parallel with a case where a mortgagee, after transferring mortgage notes, releases the mortgage and a bona fide purchaser or incumbrancer acquires an interest in the property without actual or constructive notice of the transfer of the notes. We have done this for the reason that we are of the opinion that the plaintiff cannot possibly stand in a stronger situation with reference to the security of which it seeks to avail itself than as though a mortgage had in fact been given by Mrs. Howe-Hanlyn to Clifford. In reality the plaintiff's position is, if anything, weaker than that of an equitable assignee of an interest in a real estate mortgage.

We have also treated the circumstances of the transfer of legal title from Clifford to the Hendricks bank and the quit-claim deed from Mrs.

Howe-Hanlyn as being tantamount to a release of a mortgage by the mortgagee. We are of the opinion that these transactions do in law amount to a release of any mortgage interest Clifford acquired in Mrs. Howe-Hanlyn's equitable estate, as well as a release of all the equitable estate that Mrs. Howe-Hanlyn acquired by the contract. Certainly Clifford parted with all he had when he gave a warranty deed to the Hendricks bank and just as conclusively did Mrs. Howe-Hanlyn release all her right to have the title held as security for her notes when she gave the quit-claim deed. This must at least be held to be the effect as to third persons, whatever her rights might have been as to Peterson or the bank in case she had subsequently been called upon to pay one of the notes. As to the effect of a quit-claim deed, see 8 R. C. L. 926, 1024. By these transactions the Hendricks bank was clearly put in the position of owner of the legal and equitable title to the property free and clear of all obligations incident to the purchase contract of Mrs. Howe-Hanlyn. In this situation third parties clearly had the undoubted right to deal with the owner on the strength of the title and right thus appearing of record. Of the authorities hereinbefore cited, the following will be found to support the right of the purchaser where he has dealt with a mortgagee on the strength of a conveyance from the mortgagor or on the strength of a satisfaction of a mortgage: *Henniges v. Paschke*, supra; *Ogle v. Turpin*, supra; *James v. Newman*, supra; *Jenks v. Shaw*, supra; *Ames v. Miller*, supra; *Marling v. Jones*, supra; and *Woodward v. McCullom*, 16 N. D. 42,48.

The allegations in the complaint are not sufficiently definite to enable us to tell with certainty whether or not Allen received through the Hendricks bank and Peterson *legal* conveyances of the title of Clifford and the equitable estate of Josephine Howe-Hanlyn. This opinion obviously proceeds upon the theory that these are merged in Allen through legal conveyances. The plaintiff, of course, will be permitted to amend the complaint if advised in the light of this opinion that it has a cause of action against Allen.

For the foregoing reasons we are of the opinion that the trial court properly sustained the demurrer of the defendant Allen. The order appealed from is affirmed.

ROBINSON, C. J., and CHRISTIANSON, J., concur.

BRONSON, J. I concur in result.

GRACE, J., (dissenting). This is an appeal from an order sustaining a demurrer to the complaint. The only question involved is whether or not the court erred in making its order sustaining the demurrer.

The complaint is too lengthy to be set out here in full, and we think it unnecessary to do so. A statement of the material facts pleaded will as well present the issue.

The plaintiff is a banking corporation, organized and existing under and by virtue of the laws of the State of North Dakota. It became insolvent and Fred E. Harris was appointed its receiver. The Farmers National Bank of Hendricks, Minn., is a corporation existing under and by virtue of the laws of the United States, with its principal place of business at Hendricks, Minn.

On or about the 5th or 6th day of Oct. 1916, one Thomas J. Clifford, one of the defendants herein, of St. John, was the owner of certain real estate described in the complaint, situate in the county of Rolette, State of North Dakota.

On or about the date last mentioned, Clifford, for value, did make and enter into a contract with one Josephine Howe, now Josephine Hanlyn, by the terms of which he sold to her the above mentioned land, she to receive a good and sufficient warranty deed thereto, upon fulfillment of the terms of the contract.

The consideration for the purchase of the land was \$13,055, which was to be paid as follows: \$300, on the delivery of the contract; \$1200, on March 1st 1917; and the sum of \$11,555, according to the terms of eleven promissory notes of even date, with the contract, for the sum of \$1,000. each; the first of said notes became due Nov. 1st, 1917, and one of said notes becoming due each of the following years, up to and including 1927; and one note for \$555, due Nov. 1st, 1928. All of the notes were payable to Thomas J. Clifford, and bore interest at the rate of eight per cent per annum, from March 1st, 1917.

Thirty-five and seventy-three hundredths acres of the tract of land lying East of the railway rightaway was conveyed by Thomas J. Clifford to one Amendee Desroches, and that tract was released from the contract. The contract was filed for record and recorded in the office of Register of Deeds in and for Rolette county, on the 8th day of August, 1918.

Josephine Howe, now Hanlyn, entered upon the performance of the

contract, and paid the said sum of \$300 at the inception of the contract, and \$1300, which became due March 1st, 1917, and the \$1,000 note due Nov. 1st, 1917.

Subsequent to the making of the contract and delivery of the promissory notes, the defendant Clifford, it is alleged, for value, received, transferred, endorsed and delivered to the plaintiff the certain \$1,000 promissory note which became due Nov. 1st, 1919.

On or about Dec. 26, 1918, Clifford sold and conveyed all of the premises (excepting the thirty-five and seventy three hundredths acres which was theretofore conveyed to Amendee Desroches, by warranty deed) to the defendant, Farmers National Bank of Hendricks, Minn. It assumed and agreed to pay the mortgage indebtedness, remaining unpaid on said land, and agreed to carry out the contract made by Clifford with Josephine Howe.

Thereafter, the Farmers National Bank of Hendricks, Minn., through its cashier, G. L. Peterson, procured Josephine Hanlyn, formerly Josephine Howe, to quit-claim all her interest in and to said land to said Peterson, its cashier, who then assumed and agreed to pay as part of the consideration therefor, the balance of the purchase price on the land then owing by Josephine Hanlyn, including the plaintiff's note and the whole of the amount remaining due on the contract. The quit-claim deed was taken in the name of G. L. Peterson, but, in fact, for the Farmers National Bank of Hendricks, Minn.

On or about the 6th day of Nov. 1919, by warranty deed, the Farmers National Bank of Hendricks, sold and conveyed, for a consideration of \$18,000, all of said land, with the exception of the thirty five and seventy three hundredths acres, to Wm. H. Allen.

Plaintiff prays judgment against the defendants, Josephine Howe, Thomas J. Clifford, and the Farmers National Bank of Hendricks, Minn., for the sum of \$1,000 and interest from March 1st, 1917, at eight per cent per annum, plus the sum of \$2.79 costs incurred on the protest of the note; and that the conveyance of said property by Clifford to the Farmers National Bank of Hendricks, and by that bank to the defendant Allen, be adjudged null and void and of no force nor effect, so far as the plaintiff is concerned; that the plaintiff be adjudged to be the equitable owner of the land, by virtue of its ownership of the \$1,000 note; that the plaintiff be adjudged to have a lien on the land for the payment of the \$1,000, and protest fees and interest, costs and disbursements, and that

such lien be declared prior and superior to the rights of the defendants; that plaintiff be allowed to foreclose the said lien; that, under said foreclosure, that it be decreed that the land be sold in the manner now provided for sales of land under mortgage foreclosure; and the proceeds of the sale applied to the payment of the costs and expenses incident thereto, and then to the note with interest and protest fees; and, in the event that the land does not sell for sufficient to cover the above, that a deficiency judgment be entered against Josephine Howe, Thomas J. Clifford and Farmers National Bank of Hendricks, and that the purchaser, at the sale, receive the usual certificate of sale, and, in case of no redemption, the usual sheriff's deed.

The defendant Allen interposed a demurrer to the complaint, on four different grounds, among which was one, to-wit: that the complaint does not state facts sufficient to constitute a cause of action in favor of plaintiff and against defendant. It was on this ground that the court sustained the demurrer, and whether the court erred in making its order sustaining the demurrer, we are to determine.

It is elementary that the demurrer admits all of the allegations of the complaint, or of the pleading to which it is interposed, that are well pleaded. The question is—assuming all the facts pleaded by plaintiff to be true—are they of such nature, character or effect as to state a cause of action: and, if substantiated by proper evidence, do they warrant recovery of any relief?

In order to determine the questions presented on this appeal, we must determine whether or not the contract of purchase is in the nature of security for the payment of plaintiff's note; and whether or not plaintiff is entitled to resort to that security, by bringing an action, which, in form and substance and by the relief demanded, is the same as that to foreclose a mortgage by action. We are required to determine several other controverted questions of law presented in the case. That determination cannot be accomplished until the relative interests of the parties to the contract, in the land, are defined.

This, we find our initiatory task. It lies at the threshold of our examination of this case. What, then, is the relative interest of each of the parties to the contract, in the land? Their relationship to it, and to each other? We are of the opinion, that it may with certainty be stated, as a general principle of law, applicable to this character of contracts, and one heretofore enunciated by this court, that, where the owner of land sells

it to another on contract of purchase, in which is specified the time and manner of future payments to be made by the vendee or the grantee; and which he does undertake to make; and where the grantor agrees, that, on such payments having been made, he will convey to the grantee by deed, that the grantee, at the time of the execution and delivery of the contract, becomes the equitable and beneficial owner, and the grantor merely holds the legal title of the land in trust for the grantee, and has thereby, in addition to the contract, security for the performance of the covenants in the contract, on the part of the grantee.

The position occupied by the vendor and vendee is to some extent that of mortgagee and mortgagor. The vendor, by his contract, has a lien for his purchase money, which the vendee may not affect or impair by conveyance, and which he can extinguish only by payment of the purchase price of the land, as specified in the contract.

This contract lien is a separate and additional lien to the vendor's lien created by § 6861, Comp. Laws. It is a lien created by the contract between the parties. It may be assigned, and the assignee having received deed from the vendor, may enforce the contract of purchase against the original vendee.

The personal obligation referred to in § 6861, as we view the matter, is one where there is no additional or collateral security taken to secure the payment of it. If such additional or collateral security is taken, the right to a vendor's lien is waived, but so long as the vendor has only the personal obligation of the vendee, he may, instead of proceeding to enforce the personal obligation, disregard it and bring an action to recover the purchase price, and establish a lien therefor on the property sold; and this, by authority of § 6861.

If the vendor takes a written contract for the payment of all or part of the purchase price, and subsequently assigns it, he thereby waives his right to a statutory lien, except he may assign it in trust to pay debts and for the return of the surplus, as is provided in § 6862.

The assignee in such case would hold only the vendor's contract lien, which he could enforce the same as the vendor, but, after the assignment, neither the vendor nor his assignee would have any statutory vendor's lien, as that is personal to the vendor.

It is clear, from what has been said, that the vendor who sells land on contract, whereby the purchase price is to be paid according to the

terms of the contract, has a lien created by a statute, and, as well, a lien created by the contract of the parties.

In *Roby v. Bank*, 4 N. D. 160, Justice Barthlomew, speaking for the court said:

"The vendor has a lien for his purchase money by virtue of his contract, and a lien which the vendee cannot, by conveyance or otherwise, affect or impair, and which can be extinguished only by payment of the purchase money. * * * Such a vendor is not required to rely upon the technical vendor's lien, which is a creature of equity, and exists where the vendor has parted with the legal title, and may be destroyed at any time by a conveyance by the vendee. He has a more substantial and indestructible lien, created by contract, and of which all the world must take notice."

We think this language applies as well to the statutory lien as to a lien in equity. We think the principles above stated are further recognized and adopted in the cases of *Nearing v. Coop*, 6 N. D. 349, and *Woodward v. McCollum and State Bank*, 16 N. D. 49, and the authorities cited in those and the foregoing cases.

We think the vendee, in this character of contract, acquires an estate and interest in the land. In other words, becomes the equitable and beneficial owner, and is entitled to receive a conveyance of the title, as soon as he has performed his covenants contained in the contracts. Under such a contract, the vendor is the trustee of the title and has no authority to deliver the same to any other person than the vendee, except subject to vendee's rights under the contract. In other words, if, after making such contract, the vendor gives a deed to a third person, it must be subject to the vendee's rights, and that third person must be obligated, and is obligated, to do all that the vendor was obliged to do by the contract.

The vendor is bound by the contract for deed, just as much as the vendee. For he contracted to deliver the deed on performance of the covenants agreed to be performed by the vendee. He also contracts to deliver the title by a good and sufficient deed. He is, therefore, from the time of making such a contract, a trustee of the title for the vendee. He is not at liberty to make a similar contract, selling the same property to a third person, except in subordination to the prior contract. In other words, he cannot lawfully deed the land to such third person, except subject to the prior contract, for that would be a violation of his trust relation to the vendee in the first contract.

We are not here considering the question of such third person as an innocent purchaser. We deem it not necessary to discuss that subject in this opinion. We are considering only the right and authority of the vendor to convey the title to a third party, after having prior thereto, contracted in writing to deliver the same title to a prior purchaser.

In *Miller v. Shelburn*, 15 N. D. 182, the court said:

"The vendor remains to all intents, the owner of the land; he can convey it to a third person free from any legal claim or incumbrance; in short, the vendee obtains at law no real property nor interest in real property. The relations between the two contracting parties are wholly personal."

This language is part of the quotation from *Pomeroy on Equity Jurisprudence*. We do not agree with the language of the opinion in this regard. We do not see how it is possible that the vendor can at once be the trustee of the title for the vendee under a written contract for deed, and at the same time be lawfully authorized and have a right to sell and dispose of the same property to any third person, and this in total disregard of his obligations and duties under the former contract.

As bearing on the question of the vendee's interest in the land under a contract of this character, we may consider whether it is subject to levy under an execution.

Section 7720 C. L. describes what property is liable to execution. It is as follows:

"All goods, chattels, moneys and other property, both real and personal, or any interest therein of the judgment debtor not exempt by law and all property and rights of property seized and held under attachment in the action are liable to execution. Shares and interests in any corporation or company, and debts and credits, and all other property, both real and personal, and any interest in real or personal property and all other property not capable of manual delivery, shall be liable to be taken on execution and sold as hereinafter provided. The levy of an execution shall be made in the same manner as a levy under a warrant of attachment."

Under the terms of this statute, we are of the opinion, that the interest of the vendee in land purchased on contract is subject to execution and sale. It was so held by the Supreme Court of South Dakota, in the case of *Brooke v. Eastman*, 96 N. W. 699, in construing a statute similar to ours. We quote from the syllabus:

"Constitution, Article 8, §§ 5 and 6, relating to the disposal of school lands, provide that the purchaser shall pay one-fourth of the price in cash and the remaining three-fourths in installments, but all such subdivided lands may be sold for cash, provided that upon the payment of the interest for one full year in advance the balance of the purchase price may be paid at any time, and that no "sale" shall operate to convey any title to any lands for 60 days after the date thereof, and that no grant shall issue until final payment. Laws 1890, p. 296, chap. 136, provides for sales in pursuance of the constitutional provisions, and for the issuance of "contracts of sale," and declares that whenever the purchaser of any tract shall default in the principal or interest, or shall violate any of the provisions of the contract of sale, such sale may be set aside. Held, that a purchaser who had made the first payment, and received a contract of sale from the commissioners, had an interest in the lands, which was subject to execution under Rev. Code Civ. Proc. 1903, § 336, subjecting to execution "all goods, chattels, moneys and other property, both real or personal, or any interest therein, of the judgment debtor."

We think, under our statute, which is practically the same as that of South Dakota, that an execution could be levied on the interest of the vendee in land purchased under a contract for deed. This could not be done unless the vendee has an interest or estate in the land, and we think it clear that he has such interest;" and we think the rule in this regard, announced in the *Miller v. Shelburn Case*, is not correct. If it be true, that the relations between the vendee and vendor in a contract of purchase are wholly personal, then, though the vendee wholly performs, according to the terms of the contract, the vendor may refuse to convey to him by deed; or, if the vendor may deed it to a third party, or, if he is under no obligations to carry out his contract with the vendee, if the relations are personal only, the vendee's only remedy in all such cases would be an action for damages. But we know this is not true, for, when the vendee has performed according to the terms of the contract, he can compel the vendor to deliver title by an action of specific performance against him; and this, he may do, and may have relief by specific performance, even though the vendor has transferred the land by deed to some third person, unless the third person is an innocent purchaser.

It would seem, that such action could be maintained only on the theory that the vendee is the equitable and beneficial owner, and that the

grantor merely holds the legal title of the land in trust for the grantee, and as security for the performance of the vendee's covenants in the contract.

The relation between the vendor and vendee, under a written contract of purchase, is contractual, each being bound by the terms and covenants of the contract entered into between them.

We do not think a judgment becomes effectual as a lien against the equity of the vendee in land until an execution is issued thereon, and a levy made. Then, there is a lien perfected against such equitable interest, and when a lien is so effected, it is largely analogous to a lien on an equitable interest effected by contract. In other words, the vendor has security on the equitable interest of the vendee, which lien is secured by the terms of the contract, and that is all that is effected by levy under an execution.

Having arrived at the determination that the vendee of such a contract has an interest in the land, we proceed to the determination of plaintiff's rights by having purchased the note upon which suit is brought.

The contract having been given as security, and to that extent of the nature of a mortgage, was one which, under §§ 5546, 5594 and 5595, C. L. was entitled to record. It was duly recorded, as alleged in the complaint. It was thereafter constructive notice to all the world of its contents. It recited the consideration for the purchase, and describes the notes given to represent the purchase price. The contract was security for the payment of those notes. It was in effect a mortgage, securing their payment.

If the defendant Allen had procured an abstract, it must have shown this contract. It is true, it would also have shown, that Josephine Hanlyn had quitclaimed her interest in the premises to the Farmers National Bank of Hendricks, Minnesota, but that would not operate to satisfy the vendor's lien on the land under the contract.

The vendor, Clifford, deeded the land to the Farmers National Bank, who assumed and agreed to pay the mortgage indebtedness remaining unpaid on the land, and assumed and agreed to carry out the contract made to Josephine Hanlyn by Clifford.

Subsequently, the Farmers National Bank procured from Josephine Hanlyn her quitclaim deed of all her interest in the land, and then and there agreed, as part of the consideration, to pay the balance of the purchase

price of the land, then owing by Josephine Hanlyn, including the note sued upon.

To say that the quitclaim deed from Josephine Hanlyn was sufficient to set aside a lien under the contract, would be in effect to say, that the mortgagor is a proper party to satisfy the mortgage instead of the mortgagee, considering that the contract, in the circumstances of this case, is in effect a mortgage.

The Farmers National Bank, after it received the deed to the land, was in the same position as Clifford as to Josephine Hanlyn. It had notice, knew of, and assumed to pay the balance owing by Josephine Hanlyn on the contract, and this, as a part of the consideration of receiving the deed from Clifford. She agreed to pay this thousand dollar note in question, and the security for the payment of the same was the contract which in effect was a mortgage.

But, even if it had not assumed or agreed to pay this note, and had not taken quitclaim deed from Josephine Hanlyn, the contract being of record, it had constructive notice of the existence of the note. It knew it was secured by this contract. It was its duty to see that the money applied to the payment of the purchase price was applied to the discharge of this note. For it was secured by the contract.

We do not see how Allen can be in any better position than the bank. He had the same constructive notice, by the recording of the contract, that the bank had.

If the notes had been secured by a mortgage, instead of by the contract, and, as in this case, Clifford had sold, in the ordinary course of business, a note similar to the one in question, we think in equity this would operate as an assignment of the mortgage to the extent of at least an amount thereof, equal to the note.

So, we are of the opinion, that the lien acquired by the purchase contract is in principle similar to a mortgage, and, in equity follows the debt on its assignment as an incident thereof, and the assignment of a part of the purchase money notes will operate at least as an assignment of the lien pro tanto. See, 27 R.C.L., §§ 349, 350 and 351, and Notes 19 and 20, and cases there cited.

All of the parties interested in the contract should be parties to this in order that their respective rights and interests therein may be determined. In addition to the demurrer interposed by defendant Allen, several of the defendants interposed demurrers, but no appeal was taken

from the order of the court, with reference to any demurrer except that of Allen; and, hence, that is the only one presented here for consideration.

From what has been above said, we are of the opinion, that the trial court was in error in sustaining the demurrer interposed by Allen, and in making its order to that effect. That demurrer should have been overruled, and defendant Allen permitted to answer, and the case thereafter tried on its merits.

We have written quite at length, with reference to the questions involved in this opinion. The case came to the writer in the regular order of assignment, and the foregoing opinion was prepared with the expectation that it would be adopted as the law of the case. Thorough investigation was made into several crucial questions, which heretofore have not been decided by this court, and definite conclusions, with reference thereto, arrived at, which, we believe, constitute the law of the case.

MARTIN PAULSON, Respondent, v. J. A. REEDS, Appellant.

(183 N. W. 641.)

Brokers — whether sale negotiated was in substantial conformity to listing agreement held question of fact.

1. In an action by a broker to recover commissions earned under an express contract for the sale of real property, it appeared that the broker negotiated a contract for the sale which departed somewhat from the listing agreement. The evidence was conflicting as to whether the defendant accepted the contract as a substantial fulfillment of the agency or upon condition that the agent would reduce his commission to make up the difference between the value of a contract conforming to the listing agreement and that actually negotiated. It is *held*:

Following a prior decision in the same case, a question of fact is presented upon such conflicting evidence.

Brokers — broker held entitled to commission for sale not strictly conforming to listing agreement.

2. Where an owner signed a contract for the sale of land negotiated by a broker with knowledge that it did not conform to the listing agreement, and without terminating the agency or modifying the agreement

relating to commissions, the broker is entitled to recover the stipulated commission.

Opinion filed May 18, 1921. Rehearing denied June 23, 1921.

Appeal from District Court, Richland County; *Graham, J.*

Affirmed.

W. S. Lauder, for appellant.

Under such an agreement the plaintiff's recovery must be upon a quantum meruit and not for a stated amount, and that is undoubtedly the law. *Louva v. Worden*, *Paulson v. Reeds*, 33 N. D. 141-146; *Harris v. Van Vranken*, 32 N. D. 238; *Paulson v. Reeds*, 39 N. D. 329.

Where a party sues on an express contract he cannot recover on an implied contract nor on a quantum meruit. *Paulson v. Reeds*, 33 N. D. 141; 39 N. D. 329; *Cyc. Vol. 9*, 739 et seq.; *Morrow v. Board of Education*, 64 N. W. 1126, (S. D.); *Wernli v. Collins*, 54 N. W. 365; *Ball v. Dolan*, 114 N. W. 998; *Ency. Pl. & Pr. Vol. 2*, 990; *Beers v. Schallern*, 161 N. W. 557, (N. D.)

Wolfe & Schneller, for respondent.

BIRDZELL, J. This is an appeal from a judgment in favor of the plaintiff for \$1,200, interest, and costs in an action to recover a commission for the sale of real estate. The action has been pending for 10½ years, and this is the fourth appeal. The facts have been amply stated upon the previous appeals, and need not be restated in full here. See *Paulson v. Reeds*, 24 N. D. 211, 139 N. W. 1135, 33 N. D. 141, 156 N. W. 1031, and 39 N. D. 320, 167 N. W. 371. After the last remand to the district court, a stipulation was entered into whereby it was agreed that the case should be submitted to the court, Hon. F. J. Graham, Judge, presiding, without a jury, and that it be submitted upon the testimony which had been transcribed in separate statements of the case as settled and allowed on appeals to this court. It was specifically stipulated that the court, in the decision of the questions involved, might consider the testimony with the same force and effect as though the wit-

nesses were again sworn and the same testimony given in open court. After considering the case, the court made findings of fact and conclusions of law favorable to the plaintiff, and ordered judgment accordingly.

The complaint alleges a cause of action upon an express contract. It states that on or about the 28th day of June, 1910, the plaintiff and defendant entered into an agreement whereby the defendant agreed to pay the plaintiff for his services in securing a purchaser for certain lands such amount as might be realized from the sale over and above \$16 per acre, and that thereafter, on the same day, the plaintiff procured as a purchaser, one Huey, who was then ready, willing, and able to purchase the lands upon the terms agreed upon by the plaintiff and defendant, and who did so purchase them at the price of \$17.50 per acre; whereupon, pursuant to the agreement, the plaintiff had earned the stipulated compensation of \$1,200. It seems that just prior to the signing of the sale contract which the plaintiff had negotiated with Huey the plaintiff induced the defendant to sign a memorandum which has been referred to in the previous records as Exhibit A. The memorandum reads:

“Wyndmere, N. D., June 28, 1910.

“Martin Paulson:—You are hereby authorized to sell my land, west one-half and S. E. quarter, section 21, and east $\frac{1}{2}$ 20—133—52, at (\$16.00) per acre, net to me.

“J. A. Reeds.”

In the previous appeals the records have contained testimony showing that, at the time the sale contract, referred to at various times as Exhibit B, was signed by the defendant, the question was raised that it did not embody the terms which the defendant had previously agreed to accept, in that the cash payment was smaller and the interest rate less on the deferred payments than he had stipulated for in the listing agreement. The effect of this departure was to make the value of the contract less than “\$16 per acre net” to the defendant according to the meaning which that expression was mutually understood to convey at the time it was embodied in Exhibit A. It has been the contention of the plaintiff that, notwithstanding the sale contract, Exhibit B, involved a departure from the listing terms previously agreed upon, the defendant, on June 28, 1910, accepted it as a fulfillment of the agency contract without any reduction in the commission; that the defendant accepted the aggregate consideration, amounting to \$17.50 per acre, as not reduced by the smaller cash payment.

and the lower rate of interest on the deferred payments stipulated for in the sale contract, and that the only change affecting the commission was an agreement to defer its payment until November; whereas, it has been the contention of the defendant, on the other hand, that the plaintiff agreed on June 28th, at the time the sale contract was signed, that he, the plaintiff, would make up the difference between the value to the defendant of the sale contract actually negotiated and the value of one in strict accordance with the listing agreement.

At this point it is convenient to state the grounds of reversal upon the previous appeals. Upon the first appeal the plaintiff and respondent confessed error. The action having been brought upon an express contract for \$1,200, and the verdict and judgment being for less than that, it was the respondent's contention that the recovery should have been either for the whole amount or for nothing. Upon the second trial the plaintiff recovered \$1,200, but the court, in its instructions, gave controlling effect to the memorandum of June 28th, Exhibit A above quoted, as against the remainder of the contract of the parties. In view of the testimony relating to the transaction taking place when the sale contract was signed, this was held to be prejudicial. In the third appeal it appeared to the majority of this court that the trial court had again effectually removed from the consideration of the jury the defendant's version of the transaction of June 28th in connection with the signing of the sale contract.

Upon this appeal the defendant challenges the findings of fact of the trial court, and contends that it appears as a matter of law upon the previous records that the plaintiff has no cause of action upon the express contract sued upon, but at most has an action for the quantum meruit. It is pointed out that the plaintiff's own evidence shows that the sale contract with Huey involved a departure from the listing contract in the particulars hereinbefore stated, and from this it is argued that the plaintiff is not legally entitled to recover as upon a performance of the express contract. Upon the last previous appeal the substance of this contention was urged as a ground for directing the dismissal of the action. While this court reversed the judgment, it refused to direct a dismissal, saying (Paulson v. Reeds, 39 N. D. 329-341, 167 N. W. 371, 374) :

"We do not agree with appellant's counsel wherein he contends that, under the complaint, which alleged an express contract entered into on the 28th day of June, 1910, there can be no recovery under the evidence in this case. There was ample evidence from which the jury could have

found that the express contract upon which plaintiff sues was made. There was, therefore, no error committed in refusing to grant the motion for a directed verdict. As we view the record, all of the evidence descriptive of the transaction had at the time of the signing of the sale contract should have been left to the jury under proper instructions, and from it they would have been warranted in finding that the defendant expressly agreed to pay the plaintiff the full amount of his commission, or that he expressly agreed to pay him a portion only of the commission originally agreed upon, or that no agreement whatever was reached, in which event, under proper pleadings, the recovery would be limited to the quantum meruit."

It also said, at page 339 of 39 N. D., at page 374 of 167 N. W.:

"* * * The record in this case discloses clearly that the signing of exhibit 'B' by the defendant, under the circumstances, was an equivocal act, and one reasonably susceptible of the inference that Reeds was thereby expressing his agreement to the payment of a commission measured by the difference between the value of exhibit 'B' compared to the contract originally contemplated, or an agreement by him to pay a reasonable commission, or, if the jury disbelieved his version and believed that of the plaintiff, that he was to pay the full amount of the commission originally agreed upon, but was to be given until November 15th following to pay it."

The foregoing statements were deliberately made after a careful consideration of the conflicting evidence relating to the entire transaction of June 28th. In view of the pendency of this case for so long a time, it should not be assumed that this court at so late a date would have remanded the case for a retrial if it were of the opinion that in the state of the record no recovery could be had under the pleadings and the evidence. Neither should it be assumed that we would give but passing attention to a question going to the root of this protracted litigation. Our opinion remains the same. The foregoing quoted expressions became the law of the case, and we are not now disposed to enlarge upon the reasons for so concluding. It is unnecessary to review our former holdings to determine the credence that should be given the findings of the trial court in the light of the circumstances in which this case was submitted to the judge. There is abundant evidence to warrant findings that the defendant accepted the sale contract, Exhibit B, as a substantial compliance with the terms of the agency, and with knowledge that the plaintiff was claiming for negotiating the sale the full commission of \$1,200. We are of the

opinion that the defendant became liable for the full commission if he in fact continued to recognize the plaintiff as his agent and signed the contract with Huey, knowing at the time that the listing contract had been in some respects departed from; provided that by his words or actions he manifested the intention to become bound for the full amount. See *Red River Valley Land Co. v. Hutchinson*, 41 N. D. 193, 170 N. W. 317; *S. E. Crowley Co. v. Myers*, 69 N. J. Law, 245, 55 Atl. 305. Whether or not he did so manifest the intention to become bound for the full commission presents a question of fact. The evidence does not warrant overturning the decision of this question by the trial court in favor of the plaintiff.

The judgment appealed from is affirmed.

CHRISTIANSON, J., concurs.

BRONSON, J., concurs in result.

GRACE, J. (specially concurring). This is the fourth appeal in an action by plaintiff to recover commissions claimed to have been earned in consummating a sale of 800 acres of land. See *Paulson v. Reeds*, 24 N. D. 211, 139 N. W. 1135, 33 N. D. 141, 156 N. W. 1031, and 39 N. D. 329, 167 N. W. 371.

The case has been four times before the trial court, and, with the exception of the first trial, where plaintiff recovered a \$700 judgment, in each of the trials he has recovered the full amount of commissions claimed, to wit, \$1,200. When the case was last before this court, prior to this appeal, in 39 N. D. 329, 167 N. W. 371, the writer hereof was unreservedly of the opinion that the judgment there appealed from should be affirmed. All of the other members of the court, however, thought that the judgment should be reversed, and it was reversed, the writer hereof at length and very vigorously dissenting, as will appear from a reading of my dissent.

The case is now again presented to this court, on this fourth appeal, by an appeal from a judgment in plaintiff's favor for \$1,200. The majority of the members of this court are now agreed that the judgment should be affirmed, a conclusion which harmonizes with the result arrived at by

my former dissent, and, of course, I concur in the affirmance of the judgment.

ROBINSON, C. J. I do strenuously dissent, and the reasons of my dissent are as stated in *Paulson v. Reeds*, 39 N. D. 341, 167 N. W. 375.

The testimony shows positively that the plaintiff did not comply with the listing contract under which the defendant agreed to pay \$1.50 an acre for the sale of the land, and that the sale was made for a sum and on terms and conditions which were equal to \$900 less than the list price; and at the time of making the sale for the reduced price the defendant did in no manner agree to pay the listing commission of \$1.50 an acre. As the evidence shows beyond all dispute, there was a failure to comply with the listing contract.

JOHN RAMSDELL, Appellant v. HARRY F. WARNER, Respondent.

(183 N. W. 281.)

Gifts — verbal "gift" not valid unless possession given or delivery made.

1. A gift is a transfer of personal property made voluntarily and without consideration. A verbal gift is not valid unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee. (§§ 5538-5539, C. L. 1913).

Gifts — title to straw given under condition of removal held not to pass.

2. Where W. the owner of certain strawstacks situated on his own premises, tells R. that R. may have as much of the straw as he wants provided it is removed from the premises within a specified time, and where R. does not remove any part of the straw or in any manner take possession thereof or exercise any dominion over it, title does not vest in R., so as to render W. liable for the value of the straw in an action brought by R. against W. charging the latter with having set fire to and destroyed the strawstacks.

Opinion filed May 24, 1921.

Appeal from District Court, Renville County; *Burr*, J.

Plaintiff appeals from an order granting defendant's motion for a new trial.

Affirmed.

J. E. Bryans, for appellant.

The tenant is the owner of all of the straw on this land, regardless of such provision in the contract. See the late decision of this Court. *Minneapolis Iron Store Co. v. Branum*, 36 N. D. 355; 162 N. W. 543.

That it is a general rule of law that the tenant is the owner of the straw. *Munier v. Zachary*, 114 N. W. 525; 18 L.R.A. (N. S.) 572, and note to this case. *Craig v. Dale*, found in 37 Am. Dec. 477, holds that the tenant is entitled to all straw as part of the crops on rented lands. *Smith v. Boyle*, 66 Neb. 823; 92 N. W. 1018; 103 Am. St. Rep. 745.

The following cases are to the same point that the tenant is the owner of the straw. 24 Am. St. Rep. 433; 45 Am. Rep. 277; 59 Am. Dec. 53; 48 Am. Rep. 155; *Brigman v. Overstreet*, found in 128 Ga. 447, 10 L.R.A. (N. S.) 452, 57 S. E. 454, holds that straw from which the crops is threshed is not manure, but is part of the crop and belongs to the tenant in the same way and to the same extent as the grain. *Rank v. Rank*, 5 Pa. 211.

P. M. Clark, for respondent.

Imperfect Gift. "Where, however, some essential element necessary to make a perfected gift *inter vivos*, such as delivery to or acceptance by the donee is lacking, the donor may revoke the gift at any time before it is perfected." 20 Cyc. p. 1213.

Promise of Gift. "A mere promise or executory agreement to make a gift of property does not amount to a gift *inter vivos* and is not enforceable as such." 20 Cyc. 1214. *Luther v. Hunter*, Vol. 7 N. Dak. 544; also see extensive note in *McWillie v. Van Victor*, 72 Am. Dec. 135.

If there was a reversionary interest there was not a gift, but merely an imperfect or incomplete gift and an incomplete gift is in fact and in law no gift at all. *Shepard v. Shepard*, 129 N. W. 202, (Mich.); *Dewey*

v. Barnhouse, 29 L.R.A. (N. S.) 166; Black on Recision and Cancellation, Vol. 2, § 497 on essentials of a gift.

CHRISTIANSON, J. Plaintiff brought this action to recover the value of 200 tons of straw which he avers that the defendant set on fire, and caused to be destroyed, on October 9, 1919. The defendant interposed a general denial. The case was tried to a jury, and resulted in a verdict in favor of the plaintiff for \$480 and interest. The defendant moved for a new trial on the grounds, among others: (1) Insufficiency to justify the verdict; (2) that the verdict is against law; and (3) that the verdict was rendered under the influence of passion and prejudice, and excessive damages awarded to the plaintiff. The motion for a new trial was granted, and plaintiff appealed.

The defendant was the owner of a quarter section of land in Renville county in this state. In April, 1919, the plaintiff and the defendant entered into a written contract whereby the plaintiff agreed to farm such land for the farming season of 1919 on the "crop-share plan." The land was sowed to wheat which was threshed in August, 1919, and this controversy arises over the straw. The plaintiff claims to be the owner of all of the straw. Under the contract between the parties, the plaintiff specifically agreed "not to remove any straw or manure from said farm, and not to sell or remove, or suffer to be sold or removed, any of the produce of said farm or premises, of any kind, character, or description until the division thereof, without the written consent of the party of the second part, and, that, until such division, the title and possession of all the hay, grain, crops and produce, raised, grown or produced on said premises" should be and remain in the defendant. The contract further provided that all the hay should be put up "one-half basis," and that—

"In consideration of the faithful and diligent performance of the foregoing stipulations by the party of the first part (plaintiff) the party of the second part (defendant) agrees, upon reasonable request thereafter made, to give, release and deliver to said party of the first part herein named the one-half of the hay and of all grain so raised and secured from the said farm during said season or seasons, or the proceeds thereof, if sold, after deducting from such share any just costs or disbursements, incurred and made by said party of the second part as hereinbefore provided and any indebtedness owing from the first party to the second party."

It is undisputed that at the time of the threshing some conversation took place between plaintiff and defendant with reference to the straw. The plaintiff claims that the defendant told him that he could have all of the straw if he removed it from the premises "before the snow came." The defendant, on the other hand, claims that in such conversation he told the plaintiff that he (plaintiff) could have the straw, or as much thereof as he wanted, if he took it off the premises before the 1st of October. The defendant further stated that he informed the plaintiff that he wanted to burn the straw before he went back to his home in Canada. The defendant further testified that he also informed the plaintiff that he had given other parties permission to take some of the straw. On the 9th day of October, the defendant burned the straw. The plaintiff thereupon brought this action to recover \$4,000, which he claims to be the value of the straw.

In a memorandum decision filed with the order granting a new trial, the trial court said:

"It is contended by the plaintiff that under the provisions of this lease, he would have a half interest in the straw, from the mere fact that he was tenant. The defendant claims that the crops raised, being emblements, are the property of the tenant. The respective rights of the parties, however, and the question of title to crops and straw, are fixed by this contract. An examination of the contract shows that at no time did the tenant, the plaintiff, have any interest in the straw. While the crops were growing, all the title thereto remained in the defendant, and even after division, all title that passed to the plaintiff upon the completion of the contract was title to 'the one-half of hay and of all grain raised and secured from the said farm during said season.' The straw is neither hay nor grain, and therefore it is clear that at all the time the title to the straw remained in the defendant. Despite this new theory advanced by the plaintiff, that because he is the tenant the annual crops are the property of the tenant until division, it is clear he did not have that view when he commenced the action. He brings this action against the defendant because he claims the defendant destroyed certain property which he gave to the plaintiff. In other words, the plaintiff claims the defendant made a gift of the straw to him. * * * There is no contention in the evidence that the plaintiff removed any of the straw, or had commenced hauling it before the defendant burned it. The threshing was done some time in August, and it was during the threshing

period this conversation was had between the parties regarding the straw. There was nothing further for the plaintiff to do under the contract after the threshing, and therefore he had no further right on the place, except it was his business to haul the share of the grain coming to the defendant. Unless the defendant made a gift of the straw to the plaintiff, the plaintiff cannot recover in this case. There was no consideration for the straw, and so the plaintiff's title, if any, must rest upon a gift.

"In this case, there was no motion for dismissal or directed verdict, and so the case was submitted to the jury. The court charged the jury that if the defendant gave the plaintiff all of the straw, to be the straw of the plaintiff, and burned it before the plaintiff had the right to remove it, that the plaintiff could recover. This may not have been quite clear to the jury. The court told the jury the straw was a mere gift. The question is now raised that it was not even a gift; that it was a mere license to go upon the land and take such straw as he wanted. In the charge, the court stated that if it was a mere license, this license could be revoked any time and the defendant would not be liable. * * * Under our statute, §§ 5538 and 5539, a gift is a transfer of personal property, made voluntarily and without consideration, but is not valid, when it is a verbal gift, unless the means of obtaining possession are given, and if the property be capable of delivery unless there is an actual or symbolical delivery. This, if a gift, was a verbal gift. * * * The defendant claims * * * there was no delivery of the property. The court is inclined to think this is correct. The plaintiff did not go and take any of the straw, did not exercise any more power or dominion over it than he had before the alleged gift. There was no symbolic delivery or possession given; the property remained just as it did before. Then there is another point which the defendant urges, and that is, there never was a complete transfer of title intended. Both the plaintiff and the defendant admit that if there was any straw remaining on the premises after a certain date, the defendant was going to burn it. They differ as to the date set, but they agree on the fact. The plaintiff himself admits the defendant said he could have it if he got it off by a certain time. The more the court views it, the more we are inclined to believe it was a mere license to go and take the straw, and as the plaintiff had not taken it, or any portion of it, or exercised any dominion over it, the defendant could do as he saw fit.

"The defendant claims the jury were influenced by passion or preju-

dice, and that this is shown by the amount of verdict returned. It is quite clear that both the plaintiff and the defendant looked upon the straw as being comparatively valueless at the time the alleged gift was made. The plaintiff admits he was getting it for nothing, and that the defendant was going to burn it anyway. The defendant claims he did not know what to do with the straw, was glad that any one would take it and intended to burn it before he left, in order to get rid of it. The length of the winter which followed, the severity of the season, and the ensuing scarcity of feed, caused the price of straw to go to a fabulous figure, and it does appear as if the jury were influenced by that. The plaintiff, if he can recover at all, could recover for the value of the straw at the time it was burned, and yet the jury gave him \$480 for straw that he was getting for nothing, and which the defendant was burning to get out of the way. Under all the facts and circumstances of this case, the court believes justice requires that a new trial be granted, and so the verdict will be set aside and a new trial granted."

We agree with these views of the trial court. The plaintiff at no time lived on the premises on which the straw was grown. He had a farm of his own in that vicinity. He lived on his own farm, and merely tilled the premises on which the straw was grown. He went on the premises for the purpose of doing whatever was necessary to carry out the stipulations of the contract. As pointed out by the trial court, he had removed no part of the straw, and had, in no manner, attempted to exercise dominion over it. He had been given permission to take whatever straw he wanted. He was not required to take all, or any specified part of it. If he saw fit to do so, he might decide to take nothing, or he might decide to take one load, or all of it. If he decided to take any of it, concededly he must take it within a specified time. Upon this both parties are agreed, although they disagree as to what time was specified. But no obligation rested upon the plaintiff to remove a single straw. We are agreed with the trial court that the plaintiff had been granted merely a license or permission to go upon the premises and remove some of the straw, and that title to the straw had not become vested in him so that he might maintain an action against the defendant for damages for the destruction thereof.

It is well settled that an unexecuted parol license, without consideration, is revokable at any time before it is executed. 17 R. C. L. pp. 576-578. Also, that—

"Words alone are not sufficient to constitute a gift, because mere words, unaccompanied by delivery could only be a promise, and there being no consideration, the promise could not be enforced, and therefore the gift would not be complete, except that, if the subject of the gift is already in the possession of the donee, the delivery may be effectuated by words. To make a valid and effective gift inter vivos there must be an intention to transfer title to the property, as well as a delivery by the donor and an acceptance by the donee. Mere intention to give without delivery is unavailing, and delivery is insufficient unless made with an intention to give. But property expressly delivered as a gift will not be presumed to have been intended as satisfaction of a debt. There must be an intention on the part of the donor to relinquish the right of dominion on one hand and to create it on the other, and the delivery must be not only of possession but also of the dominion and control of the property. To have the effect of a valid gift, therefore, the transfer of possession and title must be absolute and go into immediate effect, so far as the donor can make it so by intent and delivery, and must be so complete that if he again resumes control over it without the consent of the donee he becomes liable as a trespasser." 12 R. C. L. pp. 932-934.

The order appealed from must be affirmed. It is so ordered.

ROBINSON, C. J., and BRONSON and BIRDZELL, JJ., concur.

GRACE, J., being disqualified, did not participate.

T. O. HUSO, as guardian of KNUT KNUTSON, SVEIN KNUTSON, MARGIT KNUTSON and KATHRINE KNUTSON, minors, Respondent, v. REGINA JASPER and PETER JASPER, her husband, et al., Appellants.

(183 N. W. 366.)

Guardian and ward — mortgaging wards' estate and maintaining home thereon held not to show attempt to defeat wards' interests.

1. In an action brought by a guardian of certain minors for the purpose of securing a conveyance of an interest in lands to which one

of the defendants, the mother of the wards, holds the legal title, and for general relief, where it appears that the estate of the wards, consisting of a two-thirds interest in an unimproved quarter section of land, had been sold in probate court; that, in lieu of the cash consideration, the purchaser had conveyed a quarter section of equal value to the mother of the wards, who, in turn, had executed a mortgage upon the land so conveyed to her representing the value of the estate of the wards in the quarter section sold; that, owing to disqualification of the guardian making the sale, a second guardian, the plaintiff, was appointed, who initiated proceedings in probate court to legalize the first sale, but refused to receive the mortgage and accumulated interest as representing the estate of the wards; that the mother remarried, and she, her husband and children, moved onto the land so deeded to her, and put improvements thereon equal or exceeding in value the original value of the land, and that the mother and her present husband maintained thereon a home for the wards—it is *held*, the evidence does not show any attempt to defeat the interests of the minors.

Guardian and ward — value of land with accrued interest directed to be paid over to guardian; investment on second mortgages not authorized.

2. In the circumstances disclosed, equity requires that the value of the estate of the minors in the unimproved quarter section sold, plus the accrued interest, be paid over to the present guardian in cash, and that the legal titles be quieted in accordance with the conveyances made.

Opinion filed May 24, 1921.

Appeal from the District Court of Divide County, *Leighton, J.*

Reversed and remanded.

George P. Homnes, for the appellants.

All sales of real estate of wards must be for cash, or for part cash and part deferred payments not to exceed three years, bearing date from date of sale as in the discretion of the judge is most beneficial to the ward. § 8911 Comp. Laws 1913; 12 R. C. L. § 26 p. 1127.

A guardian may lawfully exchange personal property of the ward for other personal property without order of the court when a prudent man in the conduct of his affairs would have done so. He cannot exchange his realty without order of court, unless this power has been conferred on him by deed or will. 21 Cyc. p. 84.

That a guardian may lawfully exchange personal property in advance

of legal authority is contrary to public policy and void. *LeRoy v. Jacobosky*, 136 N. C. 443, 67 L. R. A. 977.

John E. Greene and Olaf Braatlien, for respondent.

BIRDZELL, J. This is an appeal from a judgment which is referred to in the notice of appeal as "a preliminary decree and judgment made by the district court of Divide county," in an action brought for the ostensible purpose of securing to the wards of the plaintiff a conveyance of a certain interest in the lands to which the defendant Regina Jasper, the mother of the wards, holds the legal title, and for general equitable relief. The facts are as follows:

Kjettil Knutson, deceased, died seized of the northeast quarter of section 21, township 163 N., of range 98, in Divide county. He died intestate, leaving as his heirs Regina Knutson and four minor children. In the probate proceedings the quarter section above described was decreed one-third to Regina Knutson and the remaining two-thirds interest to the minors. Regina Knutson later married Peter Jasper, and upon her petition to the county court he was appointed guardian of the minors. On March 6, 1916, Peter Jasper filed a petition in the county court for license to sell at private sale the two-thirds interest of the minors in the above described property. The petition recites that Regina Jasper, the mother of the minors and owner of an undivided one-third interest in the land, is desirous of selling and disposing of her interest therein; that the land is unimproved; that the income is not sufficient to be profitable from year to year without the expenditure of money; and that the best interests of the estate of the minors would be subserved by a sale and the investment of the proceeds. An order of license was made authorizing a sale for cash or on time with sufficient security, the proceeds to be invested according to law. The property was ostensibly sold thereunder to the defendant Hans K. Haugland. Haugland was the owner of the northwest quarter of section 26 in the same township, and instead of paying cash for the land he conveyed his quarter section to Regina Jasper. The report of sale states that Hans K. Haugland became the purchaser for the sum of \$2,000, and the order of confirmation recites that it was sold "for the sum of \$2,000, the said sum to be secured by a mortgage on the land sold and bearing 7 per cent interest."

Pursuant to the order of confirmation Peter Jasper, by guardian's deed

dated August 7, 1916, conveyed to Hans K. Haugland; and Regina Jasper, by warranty deed, likewise conveyed her one-third interest.

It was later discovered that by reason of the relationship of stepfather Jasper was not a qualified person to act as guardian, and in May, 1918, Regina Jasper filed a petition in the county court asking for the appointment of the defendant Huso as guardian of her minor children. He was duly appointed. On June 1, 1918, Huso petitioned for and obtained a license to sell this same land that had been originally sold by Jasper. A report of sale was made, showing its sale to Haugland, and the order of confirmation recites that it was sold for cash. It contains this further recital, however:

"These proceedings for the sale of the first above described land, namely, northeast quarter of section 21, township 163 N., of range 98, are had to legalize and correct an error in a previous sale had of said land."

Pursuant to this order Huso conveyed the premises by guardian's deed dated July 1, 1918. There was a mortgage of \$1,000 on the Knutson quarter, and one for \$1,200 on the Haugland quarter. The two properties are regarded throughout these proceedings as having been of equal value, and Haugland paid \$200, part cash, to adjust the difference between the mortgages. After conveyance of the Haugland land to Mrs. Jasper, she, her husband, and the Knutson children moved upon the Haugland land, constructed thereon improvements consisting of a house, barn, granary, fences, and in addition removed stones and did plowing, the total value of the improvements being more than \$4,000. Regina Jasper executed to Peter Jasper, as guardian of the minor children, a mortgage for \$2,000, securing a note due May 1, 1921. The evidence in the record shows that the Jaspers treated this mortgage upon their homestead as representing the investment of the proceeds of the sale of the interest of the minors in the Knutson quarter. But the present guardian, Huso, has refused to accept the mortgage as belonging to the estate of the minors, and has likewise refused to receive interest.

The judgment appealed from holds that Peter Jasper was disqualified for the office of guardian; that his transactions in purporting to convey the interest of the minors were voidable; that the conveyance thereof to Haugland was illegal and voidable, being made without due knowledge and consideration of the estate of the minors; that the terms of sale were illegal; that the guardian received no part of the consideration, either in land, moneys, or security, but that the entire consideration was received

by Regina Jasper through her title to the Haugland quarter section; that it is in the interests of the minors and not detrimental to the interests of any of the defendants that the minors be vested with the undivided two-thirds interest (each one-sixth) in the Haugland quarter; that the plaintiff is entitled to judgment accordingly. In default of such conveyance, however, it is ordered that an accounting be had covering the increased value of the two tracts of land involved, and upon the completion of such accounting a final decree be made, cancelling the deed of conveyance made by Haugland to Regina Jasper, and annulling the deeds made by Peter Jasper and by Huso as guardian, and that title be quieted to the respective quarter sections in their original owners in the proportions held by them prior to the sale, taking into account, however, increases in value, increases and decreases in incumbrances, etc. In the event of a conveyance of two-thirds interest in the Haugland quarter by Regina and Peter Jasper to the minors it is provided that title to the Knutson quarter will be quieted in Haugland, and that title to the Haugland quarter will be quieted in Regina Jasper and the minors, in the proportions indicated.

We are of the opinion that the evidence in this record fails to show any attempt to defeat the interests of the minors. The evidence is that Peter Jasper, their stepfather, and Regina Jasper, their mother, are maintaining a home for them and providing support; that at the decease of the father there were practically no improvements upon the quarter section he left, and that the Jaspers have expended large sums of money in improving the quarter section which Haugland conveyed to Mrs. Jasper. In fact, under the evidence in this record, the improvements that they have put upon the quarter section are the equivalent of the original value of the land itself. There is no testimony going to show that the interest of the minors in the Knutson quarter has been undervalued, but there is testimony that the Jaspers, by their executing the note and mortgage to the guardian upon the land upon which they were residing, have shown a disposition to keep intact the minors' estate at its full original worth.

They have also paid and offered to pay interest upon this security; but the present guardian, though at first co-operating to carry out the legitimate intention to convert the estate from real property to a mortgage investment, has for some reason changed his purpose, and by these proceedings is endeavoring, apparently, to make more difficult an equitable solution of the matter. Further, there is testimony that Mrs.

Jasper has property in the shape of stock in a tannery in Norway which has yielded a substantial income, running up to \$1,500 per year during the past few years. There is no showing that the estate of the minors is in jeopardy. It does appear, however, that the mortgage security which in fact represents the minors' estate is not a first mortgage lien upon the Haugland quarter now owned in fee by Regina Jasper. Since this was not a legal investment Huso was justified in not receiving it as representing the estate of the wards. It further appears that the note which this mortgage secures was due the first of the present month. We think equity requires that within six months from the filing of the remittitur herein the estate of the minors, as represented by their two-thirds interest in the Knutson quarter section and shown to be of the value of \$2,000, plus the accrued interest, should be converted into cash. It will then be subject to proper investment under the direction of the county court.

In view of the apparent good faith that has characterized the action of the Jaspers throughout, we can see no equity in requiring them to convey to the minors a two-thirds interest in the property that they have improved on the supposition that it was legitimately the individual property of Regina Jasper. Neither can we see wherein equity requires cancellations or reconveyances, and a prolonged accounting, the result of which would be to re-establish Haugland's title in lands which have been extensively improved by the Jaspers, of which they have had undisputed possession for several years, and upon which is the home of their own creation. The titles to the respective quarter sections are quieted in accordance with the conveyances made and subject to all lawful liens and conveyances. The title of Regina Jasper, however, to the quarter section obtained from Haugland, remains subject to a lien for the value of the interest of the minors as herein determined until such interest is converted into cash and paid to the lawful guardian.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

ROBINSON, C. J., and CHRISTIANSON, GRACE, and BRONSON, JJ.,
concur.

THE STATE OF NORTH DAKOTA, Respondent, v. FRANK
KOONCE, Appellant.

(183 N. W. 279.)

Constitutional law — constitutionality of Redistricting Act cannot be raised in prosecution for unlawful sale.

1. In a criminal prosecution for the sale of intoxicating liquors, the defendant may not raise the question of the constitutionality of the Judicial Redistricting Act (chap. 16, Laws of Regular Session, 1919), in which the county is made a part of a larger district than formerly obtained and in which provision is made for additional judges.

Constitutional law — objection to constitution of court under Redistricting Act held not well founded.

2. There is no merit in a constitutional objection to the manner in which the court is constituted, where it appears that the court is presided over by the same judge who would be the district judge de jure if the constitutional objections were valid.

Criminal law — new trial for newly discovered evidence held properly denied for want of diligence.

3. For reasons stated in the opinion, it is *held*, that the court did not err in denying the defendant's motion for a new trial on the ground of newly discovered evidence.

Opinion filed May 28, 1921.

Appeal from the District Court of Ramsey County, *Butts*, J.

Affirmed.

W. M. Anderson, for appellant.

The legislature, acting solely by itself, cannot change the fundamental law. Changes in our constitution must have the approval of the electors. *State v. Dahl*, N. D. 6, 82.

This appeal presents squarely a constitutional question, and it is the right and duty of the judiciary to decide it. 8 Cyc. p. 728b and cases

cited; *Varney v. Justice*, 86 Ky. 596; *Daily v. Swope*, 47 Miss. 367; *Newell v. People*, 7 N. Y. 9.

Rollo F. Hunt, for respondent.

Courts will listen distrustfully to a claim of newly discovered evidence, and such a ground for a new trial is not favored. 16 C. J. 1182; 16 C. J. 1182-1183; R. C. L. vol. 20, § 73; *Fleet v. Hollenkemp*, 13 B. Mon. (Ky.) 219; 56 Am. Dec. 563.

"The additional evidence, to afford opportunity for the introduction of which a new trial is sought, must be duly discovered, by which expression is meant that it must have been discovered since the trial. If discovered before, or at the trial, and no continuance of the trial was applied for, an answer to the motion that no diligence is shown will be sufficient to defeat it, no matter what else may be shown. *McGregor v. Great Northern Railway, Co.* 31 N. D. 471; *Alymer v. Adams*, 30 N. D. 514.

The new evidence must be material and competent. 16 C. J. 1183.

"The newly discovered evidence is purely impeaching and the general rule is that such evidence does not furnish a good ground for granting a new trial. *Heyrock v. McKenzie*, 8 N. D. 601; 80 N. W. 762.

The granting or denial of a new trial is a matter of discretion with the trial court. *Alymer v. Adams*, *supra*; *McGregor v. Great Northern Ry. Co.*, *supra*.

BIRDZELL, J. On November 13, 1920, the defendant was convicted in the district court of Ramsey county of selling intoxicating liquor to be used as a beverage, the alleged offense having been committed on the 11th of July, 1920. This is an appeal from the judgment of conviction and from orders entered denying the defendant's motions in arrest of judgment and for a new trial. There are only two questions presented on the appeal: First, that the defendant was not convicted in a legally constituted court; and, second, that the court erred in denying the defendant's motion for a new trial on the ground of newly discovered evidence. The first question was raised at the beginning of the trial by an objection entered on the record by the defendant's attorney going to the jurisdiction of the court to proceed in the case in any manner on the ground that the court was not legally constituted, by reason of the fact that chap. 16 of the Laws of the Regular Session, 1919 (the Judicial

Redistricting Act), is void, as violating article 4 of the Constitution. The contention is that the Legislature possessed no power under the Constitution to decrease the number of judicial districts by increasing the boundaries of each so as to embrace more counties and to increase the number of judges in each district. We express no opinion whatever on the merits of this constitutional objection to the Judicial Redistricting Act. We are satisfied that the defendant is not in a position to raise the question. *State v. Ely*, 16 N. D. 569, 113 N. W. 711, 14 L. R. A. (N. S.) 638; *State v. Bednar*, 18 N. D. 484, 121 N. W. 614, 20 Ann. Cas. 458. Furthermore, if it be conceded that the act were unconstitutional and that the defendant could raise the question, there would still be no merit to the point; for it appears that the court in which the defendant was tried was presided over by the judge who, in the absence of such legislation, would have been the de jure judge in the county.

It is next claimed that the court erred in denying the defendant's motion for a new trial. The motion was supported by the affidavit of one Severtson, whose testimony would embrace the newly discovered evidence, and by the affidavit of the defendant. It appears that at the trial the state produced as its principal witness one Ole Tufte. He testified that on the day the offense was alleged to have been committed, he and his wife drove into the village of Southam, where the defendant was running a store; that it was on Sunday afternoon, and he stopped his car a short distance from the defendant's store; that he saw a man there of whom he inquired as to a place where he could get some whiskey. The man replied that he did not know, but he would see; and that thereupon this man, together with the witness, Tufte, entered the defendant's store where the liquor was purchased, the witness giving a check for it which was written by the defendant himself. Upon his cross-examination the witness Tufte stated that the name of this man was Severt Severtson and that he resided in Southam. Severtson's name was not indorsed on the information as a witness, nor was he called by the state. It appears, however, from the testimony of the sheriff, that a subpoena for Severtson had been in his hands two days before the trial, but he had not served it for the reason that the deputy had been unable to locate him. In Severtson's affidavit he says that he is well acquainted with Koonce and with Tufte; that he never was in the defendant's store at Southam with Ole Tufte on a Sunday in the summer of 1920; that he saw Tufte on a Sunday in the summer of 1920 buying ice cream and carrying it out of the

pool room in Southam to some one in his auto; that Tufte never asked affiant where he could get some whiskey; that affiant never told him where he could get liquor in Southam. The defendant's affidavit is merely to the effect that the defendant did not know until after the trial that Severtson would contradict Tufte's testimony to the extent indicated, and that he had no reason to believe that Tufte would testify that Severtson accompanied him into the affiant's store. It will be seen that the newly discovered evidence relied upon would not impeach or contradict the testimony of Tufte with reference to his purchase of the liquor, but at best would only negative his testimony as to the circumstances leading up to the purchase. It appears that Severtson was well acquainted with the defendant; that he lived in Southam, where he was engaged in driving a school bus. It would seem that if the testimony of the witness Tufte was thought by the defendant to have been false upon the subject in question, he would have made an effort to obtain Severtson's testimony before the close of the trial. In view of the defendant's own testimony to the effect that Tufte came into his store on the Sunday in question and bought some other articles, the importance of the contradictions is minimized. We are of the opinion that the trial court did not err in the exercise of its discretion against the defendant upon the motion for a new trial. The judgment and the orders appealed from are affirmed.

ROBINSON, C J., and BRONSON, and CHRISTIANSON, JJ., concur.

GRACE, J. I concur in the result.

GREAT NORTHERN RAILWAY COMPANY, a corporation, Appellant, v. VIVIAN H. STEINKE, PAUL E. STEINKE, SPRING BROOK STATE BANK, a corporation, HENRY GRAICHEN, CHRISTIE GRAICHEN, EMMA L. SCHARTLE, VERLIE SCHARTLE, EVERETT A. WEBSTER, MARTHA WEBSTER, WALTER T. WEBSTER, ADDIE M. WEBSTER, ELI KINGSTON, EDNA KINGSTON, ELIZABETH COMFORD, SPRING BROOK TRADING COMPANY, a corporation, J. L. KINGSTON, DANIEL JACOBSON, FRANK M. CRAIG, NANCY CRAIG, CHARLIE F. BELLET, ALICE BELLET, ALVA ULRICH, and HATTIE ULRICH, Defendants, and VIVIAN H. STEINKE, PAUL E. STEINKE, SPRING BROOK STATE BANK, a corporation, HENRY GRAICHEN, CHRISTIE GRAICHEN, EMMA L. SCHARTLE, VERLIE L. SCHARTLE, EVERETT A. WEBSTER, MARTHA WEBSTER, WALTER T. WEBSTER, ADDIE M. WEBSTER, ELI KINGSTON, EDNA KINGSTON, SPRING BROOK TRADING COMPANY, a corporation, DANIEL JACOBSON and FRANK M. CRAIG, Respondents.

(183 N. W. 1013.)

Public lands — railroad held not to have complied with statute so as to acquire title as against holder of patent.

The plaintiff railway company brought action to determine adverse claims to a strip of land which it claims to have selected and appropriated as station grounds under the provisions of Act Cong. March 3, 1875, c. 152, 18 Stat. 482 (U. S. Comp. St. §§ 4921-4926.) The defendants occupied and claimed title to certain portions of said strip under and by virtue of deeds received through one Pollock, who had obtained a patent from the United States, which, among other lands, purported to convey to said Pollock the whole strip claimed by the railway company in this action. It is *held* that the defendants are the owners of the respective parcels to which they assert title.

Opinion filed May 28, 1921.

From a judgment of the District Court of Williams County, *Fisk*, J. plaintiff appeals.

Affirmed.

Murphy & Toner, for appellant.

The Welo entry was a necessary part of plaintiff's chain of title and should have been pleaded, and not having been pleaded, evidence of it was and is inadmissible. *Shuttuck v. Smith*, 6 N. D. 56, see p. 75; *Pease v. Sanderson*, 188 Ill. 597, 59 N. E. 425; *LaBaron v. Shepherd*, 21 Mich. 263; *Strong v. Whybank*, 204 Mo. 341, 102 S. W. 968; 12 L. R. A. (NS) 240; *Sturtevant v. McDougall*, 45 Wash. 532, 88 Pac. 1035; *Cargar v. Fee*, 140 Ind. 572, 39 N. E. 93; *Pittsburg R. R. Co. v. O'Brien*, 142 Ind. 218, 41 N. E. 528; *Stuart v. Lowery*, 49 Minn. 91, 51 N. W. 662.

In *Ry. Co. v. O'Brien*, supra, it is held that where the source of a party's title is specifically set out, no other source can be proven.

Decisions of the land department on questions of fact are not reviewable by the courts, and the land department having the facts before it approved the grant. *Noble v. Ry. Co.* 147 U. S. 165; *Ry. Co. v. Stringham*, 110 Pac. 868; *Ry. Co. v. Ry. Co.* 84 Pac. 1097; *Comford v. G. N.*, 18 N. D. 570.

Whether the right of way granted to lay ties and steel on, build grades on, a side turnout, or a water tank, it is granted for right of way, and the title, the right of disposition, and the right of private persons to acquire title thereto is the same as to any and all lands granted under the act, after actual acquisition. *Ry. Co. v. People* 98 Ill. 350; *Ry. Co. v. Ry. Co.* 152 Fed. 849; *Pfaff v. Ry. Co.* 108 Ind. 144, 9 N. E. 93; *Carmody v. Ry. Co.* 111 Ill. 69.

The doctrine that the person most at fault should suffer in a contest over title has no application to a contest over a title acquired by grant as in this case. *Stalker v. Ry. Co.* 225 U. S. 142; *Moran v. Ry. Co.* 120 N. W. 192.

The grant here is not subject to the rules and construction of private grants. *United States v. Van Horn*, 197 Fed. 611.

The grant evidenced by an approved map and plat under the Act of

1875 has the effect of, and is as good as a patent. *Ry. Co. v. Ry. Co.* 172 Fed. 738.

Grants under the Act of 1875 are not subject to collateral attack such as is being made in this case. *Noble v. Ry. Co.* 147 U. S. 165.

The railroad may change the location of a part of its grant under this Act, even though a different route in part had already been claimed and granted. *Taggart v. G. N. Ry. Co.* 211 Fed. 288; *Ry. Co. v. Ry. Co.* 84 Pac. 1097; *Practice In Filing Maps*, *Moran v. Ry. Co.* 120 N. W. 192; *Stalker v. Ry. Co.* 225 U. S. 192; *Ry. Co. v. Stalker*, 94 Pac. 56.

Craven & Converse and *Wm. G. Owens*, for respondents.

"There is no power in the officers of the Government to extend the grant, after the legal terminus of the road has been reached at the Pacific Ocean, the acceptance of the maps of definite location extending the road on along the ocean to San Francisco without power and void." *Atlantic & Pacific Ry. Co.* 4 L. D. 458, 460; *C. S. P. M. & O. Ry. v. Omaha Ry. Co.* 6 L. D. 195, 205.

At page 205 Department says:

"When the line of a land grant railroad has once been definitely fixed by the filing and acceptance of its map, *there is no authority to change that location except the legislative*; and in the absence of a legislative sanction the action of the land authorities in *allowing or recognizing such change* can neither confer or take away rights." *N. P. R. R. Co.* 21 L. D. 412.

"The right of said Co. to fix the terminus of its road, subject to approval of the Department, if once exercised is thereby exhausted and the Company thereafter has no authority to establish another place as the initial point of its road."

No act of the executive (The Department or President) thereafter in approval of another terminal point could confer any right in such matter.

At p. 420 the Secretary says: "The rule seems to be without exception that where authority to locate is made, the power is exhausted and the company cannot thereafter change that location (citing authorities)—It would therefore appear that the N. P. R. Co. have made its connection with Lake Superior at Duluth, whether accompanied by a formal declaration to that effect, or not, could not properly change that terminus for another.

"The lands covered by a H. E. are not 'public lands.' * * * The

words 'public lands' are habitually used in our legislation to describe such lands as are subject to sale and disposal under the general laws. The grant would not take land otherwise appropriated by H. E. existing at the date of the grant, although subsequently cancelled." *Prest. v. N. P. Ry. Co.* 2 L. D. 506.

Ry. Co. v. Jones 29 L. D. 550 holds when an entry on filing is confirmed as against a withdrawal or definite location, the land covered thereby is excepted from the operation of the grant. *N. P. R. R. Co. v. Mead*, 16 L. D. 488; *Darcy v. N. P. R. R. Co.* 17 L. D. 265; *H. & D. Ry. Co. v. Martin*, 19 L. D. 20; *U. P. Ry. Co. v. Wade*, 27 L. D. 46; *U. P. Ry. Co. v. Cunningham*, 28 L. D. 94; *U. P. Ry. Co. v. Landrum*, 28 L. D. 575.

"The right-of-way through the lands of the U. S. is hereby granted to any Railroad Co. * * * which shall have filed with the Secretary of the Interior, a copy of its Articles * * * and due proofs of its organization * * * to the extent of 100 feet on each side of the center line of the road; * * * also ground adjacent to such right-of-way for station buildings, depots, machine shops, side tracks, turnouts, and water stations, not to exceed in amount 20 acres for each station, to the extent of one station for each ten miles of its road." U. S. Comp. St. 1918, § 4923 (§ 3 of Act).

Provides for condemnation of "possessory claims on such public lands." U. S. Comp. St. 1918, § 4924 (§ 4 of Act); U. S. Comp. St. 1918, § 4925 (§ 5 of Act).

"This act shall not apply to any lands * * * especially reserved from sale," * * * U. S. Comp. St. 1918, § 4926 (§ 6 of Act).

"Congress reserves the right * * * to alter, amend or repeal this Act" * * *

Act of April 21, 1876, reads, so far as material, as follows: "All pre-emption and homestead entries, or entries in compliance with any law of the U. S., of public land, made in good faith by actual settlers, * * * within the limits of any land grant prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local Land Office.

CHRISTIANSON, J. This is an action to determine adverse claims to a certain strip of land adjoining the right of way of the plaintiff railway company in the town of East Spring Brook in Williams county in this state. The plaintiff railway company, as successor in title to the St.

Paul, Minneapolis & Manitoba Railway Company, claims that the property in question is a part of the station grounds granted to its predecessor under the act of Congress of March 3, 1875 (18 Stat. at L. 482, chap. 152; U. S. Comp. St. §§ 4921-4926). And it is averred in the complaint that the several defendants are owners of certain lots in East Spring Brook, which lots "as platted encroach upon" a part of the strip of land to which plaintiff seeks to have title quieted in itself. The strip of land described in the complaint is located wholly within the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 18, township 155, range 99. The defendants answered, denying the allegations of the complaint, and alleging a fee-simple title to the several lots through patent issued by the United States to one Philander Pollock, under whom they claim title. They further averred that they had been possessed of the premises under color of title, and had paid taxes thereon for a period of more than 10 years, and hence had become vested with title by virtue of § 5471, C. L. 1913; also that the plaintiff railway company has been guilty of such laches as to bar its right to maintain this action. The judgment in the trial court was in favor of the defendants, and the plaintiff has appealed and demanded a trial anew in this court. The conflicting claims arose as follows: The St. Paul, Minneapolis & Manitoba Railway Company was duly qualified under the act of Congress of March 3, 1875, to acquire a right of way and station grounds. In 1887 or prior thereto said railway company located and commenced the construction of a line of railway over the lands in controversy here, completing such construction in May, 1887. At that time the lands were unsurveyed. The Secretary of the Interior had approved the application of the railway company for the construction of such line of railway across the public domain, but a plat giving the definite location thereof was not filed in the local land office at Minot, N. D., until September 3, 1898. In the meantime the lands had been surveyed, and on the last-mentioned date said railway company filed in said local land office a plat, showing the railway as constructed, and an additional 20-acre tract, adjoining the right of way, located in sections 4 and 5, township 155 north, of range 99 west, said tract being designated on said plat as "Spring Brook." Said plat was thereafter presented to the then Secretary of the Interior, and by him approved on July 10, 1899. For some years after the railroad was constructed and put into operation it maintained the station of Spring Brook at the place so designated in §§ 4 and 5. At a later time (the exact time does not

definitely appear in the evidence)—the location of said station was changed to its present location in the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 18 of said township and range; that is to say, to a point on the line of railway adjacent to the strip of land involved in this controversy. On April 24, 1900, one John Welo duly made a homestead entry, covering, among others, the said N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 18, township 155, R. 99, which homestead entry remained in effect until May 13, 1901, when it was relinquished by the entryman. On January 12, 1900, the said railway company filed in the local land office at Minot, N. D., its application for and the plat of an additional 20-acre tract in the N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$, N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$, N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, and N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 18, township 155 north, range 99 west, which tract includes the lots or parcels of land in controversy here. But it seems that the railway company later withdrew the application and plat, for it bears this indorsement:

“U. S. Land Office, Minot, N. D. Received and refiled July 18, 1900, at 9 a. m. The land embraced in this section is all vacant except E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ and W. $\frac{1}{2}$ of N. E. $\frac{1}{4}$, section 18, Twp. 155, Rg. 99.

“Thomas E. Olsgard, Register.

“Abner L. Hanscom, Receiver.”

On October 18, 1900, the then Secretary of the Interior made and signed the following indorsement thereon:—

“Approved subject to all valid existing rights.”

No evidence was offered explanatory of the withdrawal of the plat and application by the railway company. Nor is there any showing that the plat was approved, was at any time filed with the local land office, or that any notation thereof or of the lands claimed therein was ever made upon the records of the local land office. On August 19, 1902, one Philander Pollock filed homestead entry upon a quarter-section of land, including the said N. W. $\frac{1}{4}$, N. E. $\frac{1}{4}$, section 18, within which the lands in controversy here are located. On June 1, 1903, said Pollock relinquished his entry as to said 40-acre tract, and at the same time located scrip on said tract. The scrip was allowed, and on October 31, 1905, a receiver's receipt for said 40-acre tract was duly issued by the officers of the local land office at Minot, N. D., and shortly thereafter recorded in the office of the register of deeds of said Williams county. On February 28, 1906, the United States issued to said Pollock a patent for said 40-acre tract, which said patent was shortly thereafter recorded

in the office of the register of deeds of said Williams county. No notation was made on the receiver's receipt, or reservation or exception made in the patent as to the alleged claim of the plaintiff. Both the receiver's receipt and patent were in the ordinary form, and contained nothing to indicate that either the plaintiff or any one else had or claimed any portion thereof. Nothing was recorded in the office of the register of deeds tending to show that plaintiff claimed any portion of the premises for station grounds. Thereafter the defendants, in good faith and without any notice of the alleged claim of the plaintiff, purchased the respective lots now claimed by them, and paid to their respective grantors full value for the tracts conveyed. Each of them received conveyances fair on their face from the then record owners of the title purported to be conveyed by the United States to Pollock by virtue of said patent. Since acquiring such titles the respective defendants or their grantors have been in open and exclusive possession of the respective lots claimed by them, and have caused the same to be improved and valuable structures to be constructed thereon. No claim was asserted by the plaintiff until in May, 1917.

The provisions of the act of Congress of March 3, 1875, which are pertinent to the questions presented in this case are:

"Section 1. The right of way through the public lands of the United States is hereby granted to any railway company duly organized under the laws of any state or territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of 100 feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turnouts, and water stations not to exceed in amount 20 acres for each station, to the extent of one station for each ten miles of its road. * * *

"Section 4. Any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of 20 miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district

where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such a right of way shall pass shall be disposed of subject to such right of way; provided, that if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road." U. S. Comp. St. §§ 4921, 4924.

Prior to the initiation of any right here involved, the Land Department put in force certain regulations to be followed by railroad companies desiring to secure the benefits of a grant in advance of actual construction, as provided by the fourth section of the act. One of these required that upon the location of any section, not exceeding 20 miles in length, the company should file with the register of the land district in which the land lay "a map for the approval of the Secretary of the Interior, showing the termini of such portion and its route over the public lands," etc. Another of these departmental regulations provided that—

"If the company desires to avail itself of the provisions of the law which grants the use of ground adjacent to the right of way for station buildings * * * it must file for approval, in each separate instance, a plat showing, in connection with the public surveys, the surveyed limits and area of the ground desired."

These regulations require that "a copy" of the approved map of "definite location," and of the "approved plat of ground selected by a company, under the act in question, for station purposes," shall be transmitted to the register of the land office where the land lies. Upon the receipt of the map of alignment, the land office is required "to mark upon the township plats the line of the route of the road as laid down on the map," and to note in pencil on the tract books opposite the tract of public land cut by said lines of railroad "that the same is disposed of subject to the right of way," etc., and to write upon the face of any certificate disposing of said lands, after the filing of such approved map of location, "that it is allowed subject to the right of way." A like duty is put upon the register when an approved station ground plat is received. *Stalker v. Oregon S. L. R. Co.*, 225 U. S. 142, 147, 32 Sup. Ct. 636, 56 L. Ed. 1027, 1030.

Did the railway company acquire title to the tracts in controversy under the above-quoted statutory provisions and the rules and regulations

of the land department incident thereto? The trial court answered this question in the negative, and we are constrained to agree with this view. Whatever title the plaintiff has rests upon the filing and approval of the plat. For, clearly there was no such act on the part of the railway company in dealing with or utilizing the premises as would constitute an appropriation by the railway company of any of the parcels in controversy here for station grounds, assuming that station grounds may be secured by the actual use thereof by the railway company for such purpose. *Stalker v. Oregon S. L. R. Co.*, 225 U. S. 142, 147, 32 Sup. Ct. 636, 56 L. Ed. 1027. It will be noted that the plat was not filed within 12 months after the location and construction of the railroad, nor was it filed within 12 months after the lands had been surveyed by the United States. Whether land may be selected under the provisions of the act after the lapse of such time we find it unnecessary to decide. For, assuming that lands may be selected after the period of time fixed in the statute has expired, we do not believe that title was vested in the railroad company to the tracts in question here. The railway company acquired no rights except such as the Secretary of the Interior by his approval purported to grant. *Stalker v. Oregon S. L. R. Co.*, *supra*. And it will be noted that when the plat was presented to the officers of the local land office on July 18, 1900, they made an indorsement thereon, specifically showing that the 40-acre tract, the title to which lies at the foundation of this lawsuit, was not vacant. In other words, the indorsement of the officers of the local land office was in legal effect that such tract was no longer a part of the public domain. 32 Cyc. 948. This indorsement was on the plat presented to the Secretary of the Interior. He was specifically informed that the tract in controversy here was not subject to disposal by him under the provisions of the act, and the language in which his approval is couched shows that he was fully aware that he could not grant the application of the railway company as made, and he did not purport to do so. It is our judgment, therefore, that the Secretary of the Interior intended to and did approve the application only in so far as the lands claimed by the railroad company were (according to the information then before the Secretary of the Interior) subject to disposal by him under the provisions of the act, and that he had no intention to and did not approve of the application for station grounds on the tracts of land which the indorsement of the officers of the local land office said were not

vacant. Hence the patent issued to Pollock vested a good title in him and those claiming under him.

In our opinion there is also another reason why the plaintiff cannot prevail in this case. Not only was the land in controversy covered by a valid and existing homestead entry at the time the application of the railway company was finally presented to and filed in the local land office, as well as at the time it was approved by the Secretary of the Interior, but subsequently the Land Department accepted scrip tendered by Philander Pollock, and after the scrip had been approved by the Commissioner of the General Land Office a receiver's receipt was issued and duly recorded, which contained no notice whatever of the fact that any portion of the land was claimed by the railroad company for station grounds. Subsequently patent was issued, purporting to convey to said Pollock the entire 40-acre tract. There is no room for doubt, under the evidence in this case, but that Pollock accepted the title which he received from the government in the best of faith, believing that the entire tract had been conveyed to him subject only to the right of way proper of the railroad company, and that he had not the slightest idea that the railway company claimed any additional portion as station grounds. The undisputed evidence shows that the defendants in this case purchased the premises in good faith, relying upon the title conveyed by the United States government to said Pollock; that in reliance upon such title they paid the grantor full value and caused valuable improvements to be placed on the premises. All this without any assertion or claim of title by the railway company. In these circumstances we believe that the defendants became and are entitled to protection as bona fide purchasers. The doctrine that bona fide purchasers will be protected even in the absence of statute has frequently been recognized by the United States Supreme Court. In construing the adjustment act, the Supreme Court of the United States said:

"There was no need of any legislation to protect a 'bona fide purchaser.' This had been settled by repeated decisions of this court. *United States v. Burlington, R. Co.*, 98 U. S. 334, 342, 25 L. Ed. 198; *Colorado Coal Co. v. United States*, 123 U. S. 307, 313, 31 L. Ed. 182, reaffirmed in *United States v. Cal., Land Co.*, 148 U. S. 31, 41, 37 L. Ed. 354. For in each of those cases it was decided that, although a patent was fraudulently and wrongfully obtained from the government, if the land conveyed was within the jurisdiction of the Land Depart-

ment, the title of a bona fide purchaser from the patentee could not be disturbed by the government." United States v. Winona R. Co., 165 U. S. 463, 478, 479, 17 Sup. Ct. 368, 372, 41 L. Ed. 789, 796.

It follows from what has been said that the judgment appealed from must be affirmed. It is so ordered.

ROBINSON, C. J., and BRONSON, and BIRDZELL, JJ., concur.

GRACE, J., concurs in the result.

KATHERINE MASON, Respondent, v. FRED UNDERWOOD, J. C. HARPER and JAMES MORAN, Appellants.

(183 N. W. 525.)

False imprisonment—evidence insufficient to sustain recovery against a joint tort-feasor.

1. In an action for false imprisonment brought against three defendants as joint tort-feasors, the evidence is examined, and it is *held* insufficient to support a recovery against one of the defendants.

False imprisonment—verdict for \$4,000 set aside as excessive.

2. Where a verdict for \$4,000 was rendered in favor of the plaintiff who was illegally confined in jail for the period of approximately three hours, it is deemed to embrace punitive damages and to include a sum as punishment to the defendant who is not shown to have been responsible for the wrongful acts of the other two defendants, and the verdict cannot stand as against the remaining tort-feasors.

False imprisonment—evidence of ownership of property held admissible on question of culpability.

3. In an action for false imprisonment where it appears that the arrest was occasioned partly by acts of the plaintiff in refusing to permit the defendants to remove personal property belonging to one of them, evidence that one of the defendants was owner of the property is admissible for its bearing upon the degree of culpability of the defendant's conduct, though not as a justification of it.

Opinion filed May 31, 1921.

Appeal from the District Court of Ransom County, *Graham, J.*

Reversed and remanded for a new trial.

Kvello & Adams and *Ray W. Craig*, for appellants.

"Where exemplary or punitive damages are sought in an action for false imprisonment, proof of good motives may go in mitigation. * * * Where more than actual damages are claimed, defendant may show that he acted prudently, wisely or in good faith. III Elliott, Evidence, § 2109; note 54 A. D. 270; *Livingston v. Burroughs*, 33 Mich. 511.

The damages awarded against all three defendants were excessive, and appear to have been given under passion or prejudice. *Wagoner v. Bodal*, 37 N. D. 594; *Reid v. Ehr*, 36 N. D. 552; *Waterman v. Soo Ry.* 26 N. D. 540; *Carpenter v. Dickey*, 26 N. D. 176.

Curtis & Remington, C. G. Bangert, and *E. T. Burke*, for respondents.

BIRDZELL, J. This is an appeal by the defendants Underwood and Harper from an order denying a motion for a new trial made on behalf of all the defendants Underwood, Harper, and Moran. The action is one to recover damages for false imprisonment. The plaintiff recovered a judgment of \$4,000 and costs. The facts are as follows:

The plaintiff, for some time prior to June 27, 1919, had been the owner of a certain dwelling house in the city of Enderlin. The house was rented to the defendant Harper, who appears to have been a tenant from month to month. In the spring of 1919, the plaintiff and her husband, C. B. Mason, were desirous of obtaining possession of the property for the purpose of making their home there. A notice to vacate was served upon Harper, but he refused to give up possession, whereupon an action in forcible entry and detainer was started in justice court before C. H. Potter, justice of the peace. This case was tried before the justice and a jury on May 28, 1919. The jury rendered a verdict for the defendant Harper, but it seems that upon the announcement of the verdict one of the jurymen stated in substance that his agreement thereto was conditional, whereupon the justice ordered a new trial. The action remained pending, but was not again tried. On June 16th a written stipulation

was entered into wherein the defendant Harper agreed that he would vacate and surrender possession to the plaintiffs on or before June 21st, in which event the justice was authorized to enter a dismissal of the action without costs to either party. And, in the event of the failure of the defendant to surrender possession, as agreed, it was stipulated that the usual judgment in forcible entry and detainer might be entered against the defendant on Monday, June 23d, at 9 a. m., to which time the action was continued for the purpose stated in the stipulation. Harper vacated the premises on the 21st and on Monday, plaintiff not appearing, Harper's attorney secured the entry of the judgment of dismissal without costs in accordance with the stipulation. In the proceedings in justice court Harper was represented by the defendant Underwood, who was the police magistrate of the city of Enderlin, and who at various times acted as attorney for individuals in justice court. Harper did not surrender the keys. He had deposited some money in the bank to the credit of the plaintiff which he claimed paid the rent until July 13th. This money was received by the plaintiff or her husband as her agent. The Masons took possession of the property, gaining entrance to the house through a window, and they promptly moved in with their household effects. Harper had left upon the premises a small tent worth about \$15 or \$16. It stood near the house, had a floor in it, and was connected with the house by electric wires. After the Masons were in possession of the premises, Harper instructed a drayman to move the tent, but the latter was unable to do so, as the Masons would not permit it. Upon being advised of this fact by the drayman, Harper, meeting Underwood on the street, told him that the Masons refused to allow him to take the tent, whereupon Underwood suggested that when they would go again for the tent they should take the chief of police, Moran, the other defendant in this action; that he thought in this event there would be no trouble. Thereafter, on June 27th, the chief of police accompanied the drayman to the Mason home, arriving there about 3 o'clock in the afternoon. Mason, who was working nights as a switchman, was upstairs asleep, but Mrs. Mason, the plaintiff in this action, was there and requested them not to take the tent unless they had papers authorizing them to take it. The defendant Moran exhibited his policeman's star and stated in substance that that was as good as papers and that he would either take the tent or take Mr. Mason. The plaintiff, becoming shocked at his attitude, ran into the house crying. Moran followed her and went upstairs, where

Mason was asleep, Mason was awakened and placed under arrest by Moran. As he was leaving the premises in Moran's custody, he ordered the drayman not to move the tent, whereupon they desisted. Moran took Mason to the office of Underwood, where there was some discussion concerning the tent.

The testimony of Underwood and of the plaintiff Mason is conflicting as to what transpired there. At the time of the trial Moran was out of the state and his testimony is not in the record. Underwood claims that he expressed the opinion that the Masons were not in legal possession of the premises, that Harper had a right to obtain the tent, and that if Mason interfered by way of assaulting any one taking the tent he should be arrested. Mason testified in substance that on entering Underwood's office Moran advised Underwood that he had Mason there to do with as he (Underwood) directed, whereupon Underwood asked Mason if he refused to give up the tent, to which the latter replied that he did, without papers; that Underwood then directed Moran to put Mason in jail; that Moran then stated that Mason's wife, the plaintiff, also refused to give up the tent; and that Underwood directed him to take his wife and put her in jail. The parties left Underwood's office, went across the street, and, taking Moran's automobile, went back to the Mason premises, where Mrs. Mason, still refusing to permit the tent to be taken, was placed under arrest. She protested being taken through the streets in her dirty house apron and with her hair down, and demanded to be allowed to change her attire. She was permitted to go into the house, but Moran followed her, so it seems she was not given an opportunity to change her attire. She was placed in the back seat of the automobile. Moran then drove the car to Underwood's office and, not finding him in, proceeded to Underwood's residence, driving slowly past. Not seeing him there, he drove to the city jail, where the plaintiff and her husband were locked up. The jail was foul and filthy. Moran finally located Underwood and swore to a complaint which stated no offense against the city ordinances nor the laws of the state, and Underwood issued warrants for the arrest of the two persons. He took these warrants to the jail and served them upon the plaintiff and her husband. The plaintiff was confined in the jail for a period of approximately three hours when she was allowed to go upon her own recognizance. Her husband was kept there some two or three hours longer, being admitted to bail in the sum of \$75 furnished by his attorney. The purported criminal proceedings were later dropped.

Separate actions were instituted by the plaintiff and her husband for false imprisonment.

A number of errors are assigned upon this appeal, all of which it will not be necessary to consider, as we are of the opinion that the judgment cannot stand in its present form and that a new trial must be awarded.

Counsel for the defendants and appellants tacitly admit that the rights of the plaintiff have been invaded and that she has a cause of action. It is urged, however, that the evidence in the record is not sufficient to prove a conspiracy between Underwood, Harper, and Moran, or to otherwise connect Harper with the false imprisonment. We have examined the evidence with great care to ascertain the exact state of the proof of Harper's connection with the arrest, and we fail to find any evidence to connect him with it. All the evidence shows in this connection is that when he related his difficulty in obtaining possession of the tent, Underwood suggested the advisability of taking or sending Moran along for the purpose of avoiding trouble, as it was thought that the Masons would offer no resistance in the presence of the chief of police. In other words, so far as Harper is concerned, at least, this record shows that the motive in sending Moran to the premises was to obtain the tent without trouble. He did not authorize Underwood to give Moran instructions, he did not know in advance that Moran contemplated arresting either the plaintiff or her husband, nor did he know of the arrest until after the parties were in jail. Neither did he in any way ratify the acts of Underwood and Moran. Thus, we think the evidence insufficient to charge Harper with a liability. At best, it only shows that the tort-feasors purported to act in his interest and that he knew in advance of their action that the plaintiff and her husband objected to his taking possession of the tent. From these facts alone we cannot infer that he authorized what was subsequently done. We cannot assume that he would countenance a false imprisonment for the sake of recovering a tent worth not to exceed \$16.

Under the instructions of the court, the jury, in assessing damages, was authorized to assess against all defendants against whom they rendered a verdict an amount sufficient to serve as punitive damages or a sum that would be a warning to the defendants and all other persons not to commit similar wrongs. Clearly the jury, in arriving at an appropriate amount to assess as punitive damages, may justly consider

the degree of participation of each of the defendants and the degree of culpability of his conduct. Where the verdict is in a lump sum, against all defendants, it is fair to assume that the jury has measured the damages with the view of appropriate punishment for all whom they deemed responsible for the wrongs committed. If, under the evidence, one be not responsible, clearly the verdict is tainted. *Landseidel v. Culeman*, 181 N. W. 593. We cannot now determine what evidence may be introduced upon another trial to connect Harper with the alleged wrongful conduct of Underwood and Moran, so on account of the insufficiency of the evidence to connect him with the tort the judgment must be reversed as to both appellants and a new trial awarded.

Error is also assigned upon the exclusion of evidence offered on behalf of the defendants to establish that Harper was the owner of the tent and that it was believed that he was such owner. The evidence was apparently excluded on the ground that the ownership of the tent did not justify the acts of the defendants in arresting the plaintiff. This is, of course, true; but nevertheless we think the ownership of the tent may well be considered by the jury in this case in measuring the degree of culpability attaching to the acts of the defendants. Acts done in pursuance of an attempt by one to obtain possession of property for the lawful owner having the right of possession, even though the acts in themselves are unlawful, are not to be considered as on a par with the same acts done wantonly and with no pretense of pursuing a legal object. It may be observed, too, that the plaintiff is not entirely without fault in not allowing the owner of the tent to remove it. On the facts appearing in this record, we are of the opinion that it would have been proper for the court to have instructed the jury that the tent was the property of Harper; that the defendants were none the less not justified in their acts, but that they should consider the fact of ownership in relation to the other circumstances in determining the degree of culpability and fixing the punitive damages.

It follows from what has been said that the order appealed from must be reversed, and a new trial granted; costs to abide the event. It is so ordered.

CHRISTIANSON and BRONSON, JJ., concur.

ROBINSON, C. J. (concurring specially). On a pleasant summer day

in June, 1919, in the city of Enderlin, the plaintiff and her husband were taken in a car and put in the Enderlin jail by the chief of police. Then he made complaint on which Mr. Underwood, the police magistrate, issued a warrant against them, and discharged them because the complaint did not state a cause of action. The result was two actions against the defendants for false imprisonment. Her verdict was \$4,000; his, \$1,200.

Some two years before the arrest the Masons had traded some property for the house and lot on which Harper and his family had resided for over three years and on which he had a tent worth about \$15. The Masons served on Harper notice to quit the premises and had a suit to obtain possession. That was on June 21, 1919. Harper claimed the right to hold possession until July 13th and that in payment of rent until then he had deposited in the Bank of Enderlin \$22.50. The suit went against Harper. Then the Masons took the \$22.50 which Harper had deposited to their credit and refused to refund it. Hence Harper refused to deliver possession of the house which he left and retained the keys. In removing he neglected to take the tent. The Masons stealthily took possession by opening a window and then they claimed the tent as a part of the realty because it was fastened to the earth by stakes to prevent it blowing away. Harper hired a dray to go and take the tent, and at his request, Moran, the chief of police, went with the dray. The Masons persisted in holding the tent. He said to her: "Old girl, hold the tent." The chief of police took them into his car and put them in jail and made a complaint on which the police magistrate issued a warrant for the arrest of the Masons. The complaint was under a supposed city ordinance. The charge was that on June 27, 1919, in the city of Enderlin, the defendants did commit the crime of being disorderly and of disorderly conduct within the city of Enderlin, and that the defendants did wrongfully and with malice aforethought threaten and interfere with the person of complainant, the chief of police, contrary to the provisions of the ordinance of the city of Enderlin. Pending the hearing of a demurrer to the complaint, she was released without any bail. He was released on a deposit of a check for \$75. After argument it was adjudged that the demurrer be sustained and the defendants discharged.

Mr. Underwood, the magistrate, is the only party in any way responsible. The others have no property; they are execution proof. The verdict is almost entirely for punitive damages. There can be no just claim that

either the plaintiff or her husband were in any way materially injured. The \$15 tent was the cause of all the trouble. As Harper had been in possession of the house for over three years, and long before the purchase of the same by the Masons, he was doubtless the owner of the tent and he had a perfect right to remove it. He offered evidence to show his ownership and to show that he had retained the keys and had not given up possession of the tenement. He offered evidence to show that pending his suit for possession he had deposited in the Bank of Enderlin \$22.50 as rent of the house to July 13, 1919, and that when the Masons prevailed in the suit they took from the bank the \$22.50 and refused to refund the same or any part of it. The court refused to permit the evidence. That was error. In taking surreptitious possession of the tenement and in refusing to give up the tent and claiming it as a part of the realty, and in taking the money deposited for rent to July 13, 1919, the Masons were clearly wrongdoers and aggressors and there is no use to say that Harper had a perfect remedy by an action of replevin, as such an action would have cost the full value of the tent. The question being one of exemplary damages, it was clearly proper for Harper to show that he owned the tent and had a right to remove it. If the Masons by their conduct directly provoked and caused the wrong of which they complain, there is no reason why they should recover punitive damages. Indeed, their right to actual damages against either of the defendants is a question of grave doubt.

Now let us consider the liability of each defendant. Moran was chief of police, and in making the arrest without a warrant and then making the complaint and serving the warrant he did just what policemen are doing every day. Whether right or wrong, he acted officially, and the presumption is that he acted in good faith.

Harper is in no way liable. He was no party to the arrest. There is no evidence of a conspiracy, as charged in the complaint.

Mr. Underwood, the police magistrate, issued the warrant against the defendants on a complaint which he himself held bad on demurrer. His action was purely judicial. That is shown by the complaint, the docket, and the testimony of the magistrate.

The case is quite similar to the recent case decided by this court. *Landseidel v. Culeman*, 181 N. W. 593. In that case the defendants appealed from a joint verdict and judgment against them for \$4,000. Culeman claimed that he merely acted as a justice of the peace. By a

special verdict the jury found that for the purpose of extorting money from the plaintiff the defendants jointly caused him to be arrested and confined in the city jail at Hebron, and that none of the defendants believed him to be guilty of any offense. However, this court held thus:

"A justice of the peace, acting judicially, and within his jurisdiction, is not * * * liable for damages resulting from the arrest and confinement of an individual in jail, though it might appear that he acted maliciously and without the belief that the person had committed a criminal offense."

Also, that—

"Where two or more defendants are sued jointly for damages arising out of a malicious trespass, * * * and * * * it appears that one of the defendants is not liable, the award of punitive damages cannot stand as to the codefendants"

This is not a case for punitive damages.

Judgment reversed, and new trial granted.

GRACE, J. (specially concurring). I concur in the opinion of Mr. Justice ROBINSON, on the ground that the court erred in excluding evidence of ownership of the tent.

C. B. MASON, Respondent, v. FRED J. UNDERWOOD, J. C. HARPER, and JAMES MORAN, Appellants.

(183 N. W. 529.)

False imprisonment—evidence of ownership of property held admissible on question of culpability.

In an action for false imprisonment, where it appears that the arrest was occasioned partly by acts of the plaintiff in refusing to permit the defendants to remove personal property belonging to one of them, evidence that one of the defendants was the owner of the property is admissible for its bearing upon the degree of culpability of the defendant's conduct, though not as a justification of it, and its exclusion by the trial court was reversible error.

Opinion filed May 31, 1921.

Appeal from the District Court of Ransom County, *Graham, J.*

Reversed and remanded for a new trial.

Kvello & Adams, and *Ray W. Craig*, for appellants.

Curtis & Remington, *C. C. Bengert*, and *E. T. Burke*, for respondents.

BIRDZELL, J. This is an appeal by the defendant Underwood from an order of the district court of Ransom county, denying a motion for a new trial. The action is one to recover damages for false imprisonment. Upon the trial the jury found the issues for the plaintiff as against the defendants Underwood and Moran, but in favor of the defendant Harper. Damages were assessed in the sum of \$1,200. It is unnecessary to state the facts in this case. They are the same, substantially, as stated in the case of Katherine Mason v. Underwood et al., 183 N. W. 525, decided concurrently herewith.

The only assignment of error argued by the appellant in the brief filed in this case is that the verdict was so excessive as to appear to have been rendered under the influence of passion or prejudice. It appears, however, that among the specifications of error printed in the brief there is one relating to the ruling of the trial court excluding testimony with reference to the ownership of the tent. And in stating the issues involved in the appeal the question is stated: "Should the court have permitted testimony in mitigation of punitory damages?" The assignment regarding the ownership of the tent is fully argued in the brief in the Katherine Mason Case, orally argued, submitted, and decided concurrently herewith. It is also argued in respondent's brief herein. This court has had some doubt as to whether the appellant should not be considered to have waived all of the assignments except that relating to the excessiveness of the verdict, since this is the only assignment argued in the brief; but in view of the manner in which the cases were submitted in this court, the majority of the court does not regard the specification as to the tent waived. Our views of this error are set forth in the other case and need not be repeated here. In view of the necessity of a retrial of the Katherine Mason Case and of the probable prejudicial effect of excluding from the jury the circumstance of the ownership of the tent for its bearing upon the

question of punitive damages, it is deemed proper to order a retrial of this action with costs to abide the event. In doing so, however, we think it appropriate to express our opinion concerning the excessiveness of the verdict, as the question is so fully argued and the expression now may serve to obviate another appeal.

The evidence goes to establish that the defendant Underwood is a man of considerable means; that he had long occupied the office of police magistrate and had occasionally appeared in justice court in the capacity of attorney; so that he had acquired a standing as one connected with the administration of the law. If the responsibilities of his honorable position are not properly met, his conduct is more culpable than that of the ordinary layman. It appears here that he was the principal actor and is perhaps more to blame than anybody else for inflicting upon the plaintiff the indignities incident to the arrest and imprisonment. The plaintiff had resided in Enderlin but a short time before the occurrence of the events leading to this suit. Probably the evidence does not show him to have been a man of delicate sensibilities in regard to his standing in the community, but it does not appear that he is a person who would not have been grievously affected by the indignities suffered. It was shown that he had at various times been engaged in the following occupations: Bartender, oil stock salesman, pool hall keeper, brakeman, and, lastly, switchman; and that he had lived in half a dozen or more places since his marriage. We cannot assume from these facts, however, that he would not naturally aspire to a respectable place in the community, and that he would not be seriously damaged by a conspicuous introduction to the community as one worthy of occupying the city bastille. While he might not have been seriously damaged in the loss of a reputation because one had not yet been acquired in his new abode, he would certainly be seriously handicapped in his efforts to establish himself upon a plane of respectability. The jury must necessarily be accorded considerable latitude in measuring damages in cases of this character, and particularly in fixing upon an amount to be assessed as punishment for the wrong done. In view of all the circumstances disclosed in this record, we cannot say that the verdict is so large as to shock the conscience, nor can we say that the trial court erred in exercising its discretion in favor of the plaintiff on the motion for a new trial.

The order appealed from is reversed, and a new trial ordered; costs to abide the event.

CHRISTIANSON and BRONSON, JJ., concur.

ROBINSON, C. J. (concurring specially). On a pleasant summer day in June, 1919, at the city of Enderlin, the plaintiff and his wife were gently arrested by the chief of police because they insisted on keeping a \$15 tent which did not belong to them. The chief took them gently into his automobile, took them to the chief magistrate, and then, for safe-keeping, put them in the city jail while he made a complaint and obtained a warrant against them for bad conduct and for obstructing him in the removal of the tent. The chief served the warrant, and in a few hours both parties were brought before the magistrate and were released. She, on her promise to return; he, on a deposit of a check for \$75. On a demurrer the complaint was held bad and they were both discharged. Then, for the arrest and imprisonment, she brought an action to recover \$10,000; he, an action for \$5,000. The jury awarded her \$4,000 against three defendants and awarded him \$1,200 against the magistrate and the chief of police. Some people are so liberal with the money of others. In each case the verdict was for about 100 times the actual damages. However, it is said the verdict is not so excessive as to shock the conscience; but, as I think, that can only be true where there is little or no conscience to be shocked. And what shall we say of the excessive damages claimed in the verified complaint, which were known to be untrue, and of the lawyer who subscribed to or verified such complaints? The duty of the lawyer and the courts is to prevent one party from robbing another through the forms and technicalities and the chicanery of the law, and to see that every suit is commenced and conducted in an honorable and professional manner.

By statute every person who suffers detriment from the unlawful act or omission of another may recover from the person at fault a compensation in money, which is called damages. § 7139. In an action for the breach of an obligation not arising from contract, when a defendant has been guilty of oppression, fraud, or malice, the jury may give damages for the sake of example by way of punishing him. § 7145. That is called exemplary or punitive damages. Damages must in all cases be reasonable and not unconscionable or grossly oppressive. § 7183.

Regardless of fine-spun theories, defendant Harper had a perfect right to take the tent without paying \$15 as the expense of a lawsuit. He had a right to take it by his drayman under the protection of the chief of

police. The chief went with the drays and he acted with great kindness and without anger. He told the plaintiffs that the tent belonged to Harper and not to them, and that he would take it or arrest them if they persisted in obstructing him. Yet, they persisted in doing wrong. They deliberately chose to be arrested and to go to jail sooner than to let Harper have his tent. For over three years Harper had been in possession of the tenement house, which was traded to the Masons for a pool room outfit. Harper had paid his rent monthly and was a tenant from year to year. Yet the Masons wrongfully treated Harper as a tenant from month to month. They served on him a notice to quit, and by error of law obtained a judgment for possession. Harper had deposited in the Enderlin Bank \$22.50 to pay rent to the night of July 13, 1919, and on entry of the judgment Mason took the \$22.50 and refused to refund any part of it. Hence Harper retained the key of the house and did not give up possession, and the Masons broke in through a window and then claimed possession of the house and the tent. The record is long and it abounds with numerous errors:

(1) The court erred by refusing to permit Harper to prove the ownership of the tent. (2) The court erred by refusing to permit proof that Harper had paid rent to the night of July 13th, that Harper held the keys of the house and did not give possession to the Masons. With such proof and such facts Harper, and those who acted for him, had a perfect right to take possession of the tent. But if the tent did not belong to Harper, then, of course, he had no right to take it, and then he was liable for both actual and punitive damages. So it was clear and manifest error to exclude evidence concerning the ownership of the tent, the payment of rent to July 13th, and the way in which the Masons broke into the house.

Now it is truly said of Mr. Mason that at the time of the trouble he had not long resided in Enderlin. "He had at various times been engaged in the occupations of bartender, oil stock salesman, pool hall keeper, brakeman, and lastly, switchman, and that he had lived in half a dozen or more places since his marriage." Then it is assumed that by the indignity suffered he must have been grievously affected and thwarted in aspirations to establish himself as a respectable citizen of the community. However, there is good reason for thinking that he deliberately chose the paths of the wrongdoer and that he acted as the bully of the community, threatened the chief magistrate, and undertook by force and intimidation to withhold a tent which did not belong to him, and broke into a tene-

ment which had been occupied by Harper. Wholly different is the testimony regarding Mr. Underwood. For 25 successive years he has been elected and re-elected as the chief magistrate of Enderlin. He has not been roving about from place to place, from post to pillar, and leaving his character behind him. For aught that appears to the contrary, the word and the conscience of Magistrate Underwood is just as good as any judge of this state, and there is no reason that he should be mulcted in damages to the amount of one cent. There is no testimony that he had anything to do with the arrest. True, the Masons testify that when brought before the magistrate he ordered them taken to jail while he made out the complaint and the warrant for their arrest. This the magistrate does emphatically deny, and it is of no special consequence. His word is fully as good as that of the roving Masons. No honesty is shown by their trying to keep the tent, their keeping the excess rent paid to July 13th, or their breaking into the house, and, as a rule, both truth and honesty go together. A person who is not honest, neither is he truthful. In dealing with Harper, if the Masons had shown a spirit of Christian charity and fairness, they might still be residing in Enderlin. The judgment should be reversed, and the action dismissed.

GRACE, J. (specially concurring). I concur in the opinion of Mr. Justice ROBINSON, on the ground that the court erred in excluding evidence of ownership of the tent.

STATE OF NORTH DAKOTA, on the relation of C. C. Wattam, et al.,
Appellants, v. D. C. POINDEXTER, State Auditor, Respondent.

(183 N. W. 852.)

Statutes — legislative enactment concerning employees of each house and its expenses held paramount to independent action of each house.

1. A legislative enactment, expressing the legislative power of the Legislative Assembly, pursuant to express constitutional provision, con-

cerning the employees of each house and its expenses, is paramount to the independent action of each house, without the concurrence of the other.

States—legislative appropriation must exist to warrant disbursement by State Auditor in payment of expenses of each house of the Legislature.

2. Pursuant to constitutional requirements, there must exist a legislative appropriation to warrant disbursement by the State Auditor in payment of the expenses of each house.

States—legislative enactment may prescribe circumstances under which legislative appropriation may be disbursed.

3. A legislative enactment may prescribe the circumstances under which a legislative appropriation may be disbursed.

Statutes—no legislative appropriation or authority for issuance of warrants to employees of investigating committee when expenses authorized by House alone.

4. In an action to compel the State Auditor to issue warrants to employees of a special House investigating committee, whose appointment and whose expenses have been authorized by the independent action of the House alone, it is *held*, under the provisions of § 42, Comp. Laws 1913, and Chap. 5, Laws Sp. Sess. 1919, that there exists neither legislative appropriation nor legislative authority for the issuance of warrants to such employees.

Opinion filed June 3, 1921. Rehearing denied July 6, 1921.

Action of mandamus in District Court, *Nuessle, J.*

From an order sustaining a motion to quash the petition, the petitioners have appealed.

Affirmed.

Cameron & Wattam, for appellant.

"There is no doubt in the power of either branch of Congress or legislature to appoint a committee of investigation without concurrence of the other branch, to act during the session." Re Chapman, 166 U. S. 661; 41 L. Ed. 1154; Anderson v. Dunn, 6 Wheat. 204; Ex Parte Dalton, 44 Ohio State, 142.

This Court has said: "The contemporaneous construction placed thereon (referring to a statute under consideration) by the various administrative officers and boards is entitled to great weight and the ac-

quiescence in and approval of such construction by subsequent legislative assemblies and chief executives ought to dispel all possible doubt as to the legislative intent." *State ex rel Linde v. Packard*, 35 N. D. 315; 36 Cyc. 1140, 1142.

Wm. Lemke, Attorney General, and *George K. Foster*, Assistant Attorney General, for respondent.

"Until such a law is enacted, there is no authority to employ such clerks or pay for their service." *State v. Wallichs*, 14 Neb. 439, 16 N. W. 481; Syllabus in *State v. Wallichs*, *Supra*; Syllabus in *Cook v. Auditor General*, 129 Mich. 48, 87 Neb. 1037.

"It is a fundamental principal of law that: 'The compensation of state officers, and employees, including the amount, and the time and mode of payment, is ordinarily provided for and prescribed by law, and a public officer or agent is not entitled to compensation for his services unless so provided.'" 36 Cyc. 863.

STATEMENT

BRONSON, J. The relators seek to compel the State Auditor to issue certain warrants. They have appealed from an order sustaining a demurrer to the petition for mandamus.

This petition alleges, in part, that on January 29, 1921, the House of Representatives adopted a resolution for the appointment of a special House committee to consider an audit of the state bank and state industries and to secure such information and data as was desirable; it empowered the committee to procure such legal assistance, such accounting experts, and such other expert and other aid and assistance as the committee should deem necessary and advisable, and granted further, to such committee, the power to summon witnesses and take testimony; that, pursuant to such resolution, a committee of nine members was appointed by the Speaker; that it thereafter organized and employed the relator Wattam as its reporter, and the other relators as stenographers, to aid and assist in the investigation; that such relators qualified, took the same oath of office as provided for legislative employees, and performed the work assigned to them by the committee; that, on March 4, 1921, this committee returned to the House its report, including a transcript of the testimony taken, the minutes of the meetings had, and a certified statement showing the persons employed and their compensation

as allowed, together with individual itemized vouchers for such persons and expenses incurred; that then the House by resolution in all things accepted and approved the report and discharged the committee; that, pursuant thereto, the Speaker and chief clerk of the House examined and certified the statement of the employees and expenses of such committee, and that such statement, together with itemized vouchers of individual and particular items, was filed on March 5, 1921, in the office of the State Auditor; that on March 22, 1921, demand was made upon the State Auditor to issue warrants to relators for the respective amounts due for such employment, and that the State Auditor, in violation of his duties, has refused so to do; that there is available and unexpended in the legislative appropriation for per diem of officers and employees of the Legislative Assembly approximately \$4,692.40, and for printing, miscellaneous expenses, and supplies of such Legislative Assembly approximately \$22,257.97. The expense account attached to the petition shows a total of \$14,894.38: for supplies, \$107.70; for stenographers, comprising the bills of relators herein, \$2,197.50; for witnesses, \$637.90; for other employees, including investigator, marshals, and accountants, \$3,951.28; for counsel, comprising the bills of Attorneys Murphy and Sullivan, \$8,000. This expense account is also verified as correct and true by the chairman and secretary of this committee.

The Senate did not concur in the resolution appointing the audit committee nor in the resolution adopting the report and approving the expenses incurred.

CONTENTIONS

The petitioners, the appellants herein, contend that under the Constitution (§ 48) each house possesses in addition to the specific powers mentioned in the Constitution, all other powers necessary and usual in the Legislative Assembly of a free state; that each house accordingly possesses inherently full and ample power to function as a branch of the Legislative Assembly, to appoint committees, to gather information, and to carry on investigations and other work incident to the work of the legislative body; that a committee of such legislative branch, properly appointed, may conduct the proceedings necessary; that it may incur expenses properly a charge against the funds of the state as though they had been contracted by the House, subject only to the constitutional limitation that there must exist an appropriation therefor; that neither prior

Legislatures nor the executive department can curb or restrict these powers; that the legislative acts provide an orderly way of designating the employees of each house; that § 34, C. L. 1913, enumerating legislative employees and their compensation, does not restrict this power; that, pursuant to § 35, C. L. 1913, each house possesses the right by resolution to employ and pay such other employees as it might designate by resolution; that the work of this special house committee was properly a legislative function; that the petitioners, being, in fact, legal House employees, are entitled to be paid out of the legislative appropriation available either for miscellaneous legislative expenses or for the per diem of officers and employees.

The respondent maintains that the petition does not affirmatively show the appointment or the existence of the committee for a proper legislative purpose; that there exists neither constitutional nor statutory authority for the appointment of the relators as employees of such committee and for the payment of their salaries and expenses as such; that, pursuant to the Constitution, there exists neither express nor implied power for one branch of the Legislative Assembly to hire employees and to pay for their services, in the absence of legislative act or the concurrence of the other branch of the assembly; that it was competent and proper for the Legislative Assembly to provide specifically for legislative officers and employees and for their compensation; that it has so done pursuant to § 34, C. L. 1913; that § 35, C. L. 1913, does not permit the employment of stenographers, clerks, reporters, expert accountants, and lawyers by a committee appointed by the House; that, so far as § 35, C. L. 1913, delegates to the House the right to hire employees other than those mentioned in § 34, it must be construed to relate to employees of the same class, and not to delegate the further authority to a committee appointed by the House the power to appoint such employees. That furthermore, pursuant to § 42, C. L. 1913, the expenses of an investigating committee are payable only when authorized by the entire Legislative Assembly.

DECISION.

The questions presented by the contending parties are res integra in this jurisdiction. To what extent is the power of one branch of the Legislative Assembly, when acting alone and without the concurrence of the other, restricted by the Constitution, or subservient to legislative en-

actment? The power to create an office, to hire public employees, and to create obligations of the state to be paid through the exercise of the taxing power is distinctly an expression of the sovereign will, legislative in its character. It is true that this court has heretofore held, concerning constitutional construction, that all governmental power not lodged elsewhere by the Constitution resides in the Legislative Assembly; that this assembly may exercise any power not denied to it by the Constitution of the state. *State v. Boucher*, 3 N. D. 389, 409, 410, 56 N. W. 142, 21 L.R.A. 539. This principle, of course, is now subject to the initiative and referendum powers of the people expressly reserved, pursuant to recent constitutional amendments. The Constitution, however, vests this legislative power in the Legislative Assembly. Article 15, Amend. Const. It also provides that the Senate and House jointly shall be designated as the Legislative Assembly. § 52, Const. This legislative power, to evidence its expression, requires the independent and concurrent action of each house. §§ 58, 65, 79, Const. It may not be evidenced by the joint action of both houses acting as one body. Each house must act independently as a separate body. Accordingly the possession of a broad governmental power in the Legislative Assembly beyond the express grant thereof in the Constitution does not serve measurably to aid in construing the powers of each house alone, when the Constitution expressly requires the expression of the legislative power to be by the concurrent and independent action of both branches. As stated in *State v. Guilbert*, 75 Ohio St. 1, 78 N. E. 931, 934, the legislative power, whatever may be the extent of that power, which is conferred upon the assembly, is not expressly delegated to a part of the assembly. The inherent or implied power possessed by both houses is not possessed by one when acting alone. *Ex parte Caldwell*, 61 W. Va. 49, 55 S. E. 910, 912, 10 L.R.A. (N. S.) 172, 11 Ann. Cas. 646. Recurrence therefore must be had to the express provisions of the Constitution in order to establish either express or inherent powers existent in either house when acting alone.

Section 47 of the Constitution provides that each house shall be the judge of the election returns and qualifications of its own members. Section 48 provides that each house shall have the power to determine the rules of proceeding and punish its members or other persons for contempt or disorderly behavior in its presence and to protect its members against violence, the offers of bribes or private solicitation, and with the concurrence of two-thirds, to expel a member and shall have all other powers

necessary and usual in the Legislative Assembly of a free state. These are the pertinent provisions of the Constitution expressly granting peculiar powers to each branch of the Legislative Assembly.

Upon these constitutional provisions, accordingly, the question arises of the authority of one branch of the Legislative Assembly, as a constitutional power, to select its employees, and determine their compensation. It is to be noted that express power in the Constitution is not granted to each house to appoint or designate its own officers and employees and to fix their salaries. Neither is there any restriction in the Constitution upon appointment of such employees or the determination of their salaries. Some state Constitutions expressly provide for and restrict the employees and their salaries. See *James v. Cromwell*, 129 Ky. 508, 112 S. W. 611; *Walker v. Coulter*, 113 Ky. 814, 68 S. W. 1108. Some Constitutions directly authorize each branch of the Legislative Assembly to choose its own officers. *Tenny v. State*, 27 Wis. 387; *State v. Guilbert*, *supra*. Our sister state of South Dakota has an express constitutional provision granting authority to each house to choose its own officers and employees and fix their pay, except as otherwise provided in the Constitution. Article 3, § 9, Const. S. D. The only provision of our Constitution concerning the officers of the Legislative Assembly and their compensation is § 45, which provides that each member shall receive as compensation \$5 per day and 10 cents per mile of necessary travel. The power of each house, therefore, to select its public employees and determine their salaries must exist impliedly or inherently under the provisions quoted. Ordinarily the powers granted to each house in the Constitution are not to be extended by construction; in other words, the maxim is frequently applied, "*Expressio unius est exclusio alterius*." *State v. Guilbert*, *supra*; *Ex parte Caldwell*, 61 W. Va. 49, 55 S. E. 910, 912, 10 L. R. A. (N. S.) 172, 11 Ann. Cas. 646. Thus a constitutional provision granting to each house specific powers concerning contempt is also a limitation upon the powers to punish for contempt. See *Kilbourne v. Thompson*, 103 U. S. 168, 26 L. ed. 377, 386, 389. See 7 Ann. Cas. note 877. So a constitutional provision providing that a Legislature may punish by imprisonment any person not a member obstructing its proceedings places a limitation upon its power to punish for contempt. *Ex parte Wolters*, 64 Tex. Cr. R. 238, 144 S. W. 531, 583, 585, Ann. Cas. 1916B, 1071. If the provision of § 48 of the Constitution properly means that each house has all other powers necessary and usual in each branch of a Legislative Assembly, much force

would be added to the contention of the petitioners that there exists power for each house to select its own officers and employees and to fix their salaries. It may be noted, however, that the provision quoted refers to the powers necessary and usual in the Legislative Assembly. This means the power and the action of both the Senate and the House. In a former Constitution of Ohio there was a clause which provided that each house should have all powers necessary for a branch of the Legislature of a free and independent state. In a later amended Constitution the provision was that each house should have all of the powers necessary to provide for its own safety and the undisturbed transaction of its business. In *State v. Guilbert*, 75 Ohio St. 78 N. E. 931, 935, the court noted that there was a much broader grant of power in the former constitution than in the latter, and that the later provision operated as a limitation upon the powers of each house. If the contentions of the petitioners are recognized to their full extent, the action of one branch of the Legislative Assembly in selecting its officers and employees and determining their salaries is paramount to any expression of the legislative power by the Legislative Assembly, or through legislative enactment otherwise designating the officers and employees of each house and their salaries. To the contention that each house must necessarily possess the inherent and implied power to designate its own employees and fix their salaries without interference by the other house, or by legislative enactment, in order to give it the ability to function and perform its duties, the answer may be made that the sovereign expression of the people is to be found in the constitution and legislative enactment pursuant thereto, and to the concession made that under the express provision of the constitution, salaries may not be paid to public employees of each house unless there exists an appropriation by legislative enactment. See *Ex parte Wolters*, 64 Tex. Cr. R. 238, 144 S. W. 531, 586, Ann. Cas. 1916B, 1071.

In specific language the Constitution grants to the Legislative Assembly the exercise of legislative power. This is an express grant of power. When expressed, this legislative power is paramount, unless contrary to constitutional provisions. It must be apparent that this legislative power extends to the appointment of officers and employees of each branch of the Legislative Assembly and to the fixing and determination of their salaries unless there be a constitutional provision to the contrary. Accordingly it would appear that the voice of the sovereign will, expressed either in the constitution or in legislative enactment pursuant to express

constitutional power, is paramount to any action of either legislative branch operating contrary thereto. This does not imply that each branch of the Legislative Assembly may not appoint committees to investigate and otherwise for purposes of its legislative undertakings as an independent body. But it does necessarily follow that the constitutional restrictions specifically stated apply, and that the expression of the legislative will through legislative enactment by both branches of the Legislative Assembly as such is paramount and superior to independent action of either branch. Otherwise one branch of the Legislative Assembly might override through its independent action constitutional provisions and the expression of the sovereign will through such constitutional provisions in a valid legislative enactment. The proposition that a branch of the Legislative Assembly, although a lawmaking body, is itself subject to regulations by law and subject to constitutional provisions permitting expression of the sovereign will through legislative enactment, seems to be well recognized by the authorities. *State v. Wallich*, 14 Neb. 439, 16 N. W. 481; *Cook v. Auditor*, 129 Mich. 48, 87 N. W. 1037; *In re Chapman*, 17 Sup. Ct. 677, 166 U. S. 661, 41 L. ed. 1154; *Kilbourne v. Thompson*, *supra*; *State v. Guilbert*, 75 Ohio St. 1, 78 N. E. 931. The Legislative Assemblies of this state have recognized this principle. Legislative enactments provide that each house may punish by imprisonment for contempt and breach of its privileges or the privileges of its members, § 29, C. L. 1913; that every person guilty of a contempt shall also be guilty of a misdemeanor, § 30, C. L. 1913; that a person summoned as a witness before either branch of the Legislative Assembly and before any committee authorized to summon witnesses who refuses to attend or who refuses to testify shall be guilty of misdemeanor. §§ 9333, 9334, C. L. 1913. A legislative enactment provides legislative officers and employees and for their compensation (§§ 34, 35, C. L. 1913); for methods of auditing and payment of salaries for such officers and employees (§ 37, C. L. 1913); likewise for a continuing appropriation for mileage and per diem of legislative members and the per diem of officers and employees thereof and for the expenses of the investigating committees when authorized by the Legislative Assembly, including postage, express, and other miscellaneous expenses, § 42, C. L. 1913. Again, a legislative enactment, in the general appropriation bill, provides an appropriation by law to cover such items of mileage and per diem, salaries of officers and employees, and expenses. Chap. 5, Sp. Sess. 1919. It would appear

that these legislative acts are valid and constitutional expressions of the sovereign will binding upon each branch of the Legislative Assembly as well as upon the citizens and people of this state.

The fact that different legislative bodies in this state have at different times in their separate branches provided by resolution for increase in the number of employees or in the amount of pay or have otherwise provided for the payment of expenses such as in a contest case does not furnish a legislative construction in favor of the possession of inherent powers in each branch of the Legislative Assembly contrary to the expression of the legislative enactment duly enacted by the Legislative Assembly. The legislative enactments themselves furnish a criterion upon legislative construction and the acts of individual branches of the Legislative Assembly in connection therewith furnish further legislative construction in support of such legislative enactments. The questions therefore are now presented: (1) Was there a legislative enactment covering the employment and the payment of the employees of this special House committee? and (2) Was there a legislative enactment providing for an appropriation and the method of disbursing such appropriation in connection with such employees? There can be no question that there is a legislative act covering the officers and employees of both branches of the Legislative Assembly. § 34, C. L. 1913. There can be no question again that under § 35, C. L. 1913, no employees of the Legislature other than those provided in § 34 shall be paid except by a resolution of the Senate or of the House. This implies that there may be other employees, and also that their pay may be fixed by a resolution of either branch. This section therefore does not negative the right to employ additional help. The contention of the respondent that the resolution shows that the investigating committee was not for proper legislative purposes should be denied, because it is to be presumed that such committee would function and has functioned as a proper legislative investigating committee until the contrary be made to appear. The contention likewise of the respondent that the committee itself employed this help, and that this legislative power could not be delegated to a committee, is answered by the two resolutions of the house which authorized the committee and fully ratified all of its actions both in the investigation had and in the help employed and expenses incurred. The crucial question remains, however, whether there exists a legislative enactment appropriating moneys for the expenses of such investigating committee, and providing the method by

which such appropriation shall be disbursed. The petitioners concede that there must exist an authorized legislative appropriation by law for such purposes pursuant to constitutional requirements. The question of the supreme authority of a legislative enactment is involved when it concerns the means or method of disbursing such appropriation as against the contention of the petitioners that there exists an inherent power in the house to appoint such committee and to incur expenses therefor, which must be paid provided there exists any legislative appropriation within the purview of the legislative functions of either branch of the Legislative Assembly. As heretofore stated, § 42, C. L. 1913, appropriates as a continuing appropriation moneys to pay the mileage and per diem of the members of the Legislative Assembly; the per diem of officers and employees of the Legislative Assembly; the expenses of investigating committees when authorized by the Legislative Assembly; necessary postage, express, and other miscellaneous expenses. Chap. 5, Laws Sp. Sess. 1919, recognizes this legislative act and makes it definite by providing specifically a definite amount for the mileage and per diem of members and for the per diem of officers and employees and for printing and miscellaneous expenses, etc. Section 42 provides an authority for the items of these expenses. Chap. 5 makes the same definite as a legislative appropriation in accordance with constitutional requirements. Section 42 is neither impliedly, nor expressly repealed by the general appropriation act. See *State ex rel. Birdzell v. Jorgenson*, 25 N. D. 539, 142 N. W. 450, 49 L. R. A. (N. S.) 67. Section 42 specifically provides for the expenses of investigating committees when authorized by the Legislative Assembly. No provision is found in a legislative act providing for the payment of, or for an appropriation for, the expenses of an investigating committee when not authorized by the Legislative Assembly. The Legislative Assembly, as the Constitution states, is composed of both a house and a senate. It appears from the petition herein that the petitioners were employees of this House investigating committee. It appears that the expense incurred was an expense of this investigating committee. It appears further that the petitioners were appointed by this investigating committee, that their duties were concerned with this investigating committee, and that their recognition by the House as a body was had through a resolution adopting the report of this investigating committee wherein the moneys due them for work in behalf of this committee were embodied. The Legislative Assembly neither authorized the appointment nor the expenses of such in-

vestigating committee. It follows, therefore, in accordance with the discussion herein had, that there exists no legislative appropriation and no legislative authority for the disbursement out of the balance of funds appropriated of moneys for the petitioners.

The action of the trial court in sustaining the motion to quash was therefore proper, and its order should be affirmed.

ROBINSON, C. J., concurs.

GRACE, J. (concurring in result). The relators applied for a writ of mandamus to compel the State Auditor to issue certain warrants. In the lower court a demurrer was interposed to the petition, and a motion made to quash it. The motion was by the trial court sustained. Appeal was taken to this court, and the trial court's order, by the main opinion, is affirmed, and we concur in the result at which the main opinion has arrived.

BIRDZELL, J. (dissenting). I dissent from the conclusions reached by the majority for the reason that in my opinion the applicable legislative enactments have not been properly construed. I express no opinion on the constitutional question discussed, as I do not deem it involved. In order to set forth clearly the basis for this difference of opinion, it is necessary to briefly state the substance of the provisions of the statutes relating to the payment of legislative expenses. Section 34, C. L. 1913, enumerates the officers and employees of the Senate and House of Representatives of the Legislative Assembly. Section 35 reads:

"No employees of the Legislature other than those provided by § 34 shall be paid, except by a resolution of the Senate or House of Representatives."

Prior to the time when the Legislature adopted the policy of passing a budget or general appropriation bill biennially, provision was made for a standing appropriation covering legislative expenses as follows (§ 35, R. C. 1905):

"There is hereby appropriated out of any money in the state treasury, not otherwise appropriated, as a standing and continuing appropriation, such a sum as may be necessary to pay the mileage and per diem of members and the salaries of the officers and of the employees of the Legislative Assembly; and the State Auditor is authorized to draw his warrants on the State Treasurer for such sums as may from time to time become due to such members and employees."

It will be noticed that those employed either by the House of Representatives or the Senate are referred to in this standing appropriation as "employees of the Legislative Assembly," even though their employment be effected by resolution of but one of the houses. Chap. 164, § 2, Laws of 1907. Payment is directed to be made "upon an account certified as correct by the presiding officers of the respective houses, duly attested by the secretary and chief clerk thereof, and when so audited and attested the State Auditor is authorized and directed to draw his warrants therefor upon the State Treasurer." Section 30, R. C. 1905. In 1913 the section providing for the standing appropriation was amended. Chap. 28, S. L. 1913. It will be noted that as the section stood prior to 1913 it appropriated merely for the mileage and per diem of members and salaries of officers and employees. The amendment of 1913 made no substantial change in this, but it added to the appropriation an amount necessary to pay "the expenses of investigating committees when authorized by the Legislative Assembly, necessary postage, express, telegrams, telephone and such other miscellaneous expenses as may be authorized by the Legislative Assembly, except printing." Section 2 of chap. 28 is explanatory of the emergency that brought forth the amendment. It reads:

"This act shall be effective from January 1st, 1913, for the reason that at this time there appears to be no appropriation to cover the expense of the Legislative Assembly outside of printing and mileage, and per diem of members and per diem of officers and employees. The lack of an appropriation leaves the State Auditor without authority to open an account for legislative expense, and as it is important and necessary that expenses of this kind should be kept in a separate account for convenience for reference, this act shall be effective from January 1st, 1913, so that it may cover the 13th Legislative Assembly now in session."

The legislative expense of that year, 1913, was paid under the authority of § 35 as so amended; there being no provision in the general appropriation law covering the matter. All expenses of the character named have been paid out of this standing appropriation, and reference to the files in the Auditor's office discloses that among the expenses so paid upon vouchers approved by the officers of the House alone were expenses of the character of those involved in this case, incurred in connection with a certain bribery investigation involving only the House. In 1915 and subsequent legislative years there was included as a subdivision in the general appropriation bill specific appropriations covering the matters pre-

viously embraced in § 42, C. L. 1913. The following is a type of such appropriation (chap. 43, § 3, subdss. 57, Session Laws of 1915):

"Subdivision 57:

The Fifteenth Legislative Assembly.

For the payment of salaries and mileage of members, per diem of officers and employees, printing, and miscellaneous expenses and supplies, for the Fifteenth Legislative Assembly, the following sums:

Mileage and per diem of members.....	\$ 57,000 00
Per diem officers and employees	20,000 00
Printing	30,000 00
Miscellaneous expenses and supplies.....	5,000 00

Total\$112,00000"

Substantially the same, differing as to amounts, will be found in subsequent session laws. See chap. 24, subdss. 54, Session Laws of 1917; chap. 16, subdss. 46, Session Laws 1919; chap. 5, § 25, Laws of Special Session 1919. From this it will be seen that the section which is made the basis of the decision in the majority opinion has practically been a dead letter since the inauguration in 1913 of the practice of passing a general appropriation bill (made applicable to the Legislature in 1915). In other words, § 35, R. C. 1905 (§ 42, C. L. 1913), has never served any purpose except as a standing appropriation, and it can scarcely continue to serve this purpose while specific appropriations are made covering the same items.

According to the majority opinion the relators are legislative employees, but yet it is held that, since they were assigned to work with an investigating committee, they can receive no compensation for their services because the committee expenditures have not been authorized by the Legislative Assembly, meaning the House and Senate combined. It is said that this conclusion is rendered necessary by the language of § 42, C. L. 1913, which appropriates money to pay "the expenses of investigating committees when authorized by the Legislative Assembly." The construction adopted depends for its validity upon the answers to two questions: First, what restrictive force should be given to language contained in a standing appropriation after it has been in effect superseded by specific appropriations? and, second, what is meant by the expression "authorized by the Legislative Assembly"?

It is apparent that the majority opinion gives effect to this standing

appropriation law (§ 42, C. L. 1913), notwithstanding subsequent general appropriation bills covering the same items. It is not my purpose to engage in an extended discussion of the opinion from this standpoint, as I regard it as being erroneous upon the second ground. But in passing I deem it well to point out the repealing provision of the general appropriation law of 1915, which for the first time embraced specific appropriations for legislative expenses. Section 4 of that act (chap. 43, Session Laws of 1915), among other things, provides:

“* * * It is the intent hereby to enact an exclusive general appropriation bill, and to repeal each and every act and all parts of acts now existing which appropriate or purport to appropriate money for any of the offices, officers, purposes and things set out in § 3 hereof in so far as the same conflicts therewith, or relate to appropriations for the same matters or purposes provided for therein.”

To like effect see chap. 24, § 4, Session Laws 1917, chap. 16, § 3, Session Laws of 1919, and chap. 5, § 26, Laws of Special Session, 1919.

That the items embraced in a general appropriation bill supersede standing appropriations for the same or kindred objects and effect an implied repeal, see *State ex rel. Wallace v. Jorgenson*, 34 N. D. 527, 159 N. W. 35. Under the decision referred to and the subsequent specific appropriations for legislative expenses, there is clearly no standing appropriation for the expense of legislative investigations as such. And such expenses could not be paid even if authorized by both branches of the Legislative Assembly except as they are payable from the items designated in the general appropriation bill as “per diem of officers and employees, printing, and miscellaneous expenses and supplies.” See chap. 5, § 25, Laws Special Session, 1919.

Coming now to the question upon which the majority opinion is based: What is meant by the expression “authorized by the Legislative Assembly”? It will be noticed that § 42, C. L. 1913, before as well as after its amendment, was a standing appropriation for the payment of the members, officers, and employees “of the Legislative Assembly.” Now, strictly and literally speaking, there is no such class of employees authorized to be employed as employees of the Legislative Assembly. Those employed are either employees of the Senate or the House of Representatives. They are not only specifically referred to as such in § 34, but § 35, C. L. 1913, expressly authorizes either house by its own resolution to employ

persons other than those enumerated in § 34; and § 37 provides for the auditing of vouchers covering the employment by the officers of the respective houses, not both houses. In my opinion, when the Legislature used the expression in § 42 "Legislative Assembly" with reference to the expenses of investigating committees, it used it in the same sense that it was used in the remainder of the section with reference to employees and miscellaneous expenses; and when it directed the payment of expenses of investigating committees "when authorized by the Legislative Assembly" it had in mind such authorization as would be regarded as sufficient for the employment of an additional clerk or for the purchase of postage stamps. In other words, when either branch of the Legislative Assembly, acting in pursuit of its constitutional functions, finds that it must incur some expense in order to exercise its legitimate powers, it has authority to do so without obtaining consent of the other. And when these powers are so exercised by either branch the expenditure is "authorized by the Legislative Assembly" to the same extent and in the same manner as though it were for an ordinary employee of the "Legislative Assembly." Quotations are from §42, C. L. 1913. The purpose is not to impose a direct restraint upon one house by the other, but to make provision for paying the expenses of an authoritative legislative investigation. If the power to investigate belongs to either house acting independently of the other, the expense of the investigation is just as much "authorized by the Legislative Assembly" as is an expenditure for one of its own employees who is referred to in the same section as an "employee of the Legislative Assembly." Why adopt a construction that renders one house directly dependent upon the other for permission to exercise its constitutional functions in the manner dictated by its own judgment? Does it not detract from the benefits which presumably flow from a bicameral legislative system? There is, of course, the inherent limitation that expenditures by one or both houses cannot exceed the amount appropriated for the specific purpose. It is to be borne in mind, too, that the investigation in connection with which the relators served was one conducted during the constitutional session of the house, so that no question is presented as to the power of one house to act alone or through committees after the expiration of a session. If the majority opinion is a sound construction of § 42, C. L. 1913, which, as previously indicated, has been practically rendered a dead letter by the successive general appropriation bills, then no bill for postage, telegrams, telephone, and

other miscellaneous expenses incurred by one house during a regular session can properly be paid by the State Auditor in the absence of some authorization by the other branch of the assembly, for identical language is employed with reference to the authority for such expenditures.

It is a safe assumption that legislative business has never been carried on in this manner, and it is doubtful if during the eight years that this legislation has been on the statute books there has been a single legal payment of expenses made under it—that is, legal according to the construction of the majority opinion. I am aware of nothing in our legislative history that furnishes a basis for such a conclusion as a practical construction of the legislation touching this subject-matter, and it certainly makes one house dependent upon the other to an extent heretofore uncontemplated. All the legislation clearly indicates that each house is to act independently in the performance of its legislative functions, but under the construction of the majority opinion in this case each can tie the hands of the other at will. The purse strings are admittedly in the hands of the Legislature, and both houses combined, through appropriation bills, may exercise a wholesome restraint upon the powers of each house to incur expenses. But where the appropriation is made and either house has proceeded in good faith, as must be assumed, to exercise the powers conferred upon it and has incurred expenses within the appropriation in so doing, in my opinion it is more consonant with the dignity of the state to meet its just obligations than to seek to justify a refusal by a restricted construction of legislative enactments never before given such an application.

In my opinion the compensation of the relators in the instant case should be paid as an item of expense "authorized by the Legislative Assembly" within § 42, C. L. 1913, for meeting which there is an existing appropriation. The case of the relators is even stronger than this. They are legislative employees. It must stand admitted, as previously pointed out, that one house does not need the assent of the other for the hiring of additional employees. This is according to the express language of the statute. Section 35, C. L. 1913. The only reason assigned by the majority for not directing payment to these employees is that they were assigned to duty with an investigating committee which functioned without the assent of the Senate. It is respectfully submitted that the relators do not lose the character of legislative employees by reason of being assigned to work with an investigating committee. Clearly the writ should issue.

I am authorized to say that Mr. Justice CHRISTIANSON concurs in this opinion.

ROY E. HENDERSON, Respondent, v. WALKER D. HINES, Director General of Railroads, Appellant.

(183 N. W. 531.)

Waters and water courses — natural surface drainway held not subject to legal principles applicable to water courses.

1. A natural drainway serving the purpose alone of draining surface waters, but not otherwise possessing the constituent elements of a water course is not subject to the principles of law applicable to a water course.

Waters and water courses — easement theory of civil law imposing servitude on lower lands not applicable in North Dakota.

2. The common law principles applicable in this state and the conditions best suited to land development require rejection of the easement theory of the civil law imposing a servitude and property right upon lower lands subject to the reception of surface waters from a dominant tenement.

Waters and water courses — right of upper and lower landed proprietors protected under the rule sic utere tue.

3. The rights of both upper and lower landed proprietors are fully protected under the rule of law that permits the land owner to use and enjoy his land and dispose of hostile surface waters thereupon subject to the application of the principle "sic utere tuo."

Waters and water courses — land owner liable for negligently obstructing natural drainway to injury of upper proprietor.

4. Under such principle of law, a duty is imposed upon the land owner which renders him liable for his negligent act in constructing an embankment or obstruction across a natural drainway so as to thereby impound or dam up flood waters upon the land of the upper proprietor.

Waters and water courses — negligence of railway company in obstructing natural drain held for jury.

5. Were a natural drainway serves purposes of conveying surface waters from a drainage area comprising some 168 acres in the city of

Dickinson and a Railway Co. constructed an embankment and other obstructions in such drainway and installed, in lieu thereof, culverts for the purpose of providing an escape for such surface waters, it is *held* that the question of its negligence under the principles of law stated is a question of fact for the jury.

Waters and water courses—evidence insufficient to establish negligence of railway company in constructing culverts to carry off flood waters.

6. Where the jury, pursuant to special questions, found that the storm which occasioned the damage was an unusual and extraordinary storm and that culverts installed by the city and which connected with the Railway culverts were of insufficient capacity to handle the surface waters resulting, it is *held* that the general verdict rendered does not establish the negligence of the Railway Co. and a new trial should be granted.

Opinion filed June 6, 1921.

Action in District Court, Stark County, *Lembke, J.*

Defendant has appealed from the judgment in favor of the plaintiff.

Reversed and a new trial granted.

Opinion of the Court by *Bronson, J.*

Young, Conmy, & Young, for appellant.

"When the special findings of fact are inconsistent with the general verdict, the former controls the latter and the court must give judgment accordingly." § 7633, C. L. 1913.

"Extraordinary or unprecedented floods are floods which are of such unusual occurrence that they could not have been foreseen by men of ordinary experience and prudence. Ordinary floods are those, the occurrence of which may be reasonably anticipated from the general experience of men residing in the region where such floods happen. *Soule v. N. P. Ry. Co.* 34 N. D. 8.

"And this is in accordance with the American doctrine as announced by the supreme courts of the various states. The American cases lay down the doctrine that, for damages accruing from extraordinary floods, or other causes that may be attributed to the act of God, or which cannot ordinarily be foreseen or prevented, there can be no liability. *China v. Southwick*, 12 Me. 238; *Bell v. McClintock*, 9 Watts, 119; *Bridge Co. v.*

Navigation Co. 4 Rawle, 9; *Everett v. Tunnel Co.* 23 Cal. 225; *Hoffman v. Water Co.* 10 Cal. 413; *Wolf v. Water Co.* Id. 541; *Lapham v. Curtis*, 5 Vt. 371; *Higgins v. Canal Co.* 3 Har. (Del.) 411; *Canal Co. v. Ryerson*, 27 N. J. Law 457; *Tenney v. Ditch Co.* 7 Cal. 335; *Richardson v. Kier*, 34 Cal. 63; *Shrewsbury v. Smith*, 12 Cush, 177, etc.; *Hannaher v. St. Paul M. & M. R. Co.* 5 Dak. 22-23; *Southern Ry. Co. v. Plott*, (Ala.) 31 Sou. 33; *Price v. Oregon R. Co.* (Ore.) 83 Pac. 843.

"A person building a fence and gate across a stream and constructing culverts therein is not liable for the overflow of water caused by the breaking of a reservoir or dam over which he had no control, or by an unprecedented downpour of rain precipitating into the stream a flood not reasonably anticipated." *American Locomotive Co. et al v. Hoffman*, (Va.) 54 S. E. 25; *Brown v. C. B. & Q. Ry. Co.* (8th Cir.) 195 Fed. 1007; *Eagan v. Central Vermont Ry. Co.* (Vt.) 69 Atl. 732.

"The rule of law in such cases is that defendant is only required to take precautions against ordinary storms which occur in the vicinity; and if the damage would have occurred by the act of God, notwithstanding the obstruction, even if there were negligence on the part of the defendant, damages cannot be recovered." *Kansas City P. & G. R. Co. v. Williams*, (Ind. Ry.) 58 S. W. 570, 571; *Ohio & M. Ry. Co. v. Thullman*, (Ill.) 32 N. E. 529; *L. & N. Ry. Co. v. Conn.* 179 S. W. 195.

Under the settled law in this state, if the loss is caused by joint wrong of the parties, or on account of reasons for which defendant is not responsible all the damages cannot be recovered from the one defendant. *Boulger v. N. P. Ry. Co.* 171 N. W. 632, (N. D.); *McDonough v. Russell-Miller Milling Co.*; *Meehan v. G. N. Ry. Co.* 13 N. D. 443, 101 N. W. 183; *Balding v. Andrews & Gage*, 12 N. D. 267; 96 N. W. 305.

T. F. Murtha, for respondent.

"If reasonable care and foresight have been exercised in construction of a railroad, the railroad company cannot be held liable, but if there was negligence in the construction of the bridge, embankment, or other work which contributed to the injury, it is no defense that the flood was unexampled or overwhelming." *Vyse v. Ry.* (Ia.) 101 N. W. 736.

"A plaintiff is not bound to exclude the possibility that the accident complained of might have happened in some other way than that contended for by him. He is merely required to satisfy the jury by a fair preponderance of the evidence of the truth of his contention." *Reichert v. N.*

P. 39, N. D. 114, (supra) § 4 of syl.; Vol. 1 Sackett's Inst. § 391 to § 397, pp. 321 to 326. There appears to be not even a shadow of objection to the instructions. 17 Cyc. 131 (V.) 5 Enc. of Evidence, 643; Laughlin v. Ry. 28 N. W. 873; Jones on Evidence, § 390 p. 491; 17 Cyc. 267 (3); 17 Cyc. 262 J. 269; 42 L. R. A. 753-762-764. 22 L. N. S. 1039. Commonwealth v. Leash (Mass.) 30 N. E. 163; § 4 Syl. (See bottom half of last column p. 164.)

BRONSON, J. This is an action for damages caused by flood waters. The defendant has appealed from a judgment entered upon a general verdict and special questions submitted to the jury. The identical property that was involved in Soules v. N. P., 34 N. D. 8, 157 N. W. 823, L.R.A. 1917A, 501, is involved in this action. The same drainage area and the same drainway that were involved in Soules v. N. P., supra, Boulger v. N. P., 41 N. D. 316, 171 N. W. 633, and Reichert v. N. P., 39 N. D. 114, 167 N. W. 127, are likewise concerned. In the three cases mentioned damages were asserted through a storm which occurred on July 28, 1914. In this action damages are claimed for a storm that occurred on August 21, 1918. In the Reichert and Boulger cases, supra, the properties involved were located about a block, westward or northward, from the property involved herein. The following facts appear in the record:

Under conditions in a state of nature, prior to the development and growth of the city of Dickinson, as well as the construction of the defendant railway, there existed a territory composing a part now of the city of Dickinson and comprising about 168 acres, which naturally drained into a so-termed drainway southeasterly across the right of way of the defendant, and thence into the Heart river. In the growth and development of the city this drainage area has been platted into blocks and streets with connecting sewer facilities, grading of streets, curbs, gutters, ditches, and culverts. In this drainage area, plaintiff's leased property (lot 13, block 5) is situated, fronting upon Villard street, which abuts upon and parallels defendant's right of way. Comparatively considered, this drainage area, block 5, is rather low and flat, the grounds to the northward and westward sloping and being higher. The surface waters accordingly flow from the northward or westward along or towards block 5 southeasterly, where eventually they passed through this drainway into the Heart river. The defendant, in the improvement of its right of way several years ago, removed a bridge over this drainway, and has filled up the lands in the low places around this drainway, and installed a cast iron culvert under its

right of way 250 feet in length, and 4 feet in diameter, with a drop or slope of 5 feet, and a cross sectional area of $12\frac{1}{2}$ square feet. There the embankment of this right of way is some 4 feet above the north end of the culvert, and, extending in a westward direction along Villard street, is higher than the crown of the street in front of plaintiff's property. There the gutter is 12 inches, the curb $3\frac{1}{2}$ inches, and the level of plaintiff's street line, 3 inches lower than the crown of the street. In addition, upon the right of way and upon the site of a part of this old drainway, there was constructed a wholesale grocery building abutting upon Villard street. There this drainway was filled up or obstructed. In lieu thereof, in the street with the permission of the city, the defendant installed a double concrete culvert about 185 feet long, with a cross sectional area of about 24 square feet. This culvert connected on the east end with an open ditch that ran some 100 feet, emptying into the culvert in the right of way, and on the west side with city culverts. These city culverts were located at the intersection of Villard street and Second avenue, two running east and west, and two, north and south, and having a cross sectional area of about 19 square feet. Thus were methods of disposition provided for the surface waters of this drainage area. If the city culverts were unable to take care of the water, the resultant effect was an overflow upon the street there which, except through the culverts, could not escape southward off the street along the old drainway by reason of the railway embankment, the construction of the wholesale grocery building, and the filling up of the old ditch or drainway there formerly existing.

On August 21, 1918, between 9 and 10 a. m., a heavy rain, accompanied by some wind, fell to the extent of $1\frac{1}{2}$ inches at Dickinson. Witnesses varied as to its duration from 20 minutes to one hour. Plaintiff testified that it lasted about one hour. In a short time the streets surrounding block 5, particularly Villard street, were overflowing with water. Into the basement of plaintiff's hardware store, the water ran in through manholes in the front sidewalk and through basement windows broken by the pressure of the water. The water filled his basement (8 feet deep), and rose upon the ground floor to a depth of about 10 or 11 inches.

The same day, the water receded upon the ground floor. It was the third day before the basement was entirely drained, the sewer appearing to be clogged. Plaintiff testified that the water in the street was coming from the west and the east; that when it came into the store it was backing up from the east (that is, from the place where the city culverts are

located some 150 feet eastward. Numerous witnesses testified. Testimony was introduced that Villard street in front of plaintiff's property was a sheet of water clear across; that the streets surrounding block 5 were flooded with water. One witness testified that there seemed to be a lake of water down First street (north of block 5) and Second avenue (east of block 5). Another witness testified that at the Masonic Temple, two blocks northward and westward from plaintiff's property, and where the elevation is 19 inches higher than plaintiff's property, the water rose upon the building to the depth of 3 inches. One of plaintiff's witnesses testified that as soon as the storm stopped somewhat he started from a store in the same block as plaintiff's property, but on higher ground. He waded all the way around the streets to plaintiff's property; water up to the knees, more or less, dependent whether walking in the streets or upon the sidewalk; he walked over to the culvert in the right of way; saw the water there level with a 4-inch projecting flange, which would make the water 4 inches above the top of the opening; 15 or 20 minutes later he went down again, and noticed that the water then was probably about 4 inches below the top of the pipe. Another of plaintiff's witnesses testified that at Soules & Butlers corner, where city culverts are located in the street the water was over his knees in the middle of the street and up to his knees on the sidewalk; that he walked down to this culvert in the right of way; remained there one-half hour; that the water was above the top 3 or 4 inches, maybe 6 inches; that it stood at that height 15 or 20 minutes, and then started to lower; that when he left the water in culvert was 3 inches down. Other witnesses testified to the water running into places of business and filling, or partially filling, some basements.

Testimony was offered that the top of the cast iron culvert under the right of way is about 10 inches lower than plaintiff's property; that before water would back up from the location of the city culverts it would rise in the street there to a depth of 4 or 6 inches; that such water upon such street would have passed under natural conditions through the drainway into the river.

Expert testimony on the part of the defendant was offered that the culvert in the right of way was planned so as to take care of a 3-inch rainfall upon the drainage areas concerned in an hour, or a continuous rainfall for any length of time of 1 inch per hour; that the 3-inch rainfall per hour in the drainage area would give a run off of 123 cu. feet per second; that the culvert had a capacity of 277 cubic feet per second. No expert

testimony was offered concerning the cubic feet per second capacity of the city or double concrete culverts; that if the water was 9 or 10 inches high in the Henderson store it would have to be one foot and a half above the cast iron culvert in order to back up to such height. Testimony was afforded from the records of the experimental station showing that on September 5, 1911, there was a rainfall of 1.65 inches; on August 9, 1909, 2.75 inches; on July 27, 1914, 3.51 inches; on June 11, 1915, 1.52 inches; on June 22, 1916, 1.44 inches. Testimony was also offered to the effect that there was an obstructing projectional wall impairing the efficiency somewhat of the double concrete culverts; that mud and silt collected therein; that the course in which such culverts ran with their right angle connections served to retard the flow of water. The jury in answer to the special questions found that the rainstorm of August 21, 1918, was an unusual and extraordinary rainstorm; that the 4-foot cast iron culvert and the double box concrete culverts maintained by the defendant were not of sufficient size and capacity to take care of the storm waters which might reasonably be expected in this locality; that likewise the city culverts across Villard street and Second avenue were not of sufficient size and capacity. A general verdict was returned for the plaintiff for \$2,355.78.

Decision.

The law of the case has been stated in the cases heretofore mentioned. The principle of law therein stated, however, must be confined strictly to the particular facts in each case involved. Again, the principle of law applicable in this case must be determined upon the record facts. This case involved the disposition of surface waters. The drainage of the area within the city of Dickinson, wherein plaintiff's property is located, is through run-off channels artificially or naturally provided. The facts in this record do not warrant the conclusion that the drainway, or run-off channel involved is a water course. *Froemke v. Parker*, 41 N. D. 408, 171 N. W. 284. Most favorably considered, this run-off channel, in a state of nature, served simply the purpose of carrying off surface waters from the drainage area involved herein as it then existed in a state of nature. The record falls far short of demonstrating the constituent elements necessary to establish a water course. Usually in an action concerning a water course, legal rights revolve about the rights of user and enjoyment. On the contrary, concerning surface waters, legal problems are concerned, generally speak-

ing, with methods of disposition and removal. This action is essentially an action concerning the disposition and removal of surface waters, and for damages by reason of failure to properly provide for methods of disposition and removal. It is not an action for the diversion or obstruction of a water course. In such cases the rights of the party injured ordinarily are property rights on which an action may be based for infringement thereof. This is an action for breach of a duty; for lack of care, and for negligent acts of commission or omission. Although it may be the duty of a lower landowner who obstructs or embanks a natural drainway to provide for the natural passage of water; which may be reasonably anticipated in the drainage area concerned, all under the particular facts and circumstances of a particular case, nevertheless such principle of law must be considered in connection with the duty of such landowner in providing means of disposition and removal of surface waters. The rule is not to be construed to mean that a mere runway or drainway is in such case to be considered upon the principles of law that apply to water courses. In such case, the duty that exists is the duty that is imposed upon all landowners concerning the disposition of surface waters.

In enunciating principles of law concerning this duty of the lower landowner, much legal discussion has been had in our American courts concerning the so-termed common enemy rule and the civil law rule. A review of these cases in the aggregate perhaps leads rather to confusion than clarification. The fundamental inquiry involved in the consideration of the principles to be applied is to first ascertain whether the law, under a common-law jurisprudence, considered in connection with the peculiar topographical and climatological conditions of the country, leans toward the easement theory of the civil law, or towards its rejection.

Fundamentally, the landowner, concerning surface waters, has the right to use his own land subject to the so-termed principle, "*sic utere tuo ut alienum non lædas*." This is a legal right that also involves a reciprocating legal duty, for breach of which an action may be maintained. Pursuant to the common enemy theory, in its strict application, an artificial obstruction or embankment of a natural runway for the disposition of surface waters may or may not involve a liability dependent upon the application of the "*sic utere tuo*" principle. Under the easement theory of the civil law, the lower landowner must maintain a servitude for purposes of receiving through natural runways thereupon the natural surface waters of the paramount estate. It is time in this state, for this court to state

the law applicable and adapted to the conditions existent in this agricultural state.

In several cases, this court, pursuant to the construction given the facts presented, has not applied either the so-termed enemy rule or the civil law rule. *Carroll v. Rye Tp.*, 13 N. D. 458, 101 N. W. 894; *Davenport Tp. v. Leonard Tp.*, 22 N. D. 152, 133 N. W. 56; *Soules v. N. P.*, supra; *Reichert v. N. P.*, supra; *Boulger v. N. P.*, supra; *Froemke v. Parker*, supra. See *McHenry County v. Brady*, 37 N. D. 59, 163 N. W. 540.

Our sister state, South Dakota, has recognized the application of the civil law rule. *Quinn v. Railway Co.*, 23 S. D. 126, 120 N. W. 884, 22 L. R. A. (N. S.) 789. *Thompson v. Andrews*, 39 S. D. 477, 165 N. W. 9. In North Dakota, however, there is no legislative recognition, either expressly or impliedly, of the easement theory such as the statute of South Dakota quoted in the opinion of *Thompson v. Andrews*. Our statute simply expressly provides that one may not prevent the natural flow of the stream or of the natural spring from which it commenced its definite course, nor pursue nor pollute the same. § 5341, C. L. 1913. This refers to water courses which are specifically defined by statute. § 5341a, C. L. 1913. It might perhaps be inferred, through statements made in the cases of *Soules v. N. P.* and *Reichert v. N. P.*, that this court has rather leaned towards the easement theory, although express statements are made in such opinions that neither the enemy rule nor the easement rule was applied. It must be evident that, in an action which involves the disposition or removal of surface waters, not through or by means of a water course, one theory or other of the law must be considered, unless, under either theory, the rule of law, as applied to the facts, remains the same. Much may be stated, perhaps, in favor of the justice of the easement theory and its application solely to agricultural territory in its ordinary agricultural development, but it must be recognized that this easement theory imposes a servitude upon lands which is classed and termed as a property right, and grants absolutely to the upper landowner the right to discharge waters as a property right over the servient tenement. This theory grants an absolute right; the enemy rule imposes a duty and the exercise of care. In this state, where the problems of drainage require increased burdens upon lower lands, where the problems of reclamation and even of irrigation require increased artificial conditions for the development of our agricultural territory, and where,

furthermore, the development and growth of towns and cities in proximity to lands, either rural or urban, create artificial conditions imposing additional burdens on lower lands in addition to surface waters, the justice of the rule granting an absolute property right in the land of a servient tenement is, in fact, made negative.

The purpose of our statute requiring publicity of title, of easements, and incumbrances thereon do not voice themselves favorably to a rule of property that grants to one paramount landowner a property right in the land of another which is covert and unknown in its extent and character. In this state the fundamental conceptions of the common-law jurisprudence obtain except as constitutional, statutory, or local laws express to the contrary. The rejection of the easement theory which permits a landowner to make fruitful and productive, for purposes of his ownership, land that he would be compelled otherwise to maintain as a servitude for purposes of a drainway, subject only to the principle of law that he must not be negligent in so doing so as to thereby occasion damage to an upper riparian owner, fully performs the office of protecting both lower and upper land proprietors. Such noneasement theory is consonant with common-law principles. In other words, the measure of a landowner's right and reciprocating duty in the removal or disposition of surface waters is to be guided by the principle of law that he has the right to possess, use, and enjoy his land subject to the principle, "*sic utere tuo ut alienum non lædas*"; that in the application of this principle it may be an act of negligence for the lower landowner to obstruct a natural drainway through artificial obstructions so as to dam up or inhibit the natural passage of surface waters that theretofore flowed, and which he might have reasonably anticipated would continue to flow. What constitutes acts of negligence in the violation of this principle, "*sic utere tuo*," has been considered in many cases, and requires no present discussion. Upon this principle of law, the decisions in *Soules v. N. P.* and *Reichert v. N. P.* can be upheld and sustained as acts of negligence upon the facts in the record of each respective case. Accordingly, in the case at bar, the gist of defendant's liability is its negligent acts, if any, imposing artificial conditions upon conditions of nature theretofore existing in its own land, whereby negligently it occasioned damages to adjacent landowners through the impounding of surface waters.

The gist of plaintiff's right to recover in this action is dependent upon the negligent action of the defendant in constructing and maintaining

an insufficient cast iron culvert under its right of way and a double concrete culvert connecting therewith in the street immediately in front of its property, so as to occasion negligent impounding of waters and flooding of adjacent property, and, further, that the storm which occurred on August 21, 1918, was one which might have been reasonably anticipated. Upon the facts in this record and as found by the jury we are of the opinion that this negligence is not established as a matter either of law or of fact. The jury found that the city culverts were of insufficient capacity. To what extent, if at all, this insufficient capacity of the city culvert operated to contribute to plaintiff's damage cannot be ascertained except as a question of fact to be determined by the jury. See *Boulger v. N. P.*, 41 N. D. 316, 171 N. W. 634.

The jury found that this storm, which was the fundamental cause of the damage, was an unusual and extraordinary storm. The court charged the jury that to escape the duty to provide for a run-off as charged the burden of proof was upon the defendant to prove that the storm which occasioned this flood was unprecedented; that it could not have been reasonably anticipated; that unprecedented floods are floods of such unusual occurrence that they could not have been foreseen by men of ordinary experience and prudence; that ordinary floods are those the occurrence of which may be reasonably anticipated from the general experience of men residing in the region where such floods happen. In accordance with such instructions it may be fairly implied that the finding of the jury was that this was an unprecedented storm, a flood of unusual occurrence. *Soules v. N. P.*, 34 N. D. 33, 157 N. W. 823, L. R. A. 1917A, 501. Manifestly the contributing factors in flood damage concerning surface waters where run-off drains are concerned are volume, velocity, and intensity of rainfall. Manifestly, again, the capacity of drain channels are not determined alone by cross-sectional areas. The capacity of a run-off channel also requires the consideration of the velocity of the water therein in connection with other elements, as well as the cross-sectional area. We are satisfied upon the principles of law stated and upon the facts appearing in this record that there are questions of fact to be submitted to a jury concerning defendant's exercise of care, in constructing the cast iron culvert under, and the embankment along, the right of way, and in constructing the double concrete culvert in the street, all in connection with its care and duty involved and to be anticipated to take care of the surface waters from the drainage area concerned in accordance with the

purposes for which these artificial creations were constructed. In this connection it is to be observed, measuring the duty and liability of the defendant, that the drainage area itself has been subjected to artificial conditions in the erection of numerous buildings and in the creation of streets and avenues which add or detract from run-off conditions as they may have existed in a state of nature.

In our opinion the judgment should be reversed, and a new trial granted.

ROBINSON, C. J., concurs.

CHRISTIANSON, J., (concurring specially). I concur in the reversal of the judgment. And I agree with Mr. Justice BRONSON that—

This action "is essentially one concerning the disposition and removal of surface waters and for damages by reason of failure to properly provide for methods of disposition and removal."

I also agree with him that the evidence in this case does not establish that the so-called drainway involved here is a water course, and that such evidence, construed most favorably to the plaintiff, merely shows that the so-called drainway or run-off channel as it existed in its natural state "served simply the purpose of carrying off surface waters from the drainage area involved herein as it then existed in a state of nature." I also agree that the liability of the defendant in this case, if any, is not determinable by the application of the so-called civil law rule.

As pointed out in the opinion prepared by Mr. Justice BRONSON, much litigation has come before this court concerning the same drainage area and drainway which are involved here. An examination of the decisions in the various cases will disclose that they were all brought and tried on the theory that the defendant had been guilty of negligence; i. e., they were brought and tried on theory that in order to recover the plaintiff must establish that his loss had been caused by the negligence of the defendant. In my dissenting opinion in *Reichert v. N. P. R. Co.*, 39 N. D. 114, 150, 167 N. W. 127, 139, I stated that I had concurred in the opinion, affirming a verdict against the railway company, in *Soules v. N. P. R. Co.*, 34 N. D. 7, 157 N. W. 823, L. R. A. 1917A, 501, for the reason that—

"I believed that under the evidence in that case it was for the jury to say whether the defendant was negligent in constructing its culvert;

whether the flooding of the premises involved in that case was occasioned by the inadequacy of such culvert; and also whether the storm was of an unusual and unprecedented character." See 39 N. D. 150, 167 N. W. 139.

I have grave doubts if there is any liability on the part of the defendant in this case. It seems to me rather that the undisputed evidence establishes a state of facts similar to that which the jury found to exist in *Boulger v. N. P. Ry. Co.*, 41 N. D. 316, 171 N. W. 632, and which I described in my dissenting opinion in *Reichert v. N. P. Ry. Co.*, *supra*. I agree with Mr. Justice BRONSON, however, that there must in any event be a new trial for the reasons assigned in § 6 of the syllabus. I believe, also, that the trial court committed prejudicial error in its instructions. The defendant placed upon the witness stand certain civil engineers whose qualifications were unquestioned. They testified regarding the adequacy of the culverts constructed by the defendant. This was the only expert testimony adduced by either party in the case. In its instructions the trial court said:

"Now, in this case, gentlemen, you have heard experts give testimony hour after hour. The court instructs you that testimony has been given by certain witnesses who in law are termed experts, and in this connection I would suggest to you that, while in an action such as the one being tried the law receives the evidence of men expert in certain lines, and as their opinion derived from their knowledge of particular matters, the ultimate weight which is to be given to the testimony of expert witnesses is a question to be determined by the jury, and there is no rule of law which requires you to surrender your own judgment to that of any person testifying as an expert witness or to give controlling effect to the opinion of scientific witnesses. In other words, the testimony of an expert, like that of any other witness, is to be received by you, and given such weight as you think it is properly entitled to, but you are not bound by the testimony of any witness, expert or other. The court instructs the jury that, before the opinion of an expert has any value, the jury must first find to be true the fact upon which such opinion is based."

The testimony of these civil engineers was highly important to the defendant. It related to the basic point in controversy, the adequacy of the culverts. According to the testimony of these experts, the culverts were wholly adequate, the defendant was not guilty of negligence, and the injury could not have been occasioned by any act of the defendant.

It seems to me that the whole tenor of the instruction was derogatory to the testimony of these engineers, and must have had a tendency to discredit it before the jury.

GRACE, J. (dissenting). This action is one to recover damages in the sum of \$3,000, with interest at 6 per cent, from August 24, 1918, on account of the flooding of a certain basement, by a certain rainstorm which occurred at Dickinson, N. D., August 21, 1918. Such flooding, it is claimed, was caused by the blocking or obstruction of a certain channel of drainage, in the city of Dickinson, by a certain embankment of earth, which crosses the channel, upon which embankment the railway is constructed. Through the embankment, over and across the channel, there is no outlet, excepting a small iron culvert. In short, it is claimed that the embankment across the channel completely blocks it, with the exception of the small culvert. The opening or diameter of the culvert is claimed to be about 4 feet.

Damage in the sum of \$100 is claimed for removing water from the basement; \$150 for damage to certain furniture, damage for the loss of rental value of the basement to the extent of \$50 per month, from August 24, 1918, to the date of bringing the action, aggregating \$825, and damage to plaintiff's stock of merchandise in the sum of \$2,100.

Defendant, after admitting the appointment of McAdoo and his successor, Hines, as Director General of Railroads, enters a general denial to the allegations of the complaint. The defendant further alleges that the damage and injury suffered by the plaintiff were occasioned and caused by an unusual and extraordinary rainstorm and flood, which occurred in the city of Dickinson and vicinity on or about the 21st day of August, 1918, and that said damage was in no manner caused through any negligence on the part of defendant.

The case was tried to the court and a jury at Dickinson. The verdict was in favor of the plaintiff for \$2,554.24, including costs and interest, and judgment was entered for that amount. The issues of fact were submitted to the jury generally, except special questions were as well submitted. The special questions, which are material for consideration here, and which the defendant has in its brief set forth, are as follows:

Question 1: Was the rainstorm of August 21, 1918, involved in this action, an unusual and extraordinary rainstorm? Answer: Yes.

Question 2: Was the 4-foot cast iron culvert maintained by the de-

fendant of sufficient size and capacity to take care of the storm waters which might reasonably be expected in this locality? Answer: No.

Question 3: Was the double box concrete culvert running east and west, north of the Dickinson Grocery Company building, of sufficient size and capacity to take care of the storm waters which might reasonably be expected in this locality? Answer: No.

Question 4: Was the city culvert crossing Villard street on Second Avenue East at the intersection of Villard street and Second Avenue East of sufficient size and capacity to take care of storm waters which might reasonably be expected in this locality? Answer: No.

Question 5: If you return a verdict for the plaintiff and award him damages for loss of use of basement, how much have you allowed in such verdict for such damages for loss of use of basement? Answer: \$165; interest, \$5.28.

Fred Dohrmann, Foreman.

Subsequent to the entry of judgment, a motion by defendant was made to vacate the judgment entered on the general verdict, and to grant judgment in his favor on the special questions returned by the jury. The motion was heard on August 16, 1920, and by the court denied.

The defendant makes assignment of eight errors, and two specifications of error as to the insufficiency of the evidence to sustain the verdict and judgment. The first five errors assigned relate to alleged errors of the court in its charge to the jury, and they may be considered in the order of their assignment. They are as follows:

"(1) Now, gentlemen, as sworn jurors, it is your duty in this case, as in any other case where an individual is on the one side and a corporation on the other, that you will not allow yourselves to be biased either for or against the corporation, or for or against the individual involved."

Of course, the railroad company was not a party to the action. The action, in fact, was against the government of the United States, though nominally, it was against the Director General. He, however, as is well known, acted for the government during the period of government control of the railroads. If there were any error in the giving of the instruction, it was error without prejudice.

"(2) If you find in favor of the plaintiff, and find that, following the flood of August 21, 1918, the plaintiff suffered damage because he was unable to use his basement, by reason of the same being threatened by recurrence of flood, and find that the plaintiff had reasonable ground to apprehend a flood, and that he was in fact in danger of a reflooding

of said premises, by reason of the defendant not furnishing adequate provisions for the run-off of waters through such drainage channel, then you may allow the plaintiff damages for the loss of the use of said basement during such time as you find that plaintiff was deprived of the full use of said basement. In no event, however, would plaintiff be entitled to recover damages for the use of the basement for a longer period than between the date of August 21, 1918, and the date of the summons in this action, to wit, January 7, 1920, or a greater sum than \$30 per month, and if you find the plaintiff is entitled to damages for the loss of his basement, under these instructions you will find the reasonable rental value of said basement, and you will also find the reasonable value of the use and occupation of said basement, and you will take the smaller of these findings and deduct from the sum the value of the use and occupation actually made of said basement, and the difference will be the damages to which the plaintiff is entitled for the loss of the use of said basement."

The defendant does not seriously argue that the giving of that instruction is error, and we hold there was no error in the giving of it. There was competent evidence of actual damages suffered by plaintiff, other than that which he suffered by the loss of the use of the basement, which were about equal in amount to that stated in the verdict.

"(3) Now, in this case, gentlemen, you have heard experts give testimony hour after hour. The court instructs you that testimony has been given by certain witnesses who in law are termed experts, and in this connection I would suggest to you that, while in an action such as the one being tried the law receives the evidence of men expert in certain lines, and as their opinion derived from their knowledge of particular matters, the ultimate weight which is to be given to the testimony of expert witnesses is a question to be determined by the jury, and there is no rule of law which requires you to surrender your own judgment to that of any person testifying as an expert witness, or to give controlling effect to the opinion of scientific witnesses. In other words, the testimony of an expert, like that of any other witness, is to be received by you and given such weight as you think it is properly entitled to, but you are not bound by the testimony of any witness, expert or other. The court instructs the jury that, before the opinion of an expert has any value, the jury must first find to be true the fact upon which such opinion is based."

There was no error in giving this instruction. It was merely explana-

tory of the nature of expert testimony. By the instruction the weight to be given to the testimony was left entirely with the jury.

"(4) The Director General of Railroads in maintaining and continuing to keep the grades and embankments of railways under his control is chargeable with the same duty to provide for the run off of waters through the natural channels of drainage through such grades and embankments the same as though the said grades and embankments were under the control of a private individual or a railway company."

There was no error in giving this instruction. It merely informed the jury that, as a matter of law, the Director General of Railroads, or, in other words, the United States government, when it took over the operation of the railways, assumed the duty to provide for the run off of water through natural channels of drainage, through grades and embankments such as those under consideration, to the same degree as if the railways were under the control of an individual or the railway company.

"(5) It was the duty of the defendant to provide for the run off and escape of waters, not only from the usual and ordinary rains, but also from such extraordinary rains as might reasonably be expected to occur in this section of the country."

The giving of this instruction is most emphatically claimed by the defendant to constitute error. The third paragraph of the answer is as follows:

"Defendant alleges the fact to be that the damage and injury suffered by this plaintiff was occasioned and caused by an unusual and unprecedented storm and flood, which occurred in the city of Dickinson and vicinity on or about the 24th day of August, 1918, and said damage was in no manner caused through any negligence on the part of this defendant."

By this the defendant sought to interpose the defense of vis major. In other words, the defendant attempts to plead that the damages alleged were not occasioned by his negligence, but were due entirely to an act of God. It would appear, however, on full consideration of this alleged defense, that it is not so extensive or complete as to in reality set forth that character of defense. A storm might be unusual and extraordinary, but the existence of those facts would not alone be sufficient to relieve the defendant from liability. The evidence clearly shows the storm was not unprecedented, as there were many rainstorms in the vicinity of Dickin-

son in many preceding years, which were more than equal, in the amount of water precipitated, to the storm in question.

In addition to showing that the storm was unusual and extraordinary, it should be made to appear by the pleading and the proof, and at least by the proof, that the storm was of such unusual and extraordinary character that it could not have been reasonably anticipated. Or, in other words, that it could not be expected that such a rainstorm would occur in that vicinity. The defendant has not pleaded this latter element, and has not offered proof to establish it.

In the case of *Reichert v. Northern Pacific Ry. Co.*, 39 N. D. 114, 167 N. W. 127, in an able opinion written by then Chief Justice Bruce, the following language is used:

"The question, to our mind, is one of notice and warning, more than it is of an unusual or extraordinary storm. And although the point is a close one, we do not feel justified in interfering with and overruling the finding of the jury in this respect. * * *

"We must, indeed, hold to what we believe to be the prevailing American rule, that the defense in such cases can only be that of vis major, or the act of God, and that the act of God in its legal sense applies only to events in nature so extraordinary that the history of the climatic variations and other conditions in the particular locality affords no reasonable warning of them, and that damages cannot be avoided on the grounds that the flood was an act of God, where, from geographical and climatic conditions, the flood might have been anticipated, though it occurred infrequently."

We think there was no error in the instruction, as it merely defined to the jury the legal duty of the defendant to provide for the escape of waters from usual and ordinary rains, but as well from extraordinary rains, where they were such as might reasonably be expected to occur in that vicinity.

Mr. Moomaw, superintendent of the State Experiment Farm at Dickinson, produced his records and showed that, in the years from 1907 to 1918, both inclusive, there were nine different rainstorms, which in amount of precipitation equaled or exceeded the one under consideration.

Witness Soules, who has owned the premises in question or a part of them, since 1907, testifies as to the flooding of the premises in the years 1907, 1909, and 1912.

The evidence is sufficient to show, as we view it, that rainstorms, resulting in precipitation equal to or exceeding the one in question, have occurred annually or biennially since 1907, in this vicinity.

This is of such frequency as to impose a duty upon those who have constructed, or who may construct, an embankment across this natural drainway in this vicinity, to anticipate this character of rainstorms as they reasonably may be expected to occur in the vicinity in question, with reasonable regularity, either annually, biennially, or perhaps more often. Though such storms may be unusual and extraordinary, it cannot be said that they should not be anticipated and provision made for taking care of the surplus water precipitated by them, where they occurred with such regularity, and covering such an extensive period, as the evidence in this case shows.

This conclusion leads us to the consideration of the contention of the plaintiff, which is to the effect that the plaintiff cannot recover, by reason of inconsistencies between the special questions and the general verdict. The contention is pressed with much earnestness as to the first question *supra*.

It will be observed that the answer to that question determines that the rainstorm was an unusual and extraordinary one. But that question, nor no other question, determines that it was not such a rainstorm as should have been anticipated.

It must be presumed that the last instruction, above mentioned, was followed by the jury. It returned a verdict in favor of plaintiff, and therefore determined that the defendant should have anticipated the storm in question, or otherwise it would have found in defendant's favor instead of against him.

It may be perfectly true that the storm was unusual and extraordinary, as the jury have said it was in their answer to question 1, and yet the defendant be just as liable in damages as if the storm had been an usual and ordinary one, if it were the duty of the defendant, under all the evidence in this case, to anticipate the character of the rainstorm, and the jury, in following the instructions of the court in this regard, have said by the general verdict that such was the duty of the defendant.

We, therefore, are of the opinion that there is no inconsistency between question 1 and the general verdict. On rehearing in *Reichert v. Northern Pacific Ry. Co.*, *supra*, this court said:

"It is also the established law that surface waters, having an accus-

tomed flow in a drainage channel or waterway having well-defined banks, may not be stopped by an embankment across the channel so as to divert the waters to the injury of adjoining proprietors. See 40 Cyc. 648; Aldritt v. Fleischauer, 74 Neb. 66, 103 N. W. 1084, 70 L. R. A. 301. It seems to be well established also—and this even where the common-law rule applies—that where a railroad crosses a ravine, gully, or natural depression in the earth, which forms the natural and accustomed channel for the escape of surface waters, it is incumbent upon the company to make provision for the flowage of the same. See Jungblum v. Minn., etc., Railroad Co., 70 Minn. 153, 72 N. W. 971; Smith v. Chicago Railroad Co., 83 Neb. 387, 119 N. W. 669; Quinn v. Chicago, etc., Railroad Co., 23 S. D. 126, 120 N. W. 884, 22 L. R. A. (N. S.) 789; 40 Cyc. 644. The controversy in the case at bar has been mainly over the question of the size of the culvert," etc.

The language of the above quotation is applicable to this case, and here, as there, one of the principal elements of contention is the sufficient size and capacity of the same culvert, as will be seen by an examination of question 2, *supra*, to which the jury answered in the negative, thus determining that the culvert was of insufficient size and capacity to take care of the storm waters which might reasonably be expected in the vicinity of Dickinson.

From the evidence in this case, and from taking judicial notice of our former decisions in Reichert v. Northern Pacific Ry. Co., *supra*, Soules v. Northern Pacific Ry. Co., 34 N. D. 7, 157 N. W. 823, L. R. A. 1917A, 501, and Boulger v. Northern Pacific Ry. Co., 41 N. D. 316, 171 N. W. 632, it is clear there is a natural drainway or channel near Villard street and Second Avenue East, and extending thence south and east to the Heart river, a distance of about 700 feet; and that in that distance there is a fall in the channel toward the Heart river of between 30 and 40 feet.

It would seem clear; from the size and nature of this channel, and the amount of lowland lying south and east from the intersection of Villard street and Second Avenue East, that the channel, if unobstructed by the railway embankment and the Dickinson Grocery building, etc., would be of sufficient capacity to carry to the Heart river all surface drainage waters within the drainage district of 168 acres here under consideration, and which would naturally empty, if unobstructed, into it, and in such manner and with such rapidity that the water would not back up and cause damage to property of the character alleged and proven in this action;

and this, we think, would be true even though the rainstorm were unusual and extraordinary.

In this connection, it is also to be observed that the evidence shows that, when the Dickinson Grocery Company building was constructed, the old open ditch which formerly led from near the intersection of Villard street and Second Avenue East was closed. In other words, that building was constructed over part of the old ditch. In its stead, the railroad company constructed two culverts which extend directly east on the south side of Villard street from the intersection of it, with Second Avenue East, approximately 185 feet, where they make an almost right angle turn, due south, for 5 feet, where they empty into a new artificially constructed open ditch, which conveys the water to the iron culvert.

The defendant further denies liability, on the theory that the primary and proximate cause of the flooding and the backing up of the water, which plaintiff claims was the direct cause of his damage, was the inadequacy of the city culverts extending north and south through Villard street, to receive and convey through them the water which naturally drained in that direction, and which necessarily would have to pass through them.

The defendant further maintains that the culverts on the right of way, extending east and west, were of sufficient capacity to take care of 3 inches of rain on the basin of 168 acres which constituted the drainage district, if it came down in a few minutes. If that contention is true, then, certainly, the city culverts should take care of an inch and a half of rain which fell in not less than 40 minutes, and perhaps the time was longer. It also may be noticed that the combined cross-section area of the city culverts on Villard street is 19 square feet. The combined cross-section area of the railroad culverts on Villard street is 24 square feet. But in this connection it may also be noticed that the cross-section area of the iron culvert is only a fraction over $12\frac{1}{2}$ feet, as it was in form circular, and its diameter is 4 feet. And this calculation does not deduct from the diameter of the iron culvert for the 4 inches of cement that was on the bottom thereof at its entrance.

It would seem impossible, therefore, for the iron culvert to receive and convey the body of water issuing from either the twin culverts on the railroad right of way, or twin culverts of the city in Villard street, if water were flowing through them to their full capacity.

The evidence, we think, fairly shows that the high-water mark above

the iron culvert was 4 inches or more. If this be true, and, considering further that the land in that vicinity was low, there must have been quite a body of water spread around, and extending back to the railroad's twin culverts. Otherwise the water would not have risen above the iron culvert. If this be true this condition would, no doubt, have considerable tendency to retard the issuing of water from the railroad twin culverts. The fact that the water did rise above the iron culvert would show that it was not of sufficient capacity to take away the water, or otherwise it would not have risen above it.

It seems clear that, when the iron culvert was running full, and the water had risen above it, the tendency of the whole situation would be to hold back all water coming from towards the city of Dickinson; in other words, to retard its flow toward the iron culvert.

The defendant claims that, notwithstanding the water was 4 or 4½ inches above the iron culvert, it still was 6 inches lower than the floor of Henderson's store, at the front thereof; and that for this reason the water could not have backed up, or have been retarded, so that it would overflow and go into the basement of his store.

But, as against this, there is positive testimony of Henderson that he was at his store at the time of the rainstorm, and saw the water back up from the east, and he describes how eventually it poured into his basement, flowing over the angle irons and breaking in windows, filling his basement in a very few minutes. He was in the basement at the time, and took the freight elevator to the next floor, and according to the tenor of his testimony the water followed the elevator right up, and covered the first floor to the depth of several inches.

All of this evidence, as well as the evidence of all the facts, was for the jury. They have found favorably for plaintiff. The defendant challenges the sufficiency of the evidence to justify the verdict, on the theory that the testimony shows the loss in question was occasioned and caused by an unusual and extraordinary storm and flood, and that for the same reason, it is insufficient to sustain the judgment. What we have above said with reference to the character of the rainstorm, and the duty of the defendant to anticipate it, is a sufficient answer to these specifications.

It may be claimed that the damages are to some degree speculative, in that part of the plaintiff's claim is for loss of use of the basement, he not using it because he was afraid to do so for fear of a recurrence of

rainstorms which would inflict damages of a similar nature as those he had sustained. We think there is no merit in such claim in this case, as the evidence shows the actual damages sustained to the merchandise and property of the plaintiff, and the time and money spent in cleaning up the basement and store after the storm, together with interest thereon and costs, approximately equals the judgment recovered.

There is no inconsistency between question 4 and the general verdict. The evidence, as a whole, as we view it, clearly shows that the embankment constructed and maintained across the channel, the natural water drainway, and the inefficiency by the iron culvert to convey, with sufficient rapidity, the water precipitated by the rainstorm here under consideration, were the proximate cause of the damages sustained by the plaintiff.

It would appear that this particular iron culvert has been the source of considerable litigation, as is evidenced from the cases above cited, and which deal with damages claimed to have arisen from that source. It would seem, so far as we are able to determine, that there was no litigation, with reference to damages resulting from overflowing or banking up of waters in this particular channel while the bridge described in the evidence was across that channel at or near where the iron culvert is now located, which bridge was in length some 45 feet on top and from 16 to 20 feet underneath, and of sufficient height so that one on horseback could ride under it.

The origin of the litigation seems to be coeval with the installing of the iron culvert. The continued maintenance of the culvert in its present condition, and in view of prior litigation, it would seem, is fast approaching the nature of a nuisance.

From an examination of the weather reports, showing the rainfall in the vicinity of Dickinson, it may be reasonably expected that a rainfall such as that of August 21, 1918, will occur most every year. Hence it is reasonable to anticipate there will be much more litigation in the future from the same source as this. This continued litigation, not only likely imposes loss on the property holders, or business men, or some of them, in the city of Dickinson—for, even though they finally succeed in being partly compensated in damages, litigation, as a rule, is both disagreeable and expensive—but as well imposes great expense on Stark county, and not the least result of all is to impose heavy losses on the railroad company,

or those operating it, all of which at least, it would appear is possible to avoid.

The railroad company or those who operate and control it, will not likely be excused, even though it may by its engineers show that the culvert it has constructed is theoretically sufficient to take care of water which it should anticipate would fall upon the drainage area here under consideration, if, in the face of such proof its culvert does not carry away the water, and it piles up above it to more than 4 inches, and, as in this case the evidence shows, backs into a basement such as the one under consideration, and where all culverts in question here are much larger capacity than it. In all such theoretical calculations, there is very likely one or more unforeseen elements not taken into the calculation. The situation may be somewhat similar to that where engineers figure the number of cubic feet to be heated in a house of a given size, and arrive at a conclusion that a boiler or furnace of a given size would be sufficient to heat that space. The theory is largely correct, but in practice and actual results derived it is largely a failure. To get results that are satisfactory, the boiler or furnace should have a capacity to heat perhaps twice that space.

BIRDZELL, J. (dissenting). I disagree with the majority opinion in the holding upon which the reversal is based to the effect that there is an inconsistency between the general verdict and the answer to the first special question. The general verdict must be assumed to be founded upon the evidence, and to be in accordance with the instructions of the court as to the law. The record shows that the court instructed the jury quite fully with reference to the duty of the defendant, and as to the circumstances which would excuse him from liability. The jury were specifically instructed that, if the storm were of such an unusual character that one could not reasonably have expected it to occur, they should find for the defendant. They were told that the defendant was bound to provide for such extraordinary rains as might reasonably be expected to occur. Under these instructions the jury could not render a verdict for the plaintiff unless they believe that the storm though unusual or extraordinary, was one which the defendant was bound to anticipate. There is nothing in the answer to the special question, as I read it, to negative the affirmative finding in the general verdict, for the answer to the question only indicates that the storm, in the judgment of the jury,

was of an unusual and extraordinary character, but not so unprecedented that the defendants were not bound to anticipate it.

While dissenting upon the ground above indicated, I deem it proper to say that in my judgment it is gravely doubtful whether the defendants were not prejudiced by the instruction of the trial court relating to the so-called expert testimony. On this account I am not prepared to say that the order of reversal and remand for a new trial is erroneous.

JOHN BRANDENBURG, Appellant, v. FIRST NATIONAL BANK
OF CASSELTON, NORTH DAKOTA, Respondent.

(183 N. W. 643.)

Fraud — special verdict for plaintiff in action against national bank held supported by evidence.

1. In an action for fraud and deceit by a National Bank concerning the negotiation and sale of a real estate mortgage, it is *held*, for reasons stated in the opinion, that the special verdict, favorable to the plaintiff, finds support in the evidence.

Banks and banking — national bank forwarding note and mortgage for collection held to act intra vires.

2. A National Bank receiving for custody, care and collection a note and mortgage of its customer and thereafter forwarding the same for collection is acting intra vires and liable for breach of its duty.

Banks and banking — national bank receiving proceeds of note and mortgage with authority to pay upon a first mortgage lien on real estate held to act intra vires.

3. A National Bank receiving the proceeds of a customer's note and mortgage with authority to pay out the same upon a first mortgage lien upon real estate is acting intra vires and liable for breach of its duty.

Banks and banking — bank liable for fraud of president investing proceed of customer's note in worthless mortgage.

4. Where a president of a National Bank, pretending to act as such, fraudulently and deceitfully made representations to the customer of the bank concerning the character of a pretended first mortgage lien and

thereby occasioned the proceeds realized upon a note belonging to the bank's customer to be paid and invested in a worthless mortgage the bank is liable for the fraud and deceit practised although it received no benefit, and its officer's acts were ultra vires.

Opinion filed June 6, 1921.

Action in District Court, Case County, *Cooley, J.* From a judgment of dismissal the plaintiff has appealed.

Reversed.

Lawrence, Murphy & Nilles, for respondent.

Pierce, Tenneson, Cupler & Stambaugh, for appellant.

National banks have power to receive special deposits and their officers have authority to bind the bank by agreements made in relation thereto. *First Nat'l. Bank of Carlisle v. Graham*, 100 U. S. 699; 25 L. ed. 750; 36 Am. Rep. 592; *McCormick v. Market Nat'l. Bank*; 165 U. S. 538; 41 L. ed. 817 *Minn. Mutual Life Ins. Co. v. Tagus*, 34 N. D. 566; 158 N. W. 1063; L.R.A. 1917A 519; *Citizens Nat'l. Bank v. Davisson*, 229 U. S. 213.

The lending of money for its customers is an every day transaction with all banks, and it has been held that for negligence or for fraud and deceit in selection of investments for its customers, the bank is liable for the acts of its officers who represented it in the transaction. 7 C. J. 719 and cases cited in notes 90 to 95.

It is well settled that a corporation cannot escape liability upon a plea that the tortious acts were ultra vires.

"It is the policy of the law to look with disfavor upon the defense of ultra vires, especially when interposed by a corporation to avoid an obligation otherwise legal and equitable. It has been said by an English judge that "the safety of men in their daily contracts requires that this doctrine should be confined within narrow bounds." 3 *Fletcher Cyclopaedia Corporations*, § 1520, p. 2581. *Seeber v. Commercial Nat. Bank*, 77 Fed. 957, 960.

Corporations have been held liable in these cases by attributing to them the conduct of their agents:

. Assault and battery with a deadly weapon by a railroad company.

(*Railway v. Harris*, 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. ed. 1146).

Libel by a railroad company, (*Railroad v. Quigley*, 21 How. 202, 1 L. ed. 73.)

Fraud and deceit, assault and battery, malicious prosecution, nuisance and libel, (*National Bank v. Graham*, 100 U. S. 699, 702, 25 L. ed. 750.)

Fraud by a municipal corporation in reports of distilled spirits to revenue collector, (*Salt Lake City v. Hollister*, 118 U. S. 256, 6 Sup. Ct. 1055, 30 L. ed. 176.)

Fraud and deceit by a manufacturing company, (*Butler v. Watkins* 13 Wall, 457; 463, 20 L. ed. 629.)

Maintenance of a nuisance, (*Railroad v. Baptist Church*, 108 U. S. 317; 2 Sup. Ct. 719; 27 L. ed. 739.)

Assault and battery by an express company, (*Southern Ex. Co. v. Platten*, 36 C. C. A. 46; 93 Fed. 936.)

Malicious prosecution by a manufacturing company, (*Copley v. Sewing Machine Co.*, 2 Woods 494; Fed. Cas. No. 3213.)

Boycotting by a corporation of which the members were mercantile firms, (*Hartnett v. Plumber's Supply Assn.* 169 Mass. 229; 47 N. E. 1002 38 L.R.A. 194.)

Malicious prosecution by a savings bank, (*Red v. Home Savings Bank*, 130 Mass. 443; 39 Am. Rep. 469.)

It is also well settled that a corporation cannot escape liability upon a plea that the tortious acts were ultra vires. Citing in support the following authorities:

Railroad v. Quigley, 21 How. 202; 16 L. ed. 73. *Merchants Bank v. State Bank*, 10 Wall. 604; 645, 19 L. ed. 1008. *County of Calhoun v. Emigrant Company*, 93 U. S. 124; 130; 23 L. ed. 826. *National Bank v. Graham*, 100 U. S. 699, 702, 25 L. ed. 750. *Salt Lake City v. Hollister*, 118 U. S. 256; 6 Sup. Ct. 1055 30 L. ed. 176. *Railway v. Harris*, 122 U. S. 597, 7 Sup. Ct. 1286; 30 L. ed. 146; *Railway Co. v. Howard*, 178 U. S. 153; 160; 20 Sup. Ct. 880 44 L. ed. 1015. *Alexander v. Relfe*, 74 Mo. 517.

"Corporations are liable for every wrong they commit, and in such cases the doctrine of ultra vires has no application."

"They are also liable for the acts of their servants while such servants are engaged in the business of their principal, in the same manner and to the same extent that individuals are liable under like circumstances."

Merchants Bank v. State Bank, 10 Wall 604; 19 L. ed. 1008. Ultra

vires is no defense to an action for fraud and deceit. Morawetz on Private Corporations, §§ 726-7. Morse on Banks and Banking, (4th Ed.) § 727.

"The proposition is sustained by the authorities that a corporation may be charged with any wrong that may be committed through an agent, and may be held liable for any damages caused by his deceit or false representations. In such case the doctrine of ultra vires has no application." *Dorsey Mach. Co. v. McCaffey*, 139 Ind. 545; 38 N. E. 208; 47 Am. St. Rep. 290 cited by the court.

"There is no rule of law which requires men in their business transactions to act upon the presumption that all men are knaves and liars, and which declares them guilty of negligence, and refuses them redress, whenever they fail to act on that presumption." *Strand v. Griffith*, 97 Fed. 856-7. 12 R. C. L. 360. *Pronger v. Old National Bank*, 56 Pac. 391. (Wash.)

"If the officer purports to represent the bank in making reply to the inquiry, the inquirer has a right to rely upon the statement as being the statement of the bank, and "ultra vires" will not shield the bank from liability for the officer's fraud. Such is the holding of the courts. *Nevada Bank v. Portland Nat'l. Bank*, 59 Fed. 338. *Hindman v. First Nat'l. Bank of Louisville*, 98 Fed. (6th Cir.) 562; 39 C. C. A. 1; 48 L.R.A. 210, opinion by Taft, Judge. Same case 112 Fed. 931, on second appeal opinion by Lurton, Judge.

"It is enough to entitle plaintiff to recovery if the false representation complained of was a material inducement to the contract or transaction which occasioned the jury, although there may have been other co-operating inducements." *Sioux National Bank v. Norfolk State Bank* 56 Fed. 139.

Lawrence, Murphy & Nilles, for respondent.

One who deals with the President of a National Bank in a transaction known to be outside the legitimate sphere of its administration, has no right to presume that the act of the officer has been sanctioned by the Board of directors or other governing body as an act done by an officer of such bank in furtherance of his business venture which is in excess of the corporate powers cannot be said to be an act which is within the scope of the customary powers of such officer. *Bank v. Smith*, 77 Fed. 129; *Bank of Manistee v. Bank of Milwaukee*, 83 Fed. 725; *Gas*

Company v. Lansden, 172 U. S. 534; 43 Law. ed. 543; Wilkin-Hale Bank v. Herstein, 149 Pac. 1109.

It is elementary of course that false and fraudulent representations for which any principal is responsible when made through an agent must have been made in the course of his service for the principal or by the principal's authority. In Gas Company v. Lansden, 172 U. S. 534; 43 L. ed. 543.

That a transaction which is ultra vires is void and that no rights grow out of it and no liability is incurred in such transaction except that if the corporation or its agents have received money or property in such unlawful transaction and an accounting must be made therefor. Bank of Manistee v. Bank of Milwaukee, 83 Fed. 725; Wilkin-Hale Bank v. Herstein, 149 Pac. 1109; Commercial Bank v. Pirie, 82 Fed. 799; Merchants Bank v. Baird, 160 Fed. 642.

Statement.

BRONSON, J. This is an action to recover damages for fraud and deceit in the sale and negotiation of a real estate mortgage. The complaint alleges that the defendant, through deceitful and fraudulent practices, loaned \$2,000 of plaintiff's money, in its custody, upon a worthless real estate mortgage. The answer asserts that the transaction was a brokerage transaction and was ultra vires, under the National Banking Act (13 Stat. 99).

The action was submitted to a jury upon a special verdict comprising 56 questions. The verdict was favorable to the plaintiff. The plaintiff thereafter moved for judgment upon the special verdict. The defendant likewise moved for judgment in its favor upon the special verdict, or, in the alternative, for judgment notwithstanding the verdict. The trial court denied the motion of the plaintiff and made an order dismissing the action with prejudice. Judgment was so entered. The plaintiff has appealed. The facts are substantially as follows:

For many years, from 1891 to 1906, the plaintiff resided in Arthur, a town tributary to Casselton, engaged in the mercantile business. During this time he did a banking business with the defendant. He had a checking account, a merchandise checking account, and an account of borrowed money. The checking account extended from 1891 to 1908, and the loan account from 1891 until it was closed in 1905. R. C. Kittel was the president of the bank for some 10 or 12 years prior to the latter part of No-

vember, 1915. He was actively in charge of the business of the bank generally. The plaintiff became acquainted with Kittel after Kittel's connection with the bank. In 1906, the plaintiff, retiring from business, removed to his former home in Lebanon, Ohio. He continued to do business with the bank. He left certain moneys upon time certificates of deposit. Other moneys were paid into the bank to his credit. Later, when the time deposits matured, he received payment and then left \$2,000 in the bank to be loaned for him upon real estate. The concern of this action is the manner in which this \$2,000, left with the bank, was handled. The defendant went into the hands of a receiver in December, 1915, but thereafter it was reinstated and has since continued as a national bank. The correspondence between the parties is voluminous; it dates from 1906 to about 1915; it is largely between the plaintiff and R. C. Kittel, the president of the bank; some is with one Weiser, cashier. There is an occasional letter from others connected with the bank. The correspondence to the plaintiff is upon the stationery of the bank. The great majority of the letters are signed by R. C. Kittel, president. Some are simply signed R. C. Kittel. Some of the letters written by the plaintiff were addressed to R. C. Kittel. The plaintiff testifies, however, that he never had any personal dealings with the officers of the bank; that he addressed his envelopes to the bank, to its cashier, or to its president. It is deemed necessary for the consideration of the issues to state substantial portions of this correspondence.

In August, 1906, Kittel, president, wrote the plaintiff that they were making out five new certificates of deposit and filing the same in the vault subject to plaintiff's order. In March, 1907, Kittel, president, wrote plaintiff that the defendant bank, in his estimation, was as strong as any in the whole country; that plaintiff's money with the bank was as safe as with any bank in the United States; and that they would be glad at all times to look after his business. In October, 1907, Kittel wrote plaintiff that, if he would like a good loan for a thousand or two at a fair rate of interest, he would be very glad to get one for him either on land or on some property in Arthur. In November, 1907, he wrote that he could get some very nice loans secured on mortgages on farms which would net 6 per cent.; that "we supply a good many of our customers here with different forms of investments," and that in view of his being an old customer they would be glad to extend the same services to him. This letter is signed by Kittel, personally, and is on the bank stationery. Again, in November, 1907, he wrote suggesting a particular loan. In December,

1907, he wrote concerning the Ellsbury loan; inclosing an application, he stated that it would be a good loan and that, if plaintiff wanted the money on the loan next fall, he would be very glad to take it off his hands; that, if he wished, his letter might stand as his agreement on that point. This was signed by Kittel, president. In the same month, the cashier, Weiser, wrote, inclosing three time certificates amounting to \$1,200, and charging plaintiff's account with such amount. In the same month Kittel, president, wrote, inclosing the Ellsbury first mortgage note for \$2,000, with interest coupons and stating that if he contemplated selling the same back to us next summer, he should leave the indorsement on the back in blank and not record the assignment; that when he was ready to sell it back all he would have to do would be to take back the papers and destroy the assignment. In January, 1908, one Knight, upon bank stationery, wrote, inclosing the Ellsbury mortgage deed.

In March, 1908, plaintiff wrote Weiser, cashier, inclosing time certificates amounting to \$3,700 and Ellsbury note for \$2,000, requesting that the package be put in the bank safe for safe-keeping. He advised that he sent them to the cashier instead of Kittel because Kittel seemed to be away a good deal of the time. In April, 1908, the cashier replied, acknowledging receipt of certificates and the note, and requesting plaintiff to call on him any time he could be of service. In December, 1908, Kittel wrote:

"We will attend to the collection and remittance on the Ellsbury interest coupon."

In November, 1909, plaintiff wrote Kittel, president, to collect and remit interest on Ellsbury coupon note of \$130 in the bank's possession. Likewise, in November, 1910, plaintiff wrote Weiser, cashier, to detach Ellsbury interest coupon and send it to the Lucca Bank for collection and remittance to him. In response to this letter Kittel, president, in December, 1910, wrote that the coupon had been sent to the Lucca Bank with instructions to remit direct to plaintiff, and also advised that in addressing any communications in the future he had better address them simply to him or to the bank and they would have their prompt attention. In December, 1911, Kittel, president, wrote that he had detached the Ellsbury interest coupon and was sending it to Lucca for collection; that he would advise as soon as it was paid. In November, 1912, Kittel, president, wrote that the Ellsbury loan would be due on December 1st; that "renewal is desired"; that he should be very glad to make them a new loan, but desired to give plaintiff the preference; that Ellsbury had been quoted a rate

of 6 per cent., but he preferred "to do business with us." In November, 1912, plaintiff wrote Kittel in reply that if Ellsbury wished to renew at $6\frac{1}{2}$ per cent. she could do so. Kittel promptly answered that he did not believe he could secure $6\frac{1}{2}$ per cent. interest; that if he would like a better interest return he could get some good loans through a bank at Towner; that he would look after these loans the same as any loans from Casselton or Lucca; that he would expect to investigate the security, the papers, and the title, and to "look after the principal and collection of interest for you" until the loan was fully paid. In December, 1912, plaintiff wrote Kittel that he would renew Ellsbury loan at $6\frac{1}{4}$ per cent.; otherwise, "they may pay it in to you and I will place it elsewhere pretty soon." In December, 1912, Kittel, president, answered that Ellsbury would not accept proposition; that he would draw satisfaction of the mortgage and send it to plaintiff and plaintiff could execute it and "send it to us for collection." In this letter he further wrote about some loans at Towner and about splitting commission, so as to net $6\frac{1}{2}$ per cent.; that—

"if you want me to get you a couple loans to take the place of the Ellsbury loan I will get them, and just as soon as the interest stops on the Ellsbury loan it will begin on the other loans for you. Any loans that I sell you will be handled by the bank here; we look after the collection and remittance of interest and attend to the loans for you until it is finally paid and discharged."

Plaintiff answered this letter by stating the proposition to reloan the Ellsbury loan at $6\frac{1}{2}$ per cent. annual interest would be satisfactory; that he wanted abstracts showing first mortgages duly approved by Pollock or Callahan. He trusted that in replacing of loan he would get it on land that was enhancing in value. This letter was addressed to Kittel, president. In January, 1913, Kittel, president, wrote that he would procure for him one or two good loans to take the place of the Ellsbury loan; that he might rest assured "that whatever loans I take on and put my money into and then sell over to you are good loans and well secured"; that "the Ellsbury loan proceeds will be deposited in the First State Bank of Lucca and they will allow you interest on the money while it is there and until I can get you a new loan." On November 28, 1913, Kittel, president, wrote:

"I was under the impression that the Ellsbury loan had been paid and a new loan obtained for you. Evidently this is not the case. The Ellsbury loan is now past due and should be cleaned up."

On the same day he wrote another letter about some mortgages on

wild lands in Billings county, one for \$2,500 and the other for \$3,000. Plaintiff responded by not accepting such mortgages and stating that he had concluded it best for him (Kittel) to reloan the \$2,000 Ellsbury loan upon real estate at not less than $6\frac{1}{2}$ per cent. In January, 1914, Kittel, president, wrote, inclosing note of the Alfalfa Valley Land Company for \$2,000, payable December 1, 1919, at 7 per cent. interest since December 1, 1913. He stated:

"I got you this loan in place of the Ellsbury loan. I have had some trouble in getting you a loan to net 7 per cent. that I would recommend. This loan is well secured on a good quarter section in Pierce county, N. D. The mortgage in your favor has been sent up for record, and when it is returned we will register it here and forward it to you. The interest for last year I will have to check up. We are a little mixed up with Lucca as to just what we are to get from Ellsbury."

Plaintiff responded by returning the note and stating the loan was not satisfactory; that he did not expect to make a loan and have the papers made out without first laying the proposition before him; that the loan was too long, as he was 68 years old; that he and his wife were not in good health; that if he accepted the loan he would want an agreement from him as president of the bank to cash this loan or resell it at any time that he would wish and to pay to him the full value of the loan; and he would want to know that the real value of the land far exceeded the value of the mortgage. In this letter he also stated that he wanted to know whether the land was wild or improved, whether the land was level or hilly, who this land company was, and why the head officers of the land company did not sign the notes. On January 30, 1914, Kittel, president, answered:

"I have been looking around for you during the last year to get you a loan that I could recommend and that would bring you 7 per cent. interest."

"W. F. Kittel and myself shall be glad to give you an agreement in writing to take this land off your hands December 1, 1916, or on any interest payment date thereafter, if you or Mrs. Brandenburg request us."

"Ordinarily, we would not do this; when we sell loans we sell on its merits and we simply do the best we can"; that this land company owned some 25,000 acres of land in McHenry county; that he handled most of their business down here; that the secretary and treasurer is spending the winter in Europe; that the assistant secretary and assistant treasurer were

authorized under the by-laws to execute notes and mortgages; that the land was level land, good medium soil, was all under cultivation, and was worth \$4,800; that he had personally seen this land; that he would hold the note and original mortgage there and file it away for safe-keeping; that he might rest assured that he had secured a good loan; one that will pay its interest and principal promptly and one that is well secured.

In response plaintiff wrote Kittel, president, that he did not doubt his best intentions to serve plaintiff's best interests; that "you did not give me a description of the land"; "we well know that if you live and continue at the head of the First National Bank of Casselton our interests there would be safe, but it occurred to us that something might happen to bring forth your successor and that our interests might suffer"; that "your proposition and description of this land in yours of January 30th is very satisfactory"; that he was glad to know that he had personally seen the land. He requested that Kittel and W. F. Kittel make up an agreement to take up the loan as proposed.

"Taking it for granted you have been furnished with abstract duly approved by a competent attorney showing the Alfalfa Valley Land Company have a legal title to this land, I would like to see the mortgage papers when completed and will return them to you for safe-keeping."

On February 11, 1914, Kittel, president, wrote, inclosing agreement to repurchase the loan, stating that the abstract was being brought down to date, that it was approved by Mr. Callahan; that he would be glad to send them to him for examination, together with the mortgage, when they came back from the register of deeds. He further stated:

"As I understand it, you desire to have me remit the interest due on the Ellsbury loan to Carver and he will issue a certificate of deposit for it, payable in six months with 6 per cent interest." (Carver was cashier of the Lucca State Bank.)

In March, 1914, Kittel, president, wrote that he had received the abstract; it was all in first-class shape excepting that they neglected to record the deed they got to the land from the Northern Trading Company; that he was asking them to hunt up the original deed and file it for record, so as to complete the title. In May, 1914, plaintiff wrote Kittel, inquiring about the recording of the deed and stating that he presumed that this had been done, but that Kittel had overlooked writing him; that he would feel better satisfied when he knew the title was complete. In June, 1914, Kittel, president, wrote that he issued instructions in connection with this

loan and sent them to Towner to be carried out; "without question those things have been attended to"; "at any rate your mortgage is a valid first lien, but I want the abstract completed and brought down to date, so that I do not have to keep it in mind and so that I will know that everything is closed up." On November 24, 1914, plaintiff wrote Kittel instructing him to collect the first coupon for \$140 on the Alfalfa Valley Land Company note, and requesting Kittel to find out definitely whether the deed of the Northern Trading Company to the land company had been recorded, so as to complete the title. Kittel, president, on November 30, 1914, wrote that the interest coupon would be paid "tomorrow promptly"; that he would have the boys mail a draft for it; that the Northern Trading Company, since the floating of the loan, had taken over from the land company all land in Pierce county including the land on which plaintiff had a mortgage; that he had the abstract, but returned it to Towner for completion; that "there will be no trouble whatever with the title." On December 2, 1915, Kittel, president, upon stationery of the Northern Trading Company, wrote plaintiff that they had taken over the land of the Alfalfa Valley Land Company and assumed the payment of his mortgage; that they were just completing an audit and would send to him a check for the amount due plus accrued interest; that "I have disposed of all my banking interests and am devoting myself to this company." On December 20, 1915, the receiver of the defendant bank sent to the plaintiff the \$2,000 mortgage note of the Alfalfa Valley Land Company and the mortgage deed.

There is evidence in the record that this land was poor land, practically a sand hill, and worth from \$800 to \$1,500. The abstract of the land introduced certified by the abstractor in February, 1914, discloses title in the Northern Trading Company and this land company mortgage to the plaintiff, filed January 14, 1914. The abstract as later certified in November, 1916, by the abstractor, shows a judgment of the National City Bank of Chicago against the Northern Trading Company for \$15,000, docketed in January, 1916. Under this judgment, upon execution proceedings, this land was sold at sheriff's sale to the National City Bank of Chicago for \$1,000 on January 10, 1918. In December, 1916, the plaintiff brought an action against this land company, the Northern Trading Company, and the National City Bank of Chicago to have adjudged the mortgage of the land and to determine the adverse interest of the defendants. The district court determined the judgment lien of the bank to

be a valid prior lien upon the premises. In July, 1917, R. C. Kittel & Co. and as individuals, were adjudicated bankrupts. There is also evidence in the record to the effect that the Alfalfa Valley Land Company and the Northern Trading Company are insolvent. R. C. Kittel was president of the First State Bank of Lucca, vice president and general manager of the Alfalfa Valley Land Company, and vice president of the Northern Trading Company. His brother, W. F. Kittel, was cashier of the defendant bank and secretary of the Northern Trading Company.

In the record there is a real estate loan record of the bank. There are 492 loans in this register aggregating \$1,449,500, and covering a period between January 12, 1904, and October 20, 1914. Eight loans, aggregating \$30,000, are listed, running to the defendant, as mortgagee. There appear numerous loans wherein R. C. Kittel is mortgagee, and likewise wherein the Northern Trading Company is mortgagee. There appears a loan from the Ellsburys to the Northern Trading Company in 1910, and likewise another loan from the Ellsburys to R. C. Kittel in 1912, both of which were assigned to the Farmers' & Merchants' Savings Bank of Minneapolis. Evidence was introduced to the effect that no commission, exchange, or consideration was ever paid into the bank on either the Ellsbury or the Alfalfa Valley Land Company loan; that receipt of the proceeds of such transactions does not appear on any of the books of the defendant bank. The testimony of the present cashier, Crick, refers to this real estate register as a record of real estate loans made for the convenience of customers. He testified that if the Ellsbury and Alfalfa Valley Land Company loans were handled by the bank they would appear and go through the records of the bank, and if there was anything received on the proceeds of them they would appear on the records of the bank, and if such proceeds were received and they did not appear the books would be out of balance, and that the books of the bank were not out of balance.

In an exhibit introduced it is shown that the assistant secretary of the land company was specifically not authorized by the by-laws to execute notes and mortgages of such company. In the mortgage from such land company to plaintiff, it appears that Mr. Patten, the assistant cashier of the defendant, took the acknowledgment of Thompson, the assistant secretary, who executed such mortgage in behalf of the incorporated land company.

Upon special questions submitted, the jury found that the defendant

agreed with the plaintiff to collect the Ellsbury note and reinvest the proceeds in another good first real estate mortgage; that it had in its possession for safe-keeping and collection this \$2,000 Ellsbury note; that the plaintiff sent a release of this Ellsbury mortgage to the defendant bank or its officers for purposes of collecting the Ellsbury mortgage; that the proceeds of this mortgage was paid into the Lucca State Bank and the funds received by the defendant bank; that the defendant on or about January 20, 1914, had under its control or in its possession \$2,000, the proceeds of the Ellsbury loan; that the defendant forwarded to the plaintiff on or about January 20, 1914, the Alfalfa Valley Land Company note and mortgage, and represented to the plaintiff that the proceeds of the Ellsbury mortgage was invested in such mortgage and that the title of the lands was in such land company; that it represented that the assistant secretary of this land company was authorized under the by-laws to execute notes and mortgages, and that this mortgage was a first lien upon the land; that he represented that this loan was well secured and that the land was level land, good medium soil, all under cultivation, and well located in a good neighborhood; that it promised to procure and record a deed from the Northern Trading Company to this land company; that in the transactions of collecting the Ellsbury loan and the reinvestment of the proceeds in the land company loan R. C. Kittel was acting as president of the defendant and the plaintiff dealt with him as such; that the representations were made with the intent to deceive the plaintiff and for the purpose of inducing him to accept the land company loan; that the officer making such representations did not believe them to be true and had no reasonable grounds for so believing; that the plaintiff believed and relied upon such representations, and that they were false and untrue; that since January 25, 1916, this land company, the Northern Trading Company, and R. C. Kittel have been insolvent; that plaintiff was damaged in the sum of \$2,000, with interest.

Contentions.

The plaintiff contends that the special findings of the jury are sustained by the evidence; that the transactions involve acts of a bank *intra vires*; and that, even though the same be *ultra vires*, the bank may not avail itself of such defense in an action for fraud and deceit.

The defendant attacks the special findings of the jury. The contention

is made that plaintiff's dealings were with Kittel personally; that Kittel was connected with many other concerns and that, most favorably considered, Kittel was the mere agent of the bank; that the transaction involved was not a bank transaction; that it was a mere brokerage transaction in any event; that under the National Banking Act the defendant was prohibited from engaging in such transaction, which the plaintiff, as a matter of law, was bound to know; that there is a total failure of evidence to justify the findings of the jury; that plaintiff turned over to Kittel, as representative of the bank, a satisfaction of the Ellsbury mortgage, and that Kittel, as representative, collected the proceeds thereof and used the same in payment of the land company loan; that the evidence conclusively shows that there is no conversion of plaintiff's security and no tortious act by any agent of the bank while acting within the course of his employment; that, furthermore, there is no evidence to show that the defendant bank had received a dollar of plaintiff's money out of the proceeds of the Ellsbury loan or from the Lucca Bank in connection therewith, or that it made any profit or commission of any kind; that the basis of plaintiff's claim for fraud and deceit is based upon a personal letter of the president of the defendant bank concerning a transaction in which the defendant bank could not engage and involving at best only a mere brokerage transaction for which the defendant bank was not liable for the personal activities of its president Kittel outside of the scope of his employment; that, furthermore, the evidence fails to disclose any receipt of a satisfaction or other paper from the plaintiff, or, upon the books of the bank, receipt of any moneys in connection with the Ellsbury or Altafa Valley Land Company, so as to make the transaction of Kittel with the plaintiff a bank transaction.

Decision.

The facts and contentions of the parties have been set forth somewhat at length in view of the complicated questions involved.

After full consideration of the voluminous record, we are satisfied that the findings of the jury find support in the evidence. The plaintiff did business with the defendant bank before the arrival of R. C. Kittel upon the scene of prominent activities. He was necessarily compelled to do business with the defendant bank after the fall of Mr. Kittel from power. This record undisputably shows that the plaintiff, through a long

course of years, transacted much business with the defendant bank, relying upon the integrity of its officials and the stability of the bank in its transactions as such. The evidence fairly justifies the inferences and findings of the jury that the plaintiff did much of his business with and through Kittel by reason of Kittel's official position with the bank and by reason of the bank, through its activities and its officers permitting, if not directing in some cases, plaintiff's business transactions to be considered and handled through its president, Mr. Kittel. Upon this record the jury were further fully warranted in concluding that the plaintiff understood that he was doing business with the bank in the transaction involved and that he was not aware of Kittel's various activities, personally, in the partnership relation, or in his connections with the corporations of the Northern Trading Company and the Alfalfa Valley Land Company. The defendant denominates as crucial questions: Did plaintiff turn over to Kittel the satisfaction of the Ellsbury mortgage? Did Kittel collect the proceeds of the Ellsbury mortgage and turn such proceeds over to the land company or some third party? Strenuously it contends that the evidence conclusively fails to show that Kittel or the bank so did.

We are of the opinion that the findings of the jury in this regard are sustained in the evidence. The fact of the physical transfer of the satisfaction or of the actual receipt of the proceeds of the Ellsbury mortgage is not, perhaps, shown directly in the evidence, but it is fully shown by indirection through facts that justify such conclusion. In Hamlet it is said, "By indirections find directions out." The defendant bank possessed the Ellsbury note and mortgage upon deposit made of the same by plaintiff. When this loan came due the bank, as directed, forwarded these deposit papers for collection. Kittel drew up a satisfaction of mortgage and he directed its execution by plaintiff and that it be forwarded by plaintiff to the Lucca State Bank. The correspondence between Kittel and the plaintiff fully shows that this Ellsbury mortgage was in fact paid.

When it was paid it is difficult to determine. The loan became due December 1, 1912, yet on November 28, 1913, Kittel advised to the effect that it had not yet been paid, but should be cleaned up. On February 11, 1914, Kittel, in his letter to plaintiff, spoke of remitting the interest due on the Ellsbury loan to Carver of the Lucca State Bank for purpose of having issued a certificate of deposit. Apparently, therefore, between December 1, 1913, and February 11, 1914, on the face of this record, this

Ellsbury loan was paid; apparently, furthermore, Kittel possessed at least the interest due thereon, since he wrote about remitting it to the Lucca State Bank. Who was authorized and entitled upon this record to receive the proceeds of this Ellsbury loan? The answer is that the defendant bank was. The fact that Kittel possessed the interest involved in the proceeds of the Ellsbury loan is indubitable and persuasive evidence that he, as president, also possessed the principal. The correspondence shows that Kittel, as president, was arranging for the purpose of replacing the proceeds of this money in a new loan. Representations were made by him upon various prospective loans. Finally, in advance of plaintiff's consent, the Alfalfa Valley Land Company loan was placed, and the evidence of negotiating such loan was made to plaintiff by sending to him the notes therefor. These at first were found objectionable, but later upon explanation, were accepted by the plaintiff. It seems obvious as a fact that the handling of the notes or mortgage and the satisfaction thereof in the Ellsbury loan were through Kittel, and, further, that Kittel necessarily received the proceeds in the payment thereof. The claim of the bank that this was a personal matter with Kittel and not one with which it was concerned, because the records of the bank show none of these transactions, and that they received neither profit nor commission thereon, is negated by the record facts that for years this bank was concerned with the negotiations of real estate mortgages. Upon the records of the bank, it was concerned at least to the extent of maintaining a loan register, wherein were listed its own loans, and of looking after collections upon interest due on such loans. It knew about the extensive business conducted in the name of its president, Kittel, as mortgagee in many of these loans; it knew to some extent about the business of the Northern Trading Company. It must be evident that the functions of the bank were used, in fact, in connection with this real estate business carried on so extensively for many years. Furthermore, the bank itself, concerning this Alfalfa Valley Land Company, had some knowledge of the transaction, for the reason that there appears, in addition to the fact of the acknowledgements taken by its assistant cashier upon the execution of the mortgage, in the correspondence, a transmittal of the mortgage itself to the plaintiff from the defendant bank through one Knight. We are not convinced that the participation of the bank is made any less evident by the fact that the proceeds of the Ellsbury mortgage when received were not carried through and upon the paper records of the bank by the nota-

tion of the cash receipt of the proceeds and a credit made to the account of Brandenburg or the Alfalfa Valley Land Company. The participation was equivalent, if Kittel, as president, received the proceeds, and, as president, immediately turned them over to the Alfalfa Valley Land Company without any entry upon the records of the bank. The present cashier in his testimony admits that in some cases the performance of an escrow agreement might not show upon the bank books.

The evidence is ample that the plaintiff was deceived and defrauded; he received a pretended mortgage that never was and never has been a mortgage in fact. If Kittel had taken the proceeds of the Ellsbury loan and appropriated the same directly for his own purposes, the plaintiff would not thus have been more defrauded nor more deceived. The evidence warrants the findings that the plaintiff relied on the representations of the defendant's officers concerning the transaction involved, and was defrauded and deceived thereby. It is claimed, however, that this transaction was not a bank transaction; that at most it is simply a brokerage transaction; that the acts of Kittel were beyond the scope of his employment and as far as the bank is concerned are *ultra vires*; that therefore no liability can be fastened upon the bank. These are the crucial legal questions upon the record and the findings of the jury. It remains for consideration therefore to ascertain to what extent the transactions involved herein are brokerage transactions; to what extent within the lawful power of the bank; to what extent the bank is liable for the *ultra vires* acts, so far as they obtain, of the defendant's officials.

When the plaintiff sent to the bank the Ellsbury note and mortgage for safe-keeping, care, and collection, the act of the bank in receiving the same and assuming the duty of custody, care, and collection assuredly was acting *intra vires*. 7 C. J. 630, 817; Morse on Banks and Banking (5th ed.) §§ 191, 192; First Nat. Bk. v. Graham, 100 U. S. 699, 25 L. ed. 750, 36 Am. Rep. 592. When the Ellsbury loan became due and the plaintiff requested that the note and mortgage and the satisfaction in connection therewith be forwarded for collection, again the bank assuredly was acting *intra vires*. 7 C. J. 816; Morse on Banks and Banking (5th ed.) §§ 52, 208. Upon this record, who was authorized to receive the proceeds of this Ellsbury loan? We are of the opinion that the jury were warranted in finding that the defendant bank was so authorized; that Kittel personally was not so authorized. The defendant contends that the evidence does not disclose that either the bank or Kittel did receive the proceeds of such

Ellsbury loan. We are of the opinion, as heretofore stated, that the jury were warranted in finding that the bank did receive the proceeds of such Ellsbury loan, and that it is not in a position to assert that it did not receive such proceeds when it was authorized so to do and when it was understood from the correspondence had with the plaintiff that it was its duty so to do. Again, in receiving such proceeds of the Ellsbury loan the bank was acting *intra vires*. Thereupon the plaintiff had the sum of \$2,000, concerning which it was the duty of the defendant bank to account to the plaintiff therefor. The interest accrued upon the Ellsbury loan had been paid to the plaintiff by the defendant. Upon representations made by the defendant's president concerning the disposition of this \$2,000, the plaintiff, in legal effect, authorized the defendant bank to pay out this money upon a first mortgage lien upon real estate. Again, it may be said that the defendant bank in paying out such money pursuant to plaintiff's legal authorization was acting *intra vires*. *Kennedy v. State Bank*, 22 N. D. 69, 132 N. W. 657; *Wagner v. First Nat. Bank of Casselton*, 173 N. W. 814; *First Nat. Bank v. Henry*, 159 Ala. 367, 49 South, 97; *Emmerling v. First Nat. Bk. of Pembina*, N. D., 97 Fed. 739, 38 C. C. A. 399; *Citizens' Nat. Bank v. Davisson*, 229 U. S. 212, 33 Sup. Ct. 625, 57 L. ed. 1153, Ann. Cas. 1915A, 272. See *Minn. Ins. Co. v. Tagus State Bank*, 34 N. D. 566, 158 N. W. 1063, L. R. A. 1917A, 519.

Thereupon Kittel, the president through his position as such, fraudulently and deceitfully represented to the plaintiff concerning the prospective first mortgage lien, to be given to the plaintiff for the proceeds of such Ellsbury loan. He may have acted personally for his own benefit or for the benefit of other concerns in which he was interested. He may have deceived the other bank officers and fraudulently imposed upon them. He may have been the person that received whatever benefit would accrue in the transaction from the making of such mortgage. His acts, so far as they made such representations and so far as they may have pretended that the bank was making the loan and was receiving or might receive the benefit therefrom, might have been *ultra vires* and beyond his authority and beyond the authority of the bank, so far as it concerned the brokerage transaction. The bank, however, still had a duty to perform from its course of conduct with the plaintiff through the years and in connection with the proceeds of this Ellsbury loan. Through its president it appropriated the proceeds of this loan and placed the same in a valueless mortgage, contrary to the legal effect of its instructions and in

violation of its duty. The bank might have refused to have paid out such money upon receiving a first mortgage lien therefor. It might have specifically informed the plaintiff that it would assume no duty nor obligation in connection with the loaning of any moneys of the plaintiff within its control or in its possession. It assumed, however, to perform its duty. Part of this duty was *intra vires*. The acts of its officer, the president, were *ultra vires*. Through the bank's permissive acts, its officer's acts were effectuated. The bank adopted such acts in performing its duty. The resulting situation was that the plaintiff was defrauded and deceived. Upon such analysis the conclusion follows that the defendant is not in a position to assert the defense of *ultra vires* in an action for the fraud and deceit practised, and that, furthermore, in connection with its own acts *intra vires* and through the fraud and deceit practised, it is liable for the damages that the plaintiff has sustained. The authorities well recognize the principle of law that a bank may not avail itself of the defense of *ultra vires* when fraud and deceit have been practised, even though it has received no benefit by reason thereof. *Smith v. First Nat. Bk. of Casselton* (C. C. A.) 268 Fed. 780; *First Nat. Bk. v. Henry*, *supra*, 159 Ala. 367, 49 So. 97, 101; *First Nat. Bank v. Graham*, *supra*; *Stewart v. Wright*, 147 Fed. 321, 77 C. C. A. 499; *Gilbert v. Citizens' Nat. Bank*, 61 Okla. 112, 160 Pac. 635, L. R. A. 1917A, 740, note 749; *Anderson v. First Nat. Bank*, 5 N. D. 451, 67 N. W. 821; *First Nat. Bank v. Anderson*, 172 U. S. 573, 19 Sup. Ct. 284, 43 L. ed. 558; *Hindman v. First Nat. Bank*, 98 Fed. 562, 39 C. C. A. 1, 48 L. R. A. 210; *Id.*, 112 Fed. 931; *Zinc Carbonate Co. v. First Nat. Bank*, 103 Wis. 125, 79 N. W. 229, 74 Am. St. Rep. 845; *Nevada Bank v. Portland Nat. Bank* (C. C.) 59 Fed. 338; *Morse on Banks and Banking*, § 727; 7 C. J. 835.

It is therefore ordered that judgment for the plaintiff be entered, upon the special verdict, pursuant to plaintiff's motion, and that the case be remanded for further proceedings in accordance with this opinion.

CHRISTIANSON and BIRDZELL, JJ., concur.

ROBINSON, C. J., dissents.

GRACE, J. (specially concurring). The plaintiff for many years had transacted business with the bank. He reposed every confidence in it.

He had implicit faith in the integrity of it and its officials. He was transacting business with the bank as such, and not with the officials individually. In the transaction here under consideration he was deceived and defrauded; his money was invested in a worthless security. He was led to do this through the wrongful acts, misrepresentation, and deception of one of the principal officials of the bank. In such circumstances the bank should not be permitted to escape liability.

Though the facts were somewhat different in the case of *Keith v. First National Bank*, 36 N. D. 315, 162 N. W. 961, L. R. A. 1917E, 901, it was there held, in substance, that, where the officer of a bank transacts business with customers, which business the bank is authorized to do, or which is incidental to its ordinary and regular business, and in the course of the transactions violates the trust relations between the bank and the customer, the bank was liable for any damages thereby suffered by the customer.

The same principle is applicable to the case at bar, and, in reality, is the principle invoked in the main opinion.

FRED E. MERRICK, as Executor of the Will of William J. Morgridge, deceased, Respondent, v. RALPH WALDO PRESCOTT, et al., Defendants; RALPH WALDO PRESCOTT and WALLACE M. PRESCOTT, Appellants.

(183 N. W. 1011.)

Statutory provisions — existence of will must be proved.

1. In this state a will cannot be proved as a lost or destroyed will unless the same is proved to have been in existence at the death of the testator, or is shown to have been fraudulently destroyed during his lifetime.

Wills — petition to prove will as destroyed document held insufficient.

2. In the instant case it is *held* that a will alleged to have been fraudulently destroyed during the lifetime of the testator is not shown to have been so destroyed.

Opinion filed June 8, 1921. Rehearing denied July 23, 1921.

Appeal from the District Court of Ramsey County, *Buttz*, J.

Defendants appeal from an order overruling a demurrer to a petition for the probate of a will alleged to have been fraudulently destroyed.

Reversed and dismissed.

W. M. Anderson, Cuthbert, Smythe & Wheeler, and *Middaugh & Cuthbert*, for contesting respondents and appellants.

"The construction placed upon the statute by the courts of the state from which it was adopted is regarded as persuasive, and indeed, is entitled to very great weight, with the courts of the adopting state, but not as conclusive." From Text, 36 Cyc. 1156.

If the will was lost or destroyed after her death, it must be alleged and proved to have been in existence at the time of her death; if it was lost or destroyed before her death, it must be alleged and proved to have been fraudulently destroyed in her lifetime." § 1339 Code of Civ. Proc.; Estate of Kidder, 57 Cal. 282; Estate of Johnson, 134 Cal. 662.

"No will shall be proved as a lost or destroyed will unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently destroyed in the lifetime of the testator." § 8643, Comp. Laws, of 1913, N. D.

"Express revocation of a will can only be shown by evidence of some of the acts designated by the statute, and unless revoked by another instrument, as thereby prescribed, the will itself must be destroyed or bear some marks of defacement or spoliation, manifesting the intent to revoke." *Graham v. Birch*, (Minn.) 49 N. W. 697; 40 Cyc. 1171-1173.

"Under such a statute, in order to prove a lost or destroyed will, the proponent must prove either that the will was actually in existence at the time of the testator's death, or that it is in existence in contemplation of law, which it would be if destroyed under the conditions stipulated in the statute." Note *Re Francis*, Col. 1, 50 L. R. A. (N. S.) 863.

Adamson & Thompson, and *Fisk, Murphy & Nash*, for respondent.

"One lacking testamentary capacity is not competent, by means of an attempted testamentary act, to revoke a prior will." In *re Will of David Goldsticker*, 18 L. R. A. (N. S.) 99, 192 N. Y. 35, 84 N. E. 581; *Case*

note pn p. 99 vol. 18 L. R. A. (N. S.); Apperson v. Cottrell, 3 Port (Ala.) 51; 29 Am. Dec. 239; Lang's Est. 65 Cal. 19; 2 Pac. 491; Re Johnson, 40 Conn. 587; Forbing v. Weber, 99 Ind. 588; Allison v. Allison, 7 Dana. 90; Rich v. Gilkey, 73 Me. 595; Rhodes v. Vinson, 9 Gill. 169; 52 Am. Dec. 685; Schaff v. Peters, 11 Mo. App. 447; 90 S. W. 1037; Idley v. Bowen, 11 Wend, 227; Delafield v. Parish, 25 N. Y. 9; Smith v. Waite, 4 Barb. 28; Re Forman, 54 Barb. 274; Re Waldron, 44 N. Y. Sup. 353; Ford v. Ford, 7 Hump. 92; McIntosh v. Moore, 22 Tex. Civ. Ap. 22; 53 S. W. 611.

The doctrine of *res adjudicata* is that "a judgment as to all matters decided thereby and as to all matters necessarily involved in the litigation relating thereto binds and estops all the parties thereto and their privies in all cases where the same matters are again brought in question. See *Moore v. City of Albany*, 98 N. Y. 396-410.

ROBINSON, C. J. This is an appeal from an order overruling a demurrer to a petition for the probate of an alleged will of William J. Morgridge. The will is dated September 19, 1916. A subsequent will, dated November 23, 1917, was held void for want of mental capacity. *Prescott v. Merrick*, 179 N. W. 693. The will in question was destroyed by the parties who secured the will that was held void.

The case above cited shows that in December 1915, Morgridge suffered a stroke of paralysis from the effects of which he never recovered. After that he lived in the General Hospital at Devils Lake. The deceased left property valued at approximately \$80,000. The will provides for bequests as follows: \$100 to Delia F. Morgridge, of Boston, Mass., a sister of deceased; to a nephew, Ralph Waldo Prescott, \$10,000; to one Clara Allen, of Boston, \$100; to Stella Merrick, of Oregon, wife of F. E. Merrick, his former business partner, \$5,000; to Ruth Canfield, of Oregon City, Or., daughter of F. E. and Stella Merrick, \$1,000; to Walter D. and Emerson P. Merrick, sons of F. E. and Stella Merrick, of Medford, Or., \$1,000 each. The balance of the property was devised to the above-named persons in proportion to the amounts bequeathed in the will.

The will now in question bears the same general character as the other will. It leaves the bulk of the property to Merrick and his family though the Merricks are no relations of the testator.

The petition for probate is signed and sworn to by Fred E. Merrick. He avers that on the 23d day of November, 1917, the testator made a will,

which was prepared by Edward F. Flynn, assisted by Fred E. Merrick, and that at the time it was made Flynn and Merrick had in their possession the prior will, and that in the office of Flynn, at Devils Lake, they destroyed the will dated September 19, 1916, by tearing the same to pieces and throwing the pieces away while the deceased was alive and that said act of destruction was done without consulting the deceased, William J. Morgridge, and without his knowledge or consent, and not in his presence, he being then confined in the hospital, and the same was done wholly upon the initiative of said Flynn and Merrick, and upon the belief that the will of September 19, 1916, was void by reason of the second will, which was subsequently held void; that by reason of the acts of Flynn and Merrick the said will dated September 19, 1916, was fraudulently destroyed, and the deceased was fraudulently deprived of his right to dispose of his property by will.

To the petition there was filed a demurrer on two grounds: (1) That the facts stated in the petition are not sufficient to constitute a petition as provided by law for the probate of a will. (2) That the facts stated do not show a fraudulent destruction of the will.

The petition for probate was drafted in view of the statute which provides as follows:

"No will shall be provided as a lost or destroyed will unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently destroyed" during his lifetime. Comp. Laws, § 8643.

The manifest purpose of the petition was to show that the will had been fraudulently destroyed during the lifetime of the testator, and at the same time to excuse the destruction by showing that it was done in good faith. In this case Merrick, the petitioner, is put in a dilemma. If the facts stated do not show a fraudulent destruction of the will, then it cannot be admitted to probate. If the facts stated do show, as they do, that Merrick was a party to the destruction of the will, then his petition must be denied because of the salutary maxim: "No one can take advantage of his own wrong." Fred Merrick cannot plead his own wrong as a reason for the allowance of a will giving a large estate to him and his family, none of whom are heirs of the deceased. Hence the demurrer must be, and it is, sustained, and the petition dismissed.

Reversed.

GRACE and BIRDZELL, JJ., concur.

CHRISTIANSON, J. (concurring specially). This is a proceeding for the probate of a will alleged to have been fraudulently destroyed during the lifetime of the testator. § 8643, C. L. 1913, provides:

"No will shall be proved as a lost or destroyed will unless the same is proved to have been in existence at the death of the testator, or is shown to have been fraudulently destroyed" during his lifetime.

In construing a provision identical in language, the Supreme Court of California ruled:

"Where a will is alleged to have been fraudulently destroyed, the petition for probate of such will must state the facts and circumstances showing such fraud." *Estate of Kidder*, 66 Cal. 487, 6 Pac. 326.

The petition in this proceeding attempts to comply with this rule, and purports to set forth the facts and circumstances which it is alleged constitutes the fraud. In my opinion, however, the facts and circumstances set forth not only fail to constitute fraud, but show affirmatively that the will which it is sought to have admitted to probate was not fraudulently destroyed during the lifetime of the testator. See *Estate of Kidder*, 57 Cal. 282; *Estate of Johnson*, 134 Cal. 662, 66 Pac. 847.

The respondent relies upon the decision of the New York Court of Appeals in *Schultz v. Schultz*, 35 N. Y. 653, 91 Am. Dec. 88. That was an action in equity to establish a lost or destroyed will. It appears from the opinion in that case that New York (in addition to a statute like § 8643, *supra*) had a statute which provided:

"Whenever any will of real or personal estate shall be lost or destroyed, by accident or design, the supreme court shall have power to take proof of the execution and validity of such will, and to establish the same as in the case of lost deeds." 35 N. Y. 654, 91 Am. Dec. 88.

No such provision exists in this state.

I agree that the order appealed from should be reversed, and the proceeding dismissed.

BRONSON, J., concurs.

FARMERS' NATIONAL BANK of Brookings, S. Dak., a corporation,
Respondent, v. L. and M. TUDOR, individually and as co-partners
under the firm name of L. Tudor & Son, Appellants.

(183 N. W. 845.)

Sales — instruction limiting express warranty in sale of cattle to statement that they were free from tuberculosis held erroneous.

1. Defendants purchased certain registered cows and calves from one Walters for \$6,675.00, paying \$2,000.00 cash at the time of purchase, and giving their negotiable promissory note for the balance, secured by a chattel mortgage on the stock. After maturity Walters sold the note to the plaintiff. Default having occurred in the terms of the mortgage, plaintiff brought action to foreclose. The answer admitted all the equities, such as the giving of the note and mortgage and failure to pay the note after its maturity, but interposed the legal defense of breach of warranty, alleging damage in a given amount. Defendants allege that the warranty was to the effect, that Walters, at the time of the sale, represented, stated and warranted that the cattle were in good condition, in perfect health and free from disease, and were in every way all right. It was further alleged that, at the time of the sale, the stock so purchased were infected with tuberculosis. The facts, with reference to the warranty and its breach, and the damages, if any, suffered by defendants thereby, were submitted to a jury. It returned a verdict for plaintiff.

The court, in substance, instructed the jury, that, in order to determine whether there was an express warranty, it must be shown that there was an express, direct affirmation by Walters at or before the time of sale, that the cattle sold were free from the disease of tuberculosis;

It is *held*, for reasons stated in the opinion, that the giving of this instruction, which is fully set out in the opinion, was prejudicial to defendants and was reversible error.

Appeal and error — dismissal of appeal denied.

2. For reasons stated in the opinion, the plaintiff's motion in this court, to dismiss the appeal, is denied.

Opinion filed June 8, 1921.

Appeal from a judgment of the District Court of Cass County:
Englert, J.

Pollock & Pollock and L. L. Twitchell, for appellants.

Engerud, Divet, Holt & Frame, on the brief.

The court erred in refusing to permit the defendants to show by expert testimony that the cattle were afflicted with tuberculosis at the date of their purchase and in restricting the use of Exhibits H and I. *State v. McKone*, 31 N. D. 547; *Bixby v. Omaha Ry. Co.* 75 N. W. 182 (Ia.) and cases cited therein.

An expert is not confined to his own examination or observation in expressing an opinion of an expert nature. *State v. Reilly*, 25 N. D. 355; *State v. Moeller*, 24 N. D. 168; *State v. Moeller*, 20 N. D. 122; *Edington v. Aetna Life Ins. Co.*, 77 N. Y. 564; *Eckles & Brown v. Bates*, 26 Ala. 655; *Lush v. McDonald*, 57 Am. Dec. 566.

A party will not be permitted to pick out parts of a document favorable to himself and exclude that which is unfavorable relating to the same subject. *Guild v. Moore*, 32 N. D. 458; 1 *Jones Commentaries on Evidence*, (1913 ed.), 171 and 294.

The reason for this rule is most cogently stated in *Ah Doon v. Smith*, 34 Pac. 1093. The record shows that the defendants stated that they wanted a nice clean herd and asked him if they were a clean, healthy herd and his reply was that they were "all right."

This statement by Walters was a warranty of quality, that the cattle were "sound." *Smith v. Justice*, 13 Wis. 600; *McClintock v. Eurick*, 7 S. W. 903 (Ky.); *Kemp v. Mays*, 127 N. E. 156 (Ind.); *Van Hoesen v. Cameron*, 20 N. W. 609; *Kenner v. Harding*, 28 Am. Rep. 615; 35 Cyc. "Sales" 422.

Lawrence, Murphy & Nilles, for respondent.

"Copies of instruments or records must be properly authenticated in order that they may be admitted in evidence. It is a familiar rule that a copy must be authenticated in a mode provided by the statute, and the statute must in this respect be strictly pursued." 10 R. C. L. 1104; *Reynolds v. Rowly*, 38 Am. Dec. 233; *State v. Kniffen*, 44 Wash. 485; 87 Pac. 837.

"In the case of records or copy of transcript must be certified by the official custodian of the records." 10 R. C. L. 1104; *Anderson v. Blair*, 48 S. E. 951; *Weeks v. Lumber Co.*, 133 Ga. 472; 66 S. E. 168; *Thompson v. Gallard*, 45 Am. Dec. 778.

"It would seem that a copy of a public record required by law to be kept is admissible when certified by the custodian without being sworn to and without the testimony of witnesses that they have compared it with the original and found it to be a true copy." 10 R. C. L. 1104; Kellogg v. Finn, 22 S. D. 578, 119 N. W. 545.

"It is the rule that copies of certified or examined copies are clearly not admissible unless the original and first copy is lost or inaccessible and it is necessary to produce secondary evidence." State v. Kohn, 108 Ia. 208; 78 N. W. 857; Goodrich v. Weston, 102 Mass. 362; 3 Am. Rep. 469.

An appellate court cannot say that rulings of the trial court sustaining objections to questions asked a witness were erroneous or prejudicial when no offer of proof was made. State v. Schoenberg, 24 N. D. 532; 140 N. W. 105; Railway Co. v. Lebeck, 32 N. D. 162; 155 N. W. 648.

"The offer of proof was inadmissible under the well settled rule that questions cannot be asked expert witnesses in such a way as to cover the very question to be found by the jury." Collins v. Ishman, 180 Ill. Apps. 655; People v. Lehr, 196 Ill. 361, 63 N. E. 725.

"It is improper to allow an expert to give his opinion on the ultimate fact to be determined by the jury." Read v. Land & Cattle Co., 66 Nebr. 423, 92 N. W. 622; Railway Co. v. Holmes, 68 Nebr. 826, 94 N. W. 1007; Railway Co. v. Sugar, 117 Ill. Apps. 578; Bettz v. Bettz, 113 Ia. 111, 84 N. W. 975; Marshall v. Hanvey, 115 Ill. 318, 88 N. W. 801; Leslie v. Granite Co., 172 Mass. 468; 52 N. W. 542.

GRACE, J. This appeal is from a judgment in plaintiff's favor for \$5,832. A statement of the material facts will lead to a clear understanding of the issues.

On November 8, 1917, the defendants purchased from W. H. Walters, at Pipestone, Minn., 31 registered cows and 24 registered calves. The agreed purchase price was \$6,675. Of this amount the defendants paid \$2,000 in cash at the time of the purchase, and after the cattle were shipped to North Dakota the defendants gave their note for \$4,675. which was secured by a chattel mortgage on the above stock. The original number agreed to be purchased was 56 head, 32 cows, and 24 calves for \$7,000, but before the sale was completed one cow died, and whole purchase price was reduced to \$6,675.

Default was made in the terms and conditions of the mortgage, by

reason of the note and interest thereon not having been paid at maturity. The payee named in the note sold, assigned, indorsed, transferred, and delivered the note to the plaintiff, after the maturity of it.

It is admitted that plaintiff is the owner and holder of the note, and that, in its hands, it is subject to all the equities and defenses as if the litigation were between the original parties.

The defendants in their answer admit the execution and delivery of the note and mortgage, and made other admissions in their answer, not material here to notice, and, in addition thereto, interposed a general denial.

Defendants, further answering interposed a defense of breach of warranty. It is as follows:

"For a further answer to said complaint and as and for a defense to said action and as and for an offset and counterclaim, the defendants allege:

"That immediately prior to and on the 8th day of November, 1917, the date upon which the said note was made and delivered, the defendants were seeking to purchase a herd of pure-bred registered cattle, with the intent, object, and purpose of establishing a stock breeding and stock sales herd of pure-bred registered cattle near the village of Hunter, in the county of Cass and state of North Dakota.

"That W. H. Walters, the original payee named in said note, then had and exhibited to the defendants at Pipestone, Minn., the said cattle mentioned and described in paragraph 4 of said complaint, with a view and object of selling them to the defendants for use in establishing and conducting such breeding and stock sales herd, said W. H. Walters having been informed and then well knowing the intent, object, and purpose of the defendants as hereinbefore alleged, and said W. H. Walters, in order to sell to defendants said cattle and with the intent and purpose of procuring and inducing them to purchase the same from him, represented, stated, and warranted that the said cattle were in good condition and in perfect health, and were free from disease, and were in every way all right, and that they were in all respects suitable for the establishment and conducting of such a herd and for the purpose of breeding pure-bred Aberdeen Angus registered cattle and selling the same to persons desiring to purchase cattle of such character and description for breeding and sales purposes.

"That the defendants, believing and relying upon such representations, statements, and warranty of the said W. H. Walters, and being induced

thereby, and not otherwise, purchased from him the said cattle at and for an agreed price of \$6,675, and as a condition and as a part of said purchase contract and agreement the said W. H. Walters agreed to deliver to the said defendants all of the said cattle at the said Hunter, Cass county, N. D., the defendants agreeing to pay upon delivery, as aforesaid, for said cattle the sum of \$2,000 in cash and the making and delivery of a promissory note and chattel mortgage of the kind and character severally described in the plaintiff's complaint herein.

"That soon thereafter the said W. H. Walters did deliver to the defendants the said cattle, and the defendants in consideration thereof paid to him the said sum of \$2,000, and made, executed, and delivered to him a note and chattel mortgage of the general character and description of those mentioned and described in the complaint in this action.

"That in truth and in fact the said cattle, on and immediately prior to the said 8th day of November, 1917, and thereafter, were not as represented, stated, and warranted by the said W. H. Walters to these defendants, as hereinbefore alleged, and were not in good condition and in perfect health, and were not free from disease, and were not all right, but in truth and in fact were in bad condition and in imperfect health, and were diseased, and a large proportion of them were then and subsequently afflicted with and affected by and had tuberculosis, and were not suitable for the establishment and conducting of a stock breeding and stock sales herd, and were not suitable and could not be used for breeding pure-bred Aberdeen Angus registered cattle and selling the same to persons desiring to purchase cattle of such character and description for breeding and sales purposes.

"That because of the misrepresentations, misstatements, and failure of warranty as to the condition of said cattle and of the health thereof, and because of the fact that said cattle were absolutely unfit and useless for the purpose for which they were purchased, as hereinbefore alleged, the defendants have been and were greatly damaged, and suffered great loss, in that they were compelled to and did pay freight from Pipestone, Minn., to Hunter, N. D., amounting to \$45 upon those of such animals purchased, subsequently found to be tubercular, and did feed and care for animals last mentioned, from the time of purchase thereof until quarantined and condemned and slaughtered, at an expense to defendants of \$2,260, and did segregate and quarantine all of said cattle for the purpose of ascertaining and determining the condition of each of the in-

dividual members of said herd and to determine and eliminate from said herd such of the individual members thereof as were afflicted with tuberculosis, all of which they were required and compelled by the federal government and state authorities of the state of North Dakota, to do, all at great sacrifice and expense in money and outlay in testing, caring for, feeding, and treating the said cattle; that in so doing it was ascertained that at least 21 head of said cattle were incurably afflicted with tuberculosis, and none of the same could be saved or used for the purpose for which they were purchased, as hereinbefore alleged, but could only be disposed of as tubercular cattle for killing purposes or condemned, and these defendants were compelled to and did dispose of and sell 21 head of said cattle at great sacrifice, either for killing purposes as tubercular infected cattle or as condemned cattle, for the latter realizing only the value of the hides.

"That shortly subsequent to the purchase and delivery to them of these cattle the defendant purchased a registered Aberdeen Angus bull, as a herd bull to be used in breeding the cattle so purchased from said Walters. That the said herd bull contracted and became infected with tuberculosis from the said tubercular cattle purchased from said Walters, and these defendants were by the state veterinarian of North Dakota required to quarantine said bull, and to subsequently have him slaughtered as tubercular, to the great damage of defendants."

Defendants further, in substance, allege, that if the cattle had been as represented and warranted, they would have been reasonably and fairly worth for the purposes for which they were used the sum for which they were purchased. That, in truth and in fact, for the purposes for which they were purchased, the herd had no value whatever, and was a liability and damage to any person who procured the same, and that for any purpose they were not worth to exceed the sum of \$2,000.

To the answer, the plaintiff interposed a reply, consisting of a general denial.

Before the cattle were shipped from Pipestone to Hunter, Walters had the cows tested to determine if any of them were tubercular. This test was made by Dr. Sigmond, and was completed on November 6, 1917. The 24 calves were not given the test. Walters told the defendant that the calves were under 6 months of age, and would not be tested. Under the state and federal regulations, it is claimed, a calf under 6 months of age does not respond to such tests.

At the time of the sale, 6 of the calves were at least from one to five weeks over 6 months of age. Dr. Sigmond's report shows that he found no evidence of tuberculosis. Defendants then shipped the cattle from Pipestone to Hunter, and they were taken by them to their farm, and, as the evidence shows, received good care. They were placed in a sanitary barn, with good light and ventilation, and had plenty of feed and running water, and were properly cared for until tested for tuberculosis by Dr. Taylor, a veterinarian. This test was made on the 21st and 22d day of May, 1918, about 6½ months after they were brought to defendants' farm. The test showed that 9 of the cows and five of the calves were infected with tuberculosis. These were quarantined; shipment out of the state not at that time being permitted by the federal government. At this same time Dr. Taylor tested all of the cattle on the farm, which were over 6 months old, which were about 60 head, among which were 11 grade cows and one herd bull, named Blackwood of Page. The grade cows and this bull successfully passed the test.

At the time of this test all that were tubercular were found to be from Walters' herd. Those that were thus found to be tubercular were quarantined until disposed of about August 1, 1918, when 12 of them were shipped to South St. Paul. Two of the cows that were heavy with calf were shipped later in November, 1918. Those shipped in August, 1918, were slaughtered, under the authority of the United States Bureau of Animal Industry.

In the first part of November, 1918, another shipment of 8 head of the cattle purchased by defendants from Walters was made to South St. Paul. With them was also shipped Blackwood of Page, all of which were at that time infected with tuberculosis. They were slaughtered under the same authority as the 12 head above mentioned.

For the United States Bureau of Animal Industry at South St. Paul, Dr. Anderson is the chief inspector, and, as such, a report of the post mortem of the above stock that was slaughtered on each of the above occasions, and the condition of each animal, as disclosed by the post mortem, was prepared and delivered to Dr. Anderson. He filed the original of the report at the home office in the Bureau of Animal Industry at Washington, D. C. He had copies made of it, one of which he retained at his office in South St. Paul, and the other he mailed to the Live Stock Sanitary Board of the state of North Dakota, of which Dr. Crewe, a veterinarian, is secretary.

Exhibits H and I are copies of the respective post mortem examinations of the cattle above referred to. The copies are not certified to by Dr. Anderson, or any other person. They were received by Dr. Crewe through the mail, from Dr. Anderson, the federal inspector of South St. Paul.

On August 2 and 3, 1918, the herd bull, Blackwood of Page, was again tested by Dr. Thompson and found to be tubercular and quarantined. It is claimed he was tested before being purchased by the defendants, and was found then to be healthy, but the evidence in this regard is somewhat conflicting.

On August 16 and 17, 1918, the defendants' herd was examined by Dr. Thompson, a federal inspector in North Dakota, under the directions of Dr. Crewe, when 6 more head of the Walters herd were found to be tubercular, and quarantined. Fourteen head had been found tubercular, as above stated, by Dr. Taylor. It appears later 1 more of the cows of this herd was tested and reacted. On December 4 and 5, 1918, Dr. Taylor made another test of the herd, and found that none reacted.

Other cattle which were on the Walters farm, or which remained after defendants had purchased the herd, which in number were 25 pure-bred bulls and 3 grade cows, were, shortly after that time, tested by Dr. Sigmond, and were not by him quarantined; and in July, 1918, the same cattle, with the exception of two bulls, were tested by Dr. Miller of Elkin, S. D. Walters had shipped the cattle to Aurora, S. D., to be put in quarantine and to be tested there by A. C. Miller, of Elkin, S. D., a veterinarian. They were tested by him, with the exception of two bulls, and released from quarantine.

The defendants have made five assignments of error, in substance as follows:

The numbers given to the assignments of error in the appellants' brief do not correspond with the numbers of the error in the specifications of error. Appellants in their brief have set forth only the substance of the errors contained in the specifications of error of which they complain. We will adopt the arrangement of them as contained in the brief.

(1) The court erred in refusing to permit the defendants to show by expert testimony that the cattle were afflicted with tuberculosis at the date of their purchase, and in restricting the use of Exhibits H and I.

(2) The court erred in excluding from the evidence a part of Exhibit 4.

(3) The court erred in instructing the jury that the defendants alleged and set forth in their answer that a large proportion of them (the cattle) were subsequently afflicted with and had tuberculosis, and by omitting in such connection the allegation of the defendants' answer that the herd in question was afflicted with tuberculosis at the time the same was purchased.

(4) The court erred in charging the jury as follows: In order to determine whether there was an express warranty, it must be shown that there was an express, direct affirmation that the cattle sold were free from the disease of tuberculosis.

(5) The court erred in making and volunteering the remarks, comments, statements, and questions set forth in detail in the specifications of error, and thereby prevented the defendants from having a fair and impartial trial.

Since as we are convinced that the fourth assignment of error is well taken, and that the giving of that instruction constitutes prejudicial and reversible error, it will be unnecessary to consider any of the other assignments of error.

In order to afford a clear understanding of this error, the instruction in full in this regard will be set forth. It is as follows:

"To constitute an express warranty, the term 'warranty' need not be used; no technical set of words are required, and it may be inferred from the affirmation of a fact which induces the purchase on which the buyer relies and on which the seller intended that he should so do, but, of course, the words used must be tantamount to a warranty, and not dubious or equivocal.

"In order to determine whether there was an express warranty, it must be shown that there was an express, direct affirmation that the cattle sold were free from the disease of tuberculosis—the mere expression of an opinion does not constitute a warranty—and in determining whether a statement of the seller is to be deemed a warranty, it is important to consider whether in the statement a seller assumes to assert a fact on which the buyer is ignorant, or merely states an opinion or judgment on a matter on which the seller has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment.

"As to whether Mr. Walters, the seller of the cattle, knew that the cattle were diseased or not, makes no difference, and would not relieve

him from liability if you find from the evidence that he actually warranted the cattle, or that his language amounted to a warranty, to be free from the disease of tuberculosis.

"The decisive test is whether, Mr. Walters stated that the cattle were free from the disease of tuberculosis at the time that the sale was made, and that the same was made in connection with the making of the sale, and that the defendants acted thereon, or that he used such language or words which would leave such an impression in the minds of the defendants.

"As I have already told you, if you find from the evidence that Mr. Walters made such a representation, and that it was clear and positive, and not a mere expression of opinion, and the defendants understood it was a warranty, and, relying on it, purchased the cattle, then your next question would be to determine whether there was a breach of such warranty.

"I should tell you, here, however, that, should you find from the evidence in this case that no representations were made by Mr. Walters in this case amounting to an express warranty that the cattle were free from the disease complained of in this suit, then it would be your duty to return a verdict in favor of the plaintiff for the amount asked for in the complaint, and you would not need to proceed further with your inquiries.

"Should you, however, find that the representations were made by Mr. Walters in connection with the sale of the cattle to the defendants which amounted to a warranty, warranting the cattle to be free from the disease complained of, then your next inquiry should be directly towards determining whether there was a breach of said warranty. It would then be for you to determine from the evidence in this case as to whether or not the cattle were in fact infected or afflicted with the disease of tuberculosis at the time the same were sold by Mr. Walters to the defendants. In this connection, I instruct you that it is incumbent upon the defendant to show by a fair preponderance of the evidence that the cattle purchased by the defendants from W. H. Walters, at Pipestone, Minn., were at the time of the purchase infected with a disease known as tuberculosis, and in that connection the burden of proof is upon the defendants to show by a fair preponderance of the evidence that such disease existed in said cattle at the date of purchase, and you are instructed that, unless the defendants show by a fair preponderance of the evidence that the cattle in question were infected with tuberculosis at the time of such purchase,

then it would be your duty to return a verdict in favor of the plaintiff for the full amount."

This instruction in effect informed the jury that the test of whether there was an express warranty was to be determined by sufficient and competent evidence to the effect that Walters stated, at the time of the sale, that the cattle were free from the disease of tuberculosis. In other words, unless the jury found that Walters made that statement at the time of the sale, there was no express warranty. In view of that instruction, there was nothing for the jury to do except to return a verdict for plaintiff. For there is no evidence showing that Walters expressly warranted that the cattle were free from tuberculosis.

The court in effect instructed that, unless there were words expressly warranting against tuberculosis, there was no express warranty. Certainly this is far from correct, and constitutes a fatal and prejudicial error. If, as alleged, Walters represented that the cattle were in good condition, and were in perfect health, free from disease, and were all right, that constituted an express warranty, at least against every disease, not readily discernible, including tuberculosis. It was not at all necessary nor incumbent upon the defendants to show that, at the time of the sale, Walters specifically warranted the cattle to be free from tuberculosis. All that was incumbent on them to show was that he represented and warranted them to be in perfect health, or free from disease, or all right, as those terms were used with reference to the health of the cattle.

The jury by the instruction should have been informed of the terms of the warranty, and then instructed to the effect that if it found the cattle were not in perfect health, free from disease, and all right, at the time of the sale, then they should find for the defendant. Necessarily, then, if the jury from the evidence did find that the cattle at the time of the sale were tubercular, or were infected with, or had, any other disease, which could not readily be observed, it could find that the express warranty was broken. In other words, it was not at all necessary for Walters to use language mentioning any particular disease, to make him liable on the express warranty as made.

There is sufficient evidence to establish the making of the express warranty by Walters, as alleged by the complaint. The instruction, as given, simply foreclosed the case against defendants. If the jury followed the instructions of the court in this regard, it could do nothing else, except bring in a verdict for the plaintiff.

The motion in this court to dismiss the appeal is denied. The action was one to foreclose a chattel mortgage. The answer admitted the matters in equity involved in the case. It admitted the execution and delivery of the note, and the default in the payment thereof. It admitted the execution and delivery of the chattel mortgage to secure the same. This disposed of the equitable features of the case, for, if the plaintiff recovered on the note, there was no defense to the foreclosure. All that remained was defendants' legal defense on the note, based on breach of warranty by Walters in the sale of the cattle, for which defendants claim damages as prayed for in the complaint.

Under the rule announced in *Lehman v. Coulter*, 40 N. D. 177, 168 N. W. 724, defendants rightly were entitled to have this issue submitted to a jury as a law issue. In such case the verdict should not be regarded as advisory. The defendants were entitled to the right of trial by jury of the legal issues, accompanied by proper instructions by the court of the law relative to those legal issues. This in effect has been defendants' theory of the appeal, and they have perfected their appeal accordingly, and in this we think there was no error.

The court having erred, to the prejudice of the defendants, in giving the instruction above set forth and analyzed, and the giving of which is the basis of the fourth assignment of error, the judgment appealed from should be reversed, and a new trial had upon the law issues involved in the case.

The judgment appealed from is reversed, and the case is remanded to the trial court for further proceedings not inconsistent with this opinion.

The appellant is entitled to his statutory costs and disbursements on appeal.

ROBINSON, C. J., and CHRISTIANSON, J., concur.

BIRDZELL, J., dissents.

BRONSON, J. (dissenting). The record discloses that this action was fairly and fully tried. The transcript consists of about 500 pages. The only reason found for a reversal of this case by the majority opinion is the giving of an instruction by the trial court concerning an express warranty. I am of the opinion that this instruction as given upon this record was not prejudicial error.

The answer in defense alleges that Walters warranted the cattle to be in good condition, in perfect health and free from disease, and to be in every way all right and in all respects suitable for the establishment and conducting of a herd for purposes of breeding pure-bred Aberdeen Angus registered cattle; that the cattle were not in good condition, perfect health, and free from disease, and were not all right, but in truth and in fact were in bad condition, in imperfect health, and diseased, and a large portion of them were affected with or subject to tuberculosis.

The testimony concerns, almost entirely, the question of whether or not these cattle were affected with tuberculosis when sold. The sole issue accordingly was that of an express warranty and a breach thereof. The appellants contend that under the instruction of the trial court (cited in the majority opinion) the jury were required to find that the word "tuberculosis" was expressly mentioned by Walters, in order to permit recovery by the appellants; that in effect this instructed the jury that a general warranty of soundness would not be sufficient to cover the disease of tuberculosis. The majority opinion practically adopts such contention. I am of the opinion that this is a narrow, technical, and unreasonable construction to be given the instruction of the trial court. The claimed breach of warranty was by reason of the disease of tuberculosis. No other deficiencies in respect to the cattle are asserted in the record. Otherwise the court charged the jury:

"If you find from the evidence that the cattle were warranted to be free from the disease, and that there was a breach thereof in accordance with the instructions I have already given you, and you find that the bull was free from the disease," etc., "then the defendant may be allowed damages therefor," etc.

Again the court instructed:

"Should you find from the evidence in this case that no representations were made by Walters in this case amounting to an express warranty that the cattle were free from the disease complained of in this suit, then it would be your duty to return a verdict in favor of the plaintiff," etc.

Assuredly, under these instructions, if Walters represented or warranted the cattle to be all right in response to the request of the appellants that they wanted a nice, clean, and healthy herd, the jury were amply warranted in finding that this was a representation and warranty that such cattle were not affected with tuberculosis.

The trial court particularly instructed that the decisive test of the

warranty was whether Mr. Walters stated that the cattle were free from the disease of tuberculosis, etc., or that he used such language or words which would leave such an impression in the minds of the defendants. This court has held frequently that the instructions must be taken together, and, if when considered together they fairly present the law, they will not be condemned because one alone may not be complete in itself. *Munster v. Stoddard*, 170 N. W. 871; *McGregor v. G. N. R. Co.*, 31 N. D. 471, 488, 154 N. W. 261, Ann. Cas. 1917E, 141. Furthermore, if Walters represented the cattle to be all right, in response to appellants' request for a nice, clean, and healthy herd, such language necessarily meant that they were free from the disease of tuberculosis. In *Mitchell v. Pinckney*, 127 Iowa, 696, 104 N. W. 286, the vendor warranted the animals to be all right and sound in every particular. The sole contention made for breach of the warranty was that the cattle were affected with "contagious abortion." In one of the instructions of the court the jury was told that if there was a warranty of any or all of the cattle, and the warranty was substantially as claimed in the petition, and had been broken, the defendant would be liable. The contention was made that the jury was not limited to the particular breach relied upon. The court held that such contention was hypercritical. In my opinion the contention in this regard is likewise hypercritical. The appellants consented to an oral charge by the court. No instructions were requested by the appellants. No objection was made to the instructions as given. No request was made for a more specific and comprehensive instruction. See *McGregor v. G. N. R. Co.*, 31 N. D. 471, 488, 154 N. W. 261, Ann. Cas. 1917E, 141. Also *Huber v. Zeiszler*, 37 N. D. 556, 561, 164 N. W. 131. I am of the opinion that the jury was not misled and did not misunderstand the issues by reason of the particular instructions upon which reversal is granted by the majority opinion.

W. A. MORIN, Respondent, v. THE DIVIDE COUNTY ABSTRACT COMPANY, a corporation, Appellant.

(183 N. W. 1006.)

Abstracts of title — abstracter liable for mistakes.

1. In this state an abstracter is liable for any and all damages proximately caused to any person by reason of any error, deficiency or mistake in any abstract or certificate of title made or issued by him.

Abstracts of title — abstracter must set forth facts relating to title but need not pass thereon.

2. An abstracter is not called on for professional opinions as to any of the matters relating to a title. It is not for him to determine the validity or invalidity of instruments of record. It is his duty to set forth the facts relating to the title as shown by the records.

Abstracts of title — abstracter liable for failure to examine records transcribed from other county.

3. Where an abstracter relies upon his own books, and fails to examine the books of records transcribed from another county and by law given the force and effect of original records in the county where filed, and in so doing overlooks and fails to show on the abstract an instrument shown in such transcribed records, and which instrument affects the title to the land covered by the abstract, he is liable for a breach of his obligations as an abstracter, even though the instrument was not recordable in the county wherein it was originally recorded.

Abstracts of title — damages allowable for negligence in certifying title stated.

4. It is *held*, under the evidence in this case, that the damages sustained by the plaintiff consists of the moneys paid by him for the land and a certain mortgage, and moneys expended in defending litigation assailing the title, together with interest on such items. But that on such sum the defendant is entitled to credit for certain moneys received by the plaintiff upon such mortgage.

Opinion filed June 11, 1921.

From a judgment of the District Court of Divide County, *Leighton, J.*, defendant appeals.

Modified and affirmed.

John J. Murphy, and *John E. Greene*, for appellant.

McGee & Goss, for respondent.

"As abstracts of title should show every instrument effecting the title which is a matter of record, and if an abstracter fails to show certain instruments that cast a cloud upon the title and the person who procures such abstract is damaged thereby, the Abstract Company is liable." *Security Abstract Co. v. Longacre*, 76 N. W. 1073.

CHRISTIANSON, J. This is an action against an abstracter to recover damages for negligence in making and certifying an abstract of title. The case was tried to the court without a jury, and resulted in a judgment in favor of the plaintiff. Defendant has appealed from the judgment.

The material facts are as follows: In October, 1907, one Lars J. Sloviken obtained title from the United States to a quarter section of land in Williams county, in this state. On October 29, 1907, said Sloviken executed and delivered to M. E. Wilson & Co. a second mortgage on said premises to secure the sum of \$63.75. Such mortgage was duly recorded in the office of the register of deeds of said Williams county on November 9, 1907. On that same day an abstract of title to said premises was made by the Williston Abstract & Guaranty Company, which said abstract was continued and a new certificate attached thereto on December 9, 1910, by the Westergaard-Blair Company. On December 10, 1910, the county of Williams was divided, and the new county of Divide created out of territory which formerly formed a part of said Williams county. As a result 120 acres of the 160-acre tract above referred to became a part of Divide county, and 40 acres thereof remained within and a part of Williams county. In April, 1914, said M. E. Wilson & Co. commenced proceedings in Divide county to foreclose the said mortgage by advertisement as against the 120 acres located in that county, with the result that sale was held on June 13, 1914, the premises bid in by said M. E. Wilson & Co., and certificate of sale issued to it. On May 26, 1915, said M. E. Wilson & Co., assigned such sheriff's certificate of sale to one Norman Lunde, to whom sheriff's deed was issued on July 20, 1915. The various instruments incident to these proceedings and transactions were duly recorded in the office of the register of deeds of said Divide county. Said Lunde sold the premises to the plaintiff, Morin, and conveyed them to him by quit-claim deed on July 24, 1915. Before purchasing the premises said Morin employed the defendant abstract company to continue the abstract, which had been prepared by the Williston Abstract

& Guaranty Company on November 9, 1907, and continued and certified to by the Westergaard-Blair Company on December 9, 1910, and the same was continued and a certificate of continuation dated July 20, 1915, which read as follows attached thereto :

"The Divide County Abstract Company hereby certifies that the within abstract of title has been continued from the 9th day of December, 1910, at 3 o'clock p. m. (numbered from 5 to 12, inclusive), and that the said continuation contains all the instruments of record in the office of the Register of Deeds affecting the title to the premises therein described since the day and hour above named."

Shortly after Divide county was organized the county commissioners thereof made a contract with one M. R. Porter for the transcribing of the records of Williams county relating to real estate in Divide county, as prescribed by § 3211, C. L. 1913. The records were so transcribed, and on April 4, 1912, the county commissioners of Divide county adopted a resolution reciting that the records in the office of the register of deeds of Williams county had been so transcribed and were then contained in certain enumerated books, which were then in the office of the register of deeds of said Divide county, and that such records were accepted by the said county of Divide in full performance of the contract for the transcribing of records which had been entered into with the said M. R. Porter. The resolution also provided that it be—

"further resolved that the said records being contained in the books of records hereinbefore enumerated * * * hereby are adopted by the said county of Divide as and for the true records of all instruments affecting title to real property in said Divide county, and hereinbefore filed in the office of the register of deeds in and for Williams county while the territory now comprising the said county of Divide was a portion of said Williams county."

The records so transcribed and filed in the office of the register of deeds of Divide county contained the record of an assignment of mortgage made by said M. E. Wilson & Co. to one S. E. Olcott. Such assignment of mortgage was executed June 22, 1910, and was recorded in the office of the register of deeds of Williams county on January 17, 1911, and, among others, assigned to said Olcott the mortgage which said M. E. Wilson & Co. had caused to be foreclosed, and upon which the sheriff's deed to said Lunde was based. This assignment was not shown upon the abstract so certified to by the defendant company, and the failure

to show the same upon the abstract forms the basis of this action. An action was brought by the executor of the last will and testament of Lars J. Sloviken to set aside the foreclosure proceedings and the sheriff's deed on the ground that the foreclosure proceedings were void. A trial thereof resulted in a judgment annulling the sheriff's deed. Morin thereupon brought this action against the defendant abstract company, claiming that the damages he had sustained were occasioned by the failure of the defendant to show upon the abstract the assignment of mortgage from M. E. Wilson & Co. to S. E. Olcott.

It appears from the evidence that the defendant abstract company is in a sense affiliated with the Westergaard-Blair Company, and that upon the organization of Divide county the defendant obtained from the latter company a complete set of books such as are kept by abstract companies, showing the title to lands in Williams county up to the date of the organization of Divide county. In continuing the abstract defendant relied on such books, and made no examination or search of the transcribed records which had been filed in the office of the register of deeds of Divide county. It is earnestly contended that the assignment of mortgage was not entitled to record in Williams county, or rather that the record thereof in such county did not constitute notice as to lands then in Divide county; that the defendant was justified in believing that no instruments would appear of record in the transcribed records except such as were filed prior to the organization of Divide county; and that the defendant was not guilty of negligence in failing to search the transcribed records.

The duty of an abstracter is to make a painstaking examination of the records and set forth in the abstracts all the facts relating to the title under investigation. He is not called on for professional opinions as to any of the matters reported. 1 R. C. L. p. 92. It is not for him to determine whether instruments of record are valid or invalid, or whether they were or were not entitled to record. His duty is to set forth the facts relating to the title as shown by the records; and he is liable for "any and all damages that may be sustained by or accrue to any person by reason or on account of any error, deficiency or mistake in any abstract or certificate of title * * * made and issued" by him. § 3090, C. L. 1913.

Section 3211, C. L. 1913, provides:

"When a new county is organized in whole or in part from an organized county or from territory attached to such * * * county for judicial

purposes, it shall be the duty of the commissioners of such new county to cause to be transcribed by copying or by photographing in the proper books all the records or deeds or other instruments relating to real estate and other records, deeds or instruments of every kind required by law to be kept on file or recorded in the respective county offices in such new county, and all contracts heretofore made by any board of county commissioners for the transcribing by copying or by photographing of any such records are hereby made valid and all records transcribed by copying or photographing thereunder or under the provisions of this section shall have the same effect in all respects as original records"

By the express terms of this statute, the transcribed records became and were in legal effect original records of Divide county. Those records were in existence in the office of the register of deeds of Divide county at the time the defendant continued the abstract and made the certificate which is involved here. The witnesses for the defendant admit that a search of the records, or even an examination of the numerical indexes covering such transcribed records, would have disclosed the record of the assignment of mortgage from M. E. Wilson & Co. to Olcott. In these circumstances it seems clear that there was in fact a deficiency in the abstract; it did not correctly set forth the facts relating to the title to the land as they were disclosed by the records in the office of the register of deeds of Divide county at and prior to the time the certificate was made. Hence the plaintiff is entitled to recover such damages, if any, as he shows to have been directly and proximately caused by the defendant's breach of duty. § 3090, *supra*; 1 C. J. 371; 1 R. C. L. p. 100. See, also, §§ 7146 and 7165, C. L. 1913.

The plaintiff testified, and the trial court found, that the plaintiff purchased the premises from Lunde in reliance upon the abstract of title, and that he would not have purchased them if the abstract had shown the assignment of mortgage appearing in the transcribed records. The evidence also shows, and the trial court found, that the title purported to be transferred to the plaintiff by Lunde was later adjudged to be invalid, in the action brought by the executor of the last will and testament of said Sloviken, on account of the assignment by M. E. Wilson & Co. to S. E. Olcott. There is no contention but that the litigation which resulted in such adjudication was *bona fide*. The validity of the judgment has not been questioned, and the correctness thereof is not in issue here.

The next question is the proper measure of damages. No specific

provision is made in our statutes for the measure of damages recoverable against an abstracter for breach of duty. Hence the damages must be measured by the general provisions prescribing measure of damages. For the purposes of this action, it is immaterial whether damages be allowed as for the breach of an obligation arising from contract, or for the breach of an obligation not arising from contract. In either case the plaintiff is entitled to recover such damages only as will compensate him for all the detriment proximately caused by the breach. See §§ 7146 and 7165, C. L. 1913. In this case the plaintiff purchased certain premises, relying upon the abstract of title, or rather the certificate attached by the defendant thereto. The deal included both the 120-acre tract of land and a \$300 mortgage on another tract of land. The plaintiff paid Lunde \$1,100 for the land and for the mortgage. He received a quit-claim deed for the land and an assignment of the mortgage. The plaintiff also expended certain moneys in defending the action brought to set aside the sheriff's deed. There is no showing that the plaintiff made any further expenditures of any kind. It would seem, therefore, that the detriment proximately and directly caused to the plaintiff consists of what he has expended in reliance upon the incorrect abstract, that is, the moneys paid for the premises, and the expenditures reasonably and necessarily incurred in defending the action to set aside the foreclosure proceedings, together with interest on such items. The evidence, however, shows that the \$300 mortgage with accrued interest was paid in full. Hence the amount so received by the plaintiff should be deducted from the total amount expended by him and interest thereon. In other words, we are of the opinion that the damages sustained by the plaintiff in this case consists of the \$1,100 originally paid by him to Lunde and the expenditures reasonably and necessarily made in defending the litigation, together with interest on such items, less the moneys received upon the mortgage. See 1 C. J. p. 371, and authorities cited in note 8, and subsequent annual annotations. See, also, § 7149, C. L. 1913. The judgment in this case is in excess of that amount. It is therefore ordered that it be modified to conform to the views expressed in this opinion, and, as so modified, it is affirmed.

ROBINSON, C. J., and BRONSON and BIRDZELL, JJ., concur.

GRACE, J. (specially concurring). I am not wholly satisfied that the

main opinion states the true measure of damages. It is certain, however, that at least the damages specified therein have been sustained. More than that amount may have been sustained if a different rule as to the measure of damages were applicable.

We do not, however, feel disposed to enter into a discussion at length, of another and different rule of damages than that above stated.

J. D. HALSTEAD, Appellant, v. MISSOURI SLOPE LAND & INVESTMENT COMPANY, a corporation, and A. L. MARTIN, and MARY J. MCGILLIVRAY, Respondents.

(184 N. W. 284.)

Damages — contract construed as agreement for rental, contingent on determination of ownership, and not one for penalty.

In this action two parties, H. and M., were asserting conflicting claims of ownership to a certain tract of land. During the pendency of litigation involving such claims, H., the one in possession, surrendered possession to M. pursuant to a written agreement, signed by M. and two sureties, wherein it was agreed that "in case the court shall decree the return of said land" to H., "they will return the same to him together with \$500 per year as damages for the use and occupancy of the said premises." For reasons stated in the opinion it is *held* that, under the evidence in this case, the agreement between the parties was one for the payment of a rental, fixed by them, contingent upon the determination of the ownership of the premises; and not one for the payment of a penalty, or one whereby "the amount of damages to be paid or other compensation to be made for a breach of an obligation, is determined in anticipation thereof."

Opinion filed June 27, 1921. Rehearing denied September 10, 1921.

From a judgment of the District Court, Golden Valley County.
Hanley, J. Plaintiff appeals.

Reversed.

Per Curiam Opinion.

H. L. Halliday, and J. A. Miller, for appellant.

"The term 'liquidated damages' is used in reference to the breach of a contract or non-performance of duty as expressing a fixed sum which is agreed upon between the parties as the ascertained damage which one is to receive and the other pay because of default." *U. S. v. U. S. Fidelity etc. Co.* 151 Fed. 534, (14 C. J. 714).

"The distinction between a penalty and a provision for liquidated damages is that a penalty is in effect a security for performance, while a provision for liquidated damages is for a sum to be paid in lieu of performance." 14 C. J. 933.

"A contract for a penalty is an agreement to pay a stipulated sum in case of default intended to coerce performance, to punish default, or to secure payment of actual damages." *Muehlebach v. Missouri etc. Ry. Co.* (Mo.) 148 S. W. 453.

In the following cases the courts have defined what contracts are void as providing penalties or liquidated damages. *DeGraff, Vrieling & Co. v. Wickham*, 52 N. W. 503; *Crawford v. Heatwole* (Va.) 34 L. R. A. (N. S.) 587 and note; *Eadler v. Silverstone* (Wash.) 34 L. R. A. (N. S.) 4 and note; *Bilz v. Powell* (Col.) 38 L. R. A. (N. S.) 847 and note; *Barnes v. Clement* (S. D.) 66 N. W. 810.

W. H. Stutsman, for respondents.

Section 7166 prescribes that the detriment caused by the wrongful occupation of real property is deemed to be the value of the use of the property for the time of such occupation, not exceeding six years last preceding the commencement of the action, and costs, if any, of recovering the possession and therefore any attempt to stipulate the damages for the wrongful occupation of land must be void. *Utley v. Dunning*, 161 N. W. 813, and *Barnes v. Clement*, 66 N. W. 810. (South Dakota cases).

PER CURIAM. This is an action to recover on a written agreement in the form of a bond executed by the defendant, Missouri Slope Land & Investment Company, as principals and the defendants, A. L. Martin and Mary J. McGillivray, as sureties. The written instrument upon which this action is brought was executed under the following circumstances:

About the year 1906 the defendant Missouri Slope Land

& Investment Company, instituted an action against J. D. Halstead to quiet title to and recover possession of a quarter section of land situated in what is now Golden Valley county, in this state. Said Halstead defended such action, and claimed to have purchased the land under a contract from the Missouri Slope Land & Investment Company, and asserted that he was entitled to occupy said premises and to have the same conveyed to him upon payment of the sum due on the contract. The Missouri Slope Land & Investment Company denied the validity of the contract. Halstead was in possession of the land. A trial of the action resulted in a judgment in favor of the Missouri Slope Land & Investment Company and against Halstead; said judgment being entered February 3, 1909. 27 N. D. 596, 147 N. W. 643. Thereafter said Halstead proceeded to take proper steps to move for a new trial. Such motion was made and granted on January 14, 1911. 27 N. D. 597, 147 N. W. 643. An appeal to this court resulted in an affirmance of the order granting a new trial. 27 N. D. 591, 147 N. W. 643. On a retrial of the action Halstead prevailed. The Missouri Slope Land & Investment Company appealed to this court, but it subsequently attempted to withdraw the appeal, with the result that this court ordered the appeal to be dismissed, and the judgment of the trial court then became final.

The written instrument which is involved in this controversy was executed during the time when Halstead was taking steps looking toward moving for a new trial, to-wit: on June 6, 1910, and is in words and figures as follows:

"State of North Dakota, County of Billings.

"In District Court, Tenth Judicial District.

"Missouri Slope Land & Investment Company, a Corporation, Plaintiff,
v. J. D. Halstead, Defendant.

"Undertaking

"Know all men by these presents, that the Missouri Slope Land & Investment Company, a corporation, as principal, and A. L. Martin and Mary J. McGillivray, as sureties, of Dickinson, N. D., are firmly bound unto J. D. Halstead in the sum of five thousand five hundred dollars (\$5,500.00), lawful money of the United States of America, to be paid to the said J. D. Halstead, his executors, administrators, or assigns, for the payment of which, well and truly to be made, we bind ourselves, our

executors and administrators, successors and assignees, firmly by these presents. Sealed with our seals, and dated this 6th day of June, A. D. 1910.

"The condition of the above obligation is such that whereas, the plaintiff is in possession of the northwest quarter (N. W. $\frac{1}{4}$) of section eleven (S. 11), in township one hundred thirty-nine (T. 139) north, of range one hundred six (R. 106) west of the 5th P. M., Billings county, North Dakota, under an execution issued in the above entitled case; and whereas, defendant above named, J. D. Halstead, has secured an order from the court above entitled to show cause why a stay of execution should not be granted in the above entitled action; and whereas, the defendant feels aggrieved and desires to take further action in the above-entitled case:

"Now, therefore, the above-named sureties hereby undertake and agree that the plaintiff, Missouri Slope Land & Investment Company, in case the court should decree the return of said land above described, they will return the same to the defendant herein named, together with five hundred dollars (\$500) per year as damages for the use and occupancy of the northwest quarter (N. W. $\frac{1}{4}$) of section eleven (S. 11) in township one hundred thirty-nine (T. 139) north, of range one hundred six (R. 106) west of the 5th P. M., Billings county, North Dakota, by the plaintiff herein.

"Now, if the plaintiff should do as hereinbefore set out, then this bond to be null and void; otherwise, to be in full force and effect. Missouri Slope Land & Investment Company, by H. A. Hunter, its Secretary and Treasurer. (Cor. Seal.) A. L. Martin, Mary J. McGillivray.

"In Presence of: J. E. Davidson, E. C. Goodman."

It is undisputed that at, and prior to, the time this bond was executed and delivered, Halstead was in possession of the premises. It is also undisputed that upon the execution of such bond and in reliance thereon he delivered possession of the premises to the Missouri Slope Land & Investment Company, and that its agent entered into possession thereof and occupied the same from on or about June 6, 1910, until March, 1917, at which time Halstead was put in possession by virtue of an execution. Thereafter Halstead made demand for the payment to him of the amount stipulated in the written agreement. No payment was made, and he thereupon brought this action to enforce the bond. The three defendants answered separately, admitting the execution of the

bond, and alleging that the same was without consideration. At the close of the trial both parties moved for directed verdicts. The trial court thereupon dismissed the jury, and rendered judgment in favor of the defendants.

The sole question presented on this appeal is whether the trial court was correct in ordering judgment in favor of the defendants. A determination of that question involves a consideration of, and is controlled by, a construction of the instrument in suit. Our statute provides:

"Every contract by which the amount of damages to be paid or other compensation to be made for a breach of an obligation is determined in anticipation thereof is to that extent void." § 5925, C. L. 1913.

"Parties to a contract may agree therein upon the amount which shall be presumed to be the amount of damages sustained by a breach thereof, when from the nature of the case it would be impracticable or extremely difficult to fix the actual damages." § 5926, C. L. 1913.

Questions similar to the one here presented have frequently been before the courts, and have given them much trouble. No good purpose would be subserved by analyzing the different adjudicated cases, for as has been well said:

"No definite rule to determine the question is furnished by them, each being determined more in direct reference to its own facts than to any general rule." *Streeper v. Williams*, 48 Pa. 450.

In the earlier cases the courts gave more weight to the language of the clause designating the sum to be paid. The modern authorities attach greater importance to the meaning and intention of the parties. *Sutherland on Damages* (4th ed.) § 293, p. 907. No form of words has been regarded as controlling.

"But the fundamental rule, so often announced, is that the construction of these stipulations depends, in each case, upon the intent of the parties as evidenced by the entire agreement construed in the light of the circumstances under which it was made." *Kemp v. Knickerbocker Ice Co.*, 69 N. Y. 45.

Thus, in *Streeper v. Williams*, *supra*, the Supreme Court of Pennsylvania held that the word "forfeit," in a certain instrument there in suit, was outweighed by the applicable rules of interpretation and meant "to pay." Our statute provides:

"All contracts, whether public or private, are to be interpreted by the

same rules, except as otherwise provided by this Code." § 5895, C. L. 1913.

"A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting so far as the same is ascertainable and lawful." § 5896, C. L. 1913.

"A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect, if it can be done without violating the intention of the parties." § 5903, C. L. 1913.

"A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates." § 5907, C. L. 1913.

"Particular clauses of a contract are subordinate to its general intent." § 5910, C. L. 1913.

From the evidence it appears that the bond in suit was drawn up as the result of a conference had between the parties and their respective attorneys. It was first suggested that the bond provide that the land company pay a reasonable rental value of the land, in event it was defeated, without naming the sum of such rental. Halstead objected to this, and wanted "a stated sum" named. When, during the course of this trial, he was asked by his counsel if there was "any discussion at that time what would be the reasonable value of the use of the premises." Counsel for the defendants objected, on the ground that this "would tend to vary the terms of a written instrument," and this objection was sustained. There is not the slightest evidence tending to show that the sum stated, viz. \$500, was in excess of the reasonable rental value of the premises. There can be no question but that the owner of a tract of land has the right to contract with another with reference to the occupancy thereof, and to agree upon the rental to be paid for such occupancy. Nor is there any reason why two parties, asserting conflicting claims of ownership to a tract of land, may not contract, either with a third party or with one another, with regard to such occupancy and the rental to be paid, and leave the ownership of the rents contingent upon the adjudication of the right of ownership; that is, they may contract that a certain rental shall be paid to whoever is eventually determined to be the owner. And as we construe the contract, under the evidence before us in this case, that is precisely what the parties here did; that is, upon the record before us, we are of the opinion that the parties did not attempt to provide for a penalty, or for stipulated damages, but that they agreed upon the value

of the "use and occupancy" of the premises—that is, upon what would be a fair rental to be paid to the owner of the premises, when the question of ownership was determined.

The judgment appealed from is reversed, and the cause remanded for further proceedings not inconsistent with this opinion. Appellant will recover costs on this appeal.

BIRDZELL, CHRISTIANSON, BRONSON, and GRACE, JJ., concur.

ROBINSON, C. J. (concurring in part). We all agree that the owner of land may lease it, and that it was competent for the plaintiff to lease his quarter section of land to the Missouri Company at an agreed price; but the bond in question is not a lease. There was no lease of the land for a month, a year, or for any time. The Missouri Company did not hold possession as a lessee, for a lessee is never subject to be dispossessed in a moment in the way the Missouri Company was dispossessed. When the bond was made, the parties were in court disputing the right to the title and possession of the land. The Missouri Company had a right to hold possession on giving a bond to pay the value of the use and occupation. Comp. Laws, § 7828. The bond in question may well be sustained, if considered as an agreement to pay the value of the use and occupation, not exceeding \$500 a year. But if the bond is construed as an agreement to pay \$500 a year as damages for the withholding of the land not leased to it, then it is an agreement to pay a compensation for the breach of an obligation, and is to that extent void. Comp. Laws, § 5925.

The case should be remanded for a new trial, with directions to give judgment for the value of the use and occupation of the land, regardless of the amount named in the bond.

ORLIN L. BURDICK, Appellant, v. FARMERS' MERCANTILE COMPANY, a corporation, OLE AAKER, TORGER SINNESS and CHARLES W. BUTTZ, Respondents.

(184 N. W. 4.).

Execution — doctrine of caveat emptor applies to assignee of purchaser.

1. The doctrine of caveat emptor applies to the assignee of a purchaser at an execution sale.

Evidence — supreme court takes judicial notice of its determinations alleged in complaint.

2. The Supreme Court may take judicial notice of its determinations alleged in a complaint.

Execution — assignee of sheriff's certificate of sale not liable for subsequent failure of title.

3. In the absence of an express warranty or fraud the assignee of a sheriff's certificate upon execution sale of real property is not liable for the failure or partial failure of title thereafter resulting.

Opinion filed June 22, 1921.

Action in District Court, Ramsey county, *Burr, J.*, from an order sustaining a demurrer to the complaint the plaintiff has appealed.

Affirmed.

Serumgard & Conant, for appellant.

Clyde Duffy, for respondents.

C. W. Buttz, pro se.

Statement

BRONSON, J. The plaintiff has appealed from an order sustaining a demurrer to the complaint, on the grounds that the same does not state a cause of action. The complaint alleges that in 1905 Wm. Burdick, then a minor, 15 years old, received a consignment of nursery stock valued at \$217; that the same was worthless, and the customers of Burdick refused

to accept the same; that plaintiff refused to become responsible for his son's indebtedness, and that Cashman sold the claim to one Christianson, or the State Bank of Minnewaukan; that in April, 1908, Kitsey G. Burdick, wife of the plaintiff, conveyed 560 acres of land in Benson county to Jessie James, who thereupon went into possession; that, in May, 1908, through threats and duress, Christianson procured from Kitsey G. Burdick a note for \$217, payable to the State Bank of Minnewaukan, for the claim against the minor; that, in August, 1908, Kitsey G. Burdick, after consulting an attorney, received advice to be adjudged a bankrupt, and thereupon, pursuant to proceedings, she was adjudged a bankrupt; that Christianson thereupon had himself appointed as trustee in bankruptcy, and instituted proceedings to set aside the deed from Kitsey G. Burdick to Jessie James; that subsequently Christianson died, and, upon application of the State Bank, the defendant Buttz was appointed trustee instead; that, in 1911, the defendants Buttz and Sinness, lawyers, forced such action to trial, and the same, in March, 1912, was dismissed by the district court; that from September, 1908, until March, 1912, the plaintiff and his wife resided in northern Canada, and were in this state for only short visits; that they believed that the decision by the trial court ended the matter, and vested the title in Jessie James; that in the spring of 1911, the defendant Aaker, as managing officer of the defendant Mercantile Company, employed the defendants Buttz and Sinness to collect the debt against John James and Jessie James, and that, pursuant to action, judgment was obtained against John James and Jessie James for \$811.79 on or about November 14, 1911; that subsequently the defendants Buttz and Sinness caused execution to be issued against the property of John James and Jessie James, and levied upon the grain raised upon the lands mentioned in 1912 and applied the same upon the judgment; that subsequently the defendant Buttz, who had become district judge, confirmed the sale; that there still remained upon the judgment unpaid about \$900; that in November, 1913, the defendant Sinness issued an execution on the judgment, made a levy upon the land mentioned, and caused the same to be sold for some \$869 to the defendant Mercantile Company; that the defendant Buttz, as district judge, in December, 1913, confirmed the sale; that during such time the plaintiff and his wife were living in Canada, and had no notice of the sale of the land until the fall of 1914; that in the meantime Jessie James had conveyed the land to the plaintiff; that the plaintiff, in 1914, had rented the land to Johnson; in October, 1914,

Johnson notified the plaintiff that the Mercantile Company claimed the crop; that thereupon the plaintiff went to Benson county and investigated; that he was informed that, unless he redeemed or got an assignment of the sheriff's certificate of sale, he would lose the land, and the Mercantile Company would claim title thereto; that thereupon the plaintiff negotiated with the Mercantile Company, and, in consideration of \$925, received an assignment of the sheriff's certificate of sale; that thereafter, in February, 1915, the sheriff executed a sheriff's deed to the plaintiff; immediately thereafter the plaintiff went to Canada; on information and belief that the defendant Buttz, upon learning that the plaintiff had obtained a sheriff's deed, as trustee of the estate of Kitsey Burdick, a bankrupt, together with Sinness, perfected an appeal to the Supreme Court of this state from the judgment dismissing the action mentioned; that thereafter the Supreme Court, upon hearing, set aside the conveyance to Jessie James from Kitsey Burdick, and vested the title in Buttz as trustee; "that the order of said Supreme Court was subsequently followed out, and that for said reason the title of Jessie James to such property failed"; that by reason of the decision of the Supreme Court the assignment of the sheriff's certificate of sale from the Mercantile Company to the plaintiff failed, and the payment of \$526 by the plaintiff was wholly without consideration, and was obtained through misrepresentations; that the plaintiff would not have purchased the same unless he believed that the sale was in all respects valid, and that the assignment of the certificate of sale would mature into a fee simple upon the issuance of the sheriff's deed; that, in addition, relying upon representations made, the plaintiff paid taxes between December, 1914, and December, 1915, amounting to \$532, also erected two frame buildings on the premises worth \$1,000, and cleared 25 acres of land reasonably worth \$500, employed counsel and incurred expenses to the amount of \$250—for all of which judgment was claimed against the defendant for about \$3,200, with interest.

Decision

The plaintiff presents the question of whether the assignee of the purchaser at an execution sale can recover from such purchaser upon the failure of title in the premises concerned. It is contended that the sheriff's certificate of sale involved herein conveyed no title; that it was merely a chose in action, and as such personal property; that § 5984, C. L. 1913, applies, which provides:

"One who sells or agrees to sell an instrument purporting to bind any one to the performance of an act thereby warrants the instrument to be what it purports to be and to be binding according to its purport upon all parties thereto; and also warrants that he has no knowledge of any facts which tend to prove it worthless, such as the insolvency of any of the parties thereto, when that is material, the extinction of its obligations, or its invalidity for any cause."

It is contended that the Mercantile Company, when it sold this sheriff's certificate, warranted to the plaintiff that the certificate purported to be an instrument which entitled the plaintiff to a good and sufficient deed at the expiration of a year from its date, or a refund of the money paid; that furthermore, plaintiff in this connection was entitled to rely upon the state of title as then existing, and upon the regularity and validity of the proceedings in the execution sale as they then appeared of record; that the defendant Sinness, as attorney for the Mercantile Company, as well as the defendants Buttz and Aaker, then knew or had knowledge of matters concerning the pending litigation which affected the title upon the execution proceedings which eventually made the title of James, upon which the execution proceedings depended, invalid; that the acts of the defendants in parting with the assignment of the sheriff's certificate and their connections in the litigation and proceedings had concerning this land operated to deceive the plaintiff, and created a trap, so that the plaintiff was compelled either to purchase the rights of the Mercantile Company or lose the land. It is further contended that the allegations of the complaint concerning the determination made by this court in the case of *Buttz v. James* must be taken as true, and that proof may be introduced to show that in fact, pursuant to such allegations, the title of James did fail; further, that the plaintiff, through the purchase of the sheriff's certificate, does not stand in the position of a purchaser at a judicial sale, and was entitled further to rely upon representations appearing of record or as made through acts of the parties concerned.

Hon. A. G. Burr, trial judge, in extensive memoranda opinions, held that the gist of the action was the sale of the certificate, the assignment of that instrument by the Mercantile Company to the plaintiff; that neither Buttz nor Sinness had anything to do with such sale; and the confirmation of the sale by the defendant Buttz as a judge did not render him liable; that all he did under such order of confirmation was to declare that the sale had been made in compliance with the statute; that the fact that

Judge Buttz was trustee in bankruptcy, and that there was pending an action to have the conveyance to James set aside, had no bearing upon the order confirming the sale; that the defendant Sinness was merely the attorney who prosecuted both actions to a successful conclusion; that he had nothing to do with the transfer of the certificate of sale; that the defendant Aaker was merely the manager of the Mercantile Company, and was so known by the plaintiff to be; that there is no attack made upon the judgment of the Mercantile Company against James, and that this company bought the land upon the execution sale at its own peril; that the assignment of the certificate carried whatever interest the Mercantile Company had in the land; that it possessed such interest as James had in the land at the time the judgment was docketed and levy made before James sold the premises to the plaintiff; that in this case there was a valid judgment and a valid execution; that there was no warranty of title contained in the assignment, nor any statement made as to the extent of the interest sold; that there is nothing to show that the company did not know that the sale would pass good title to the property; that no fraud is set up; that in the case of *Buttz v. James*, 33 N. D. 162, 178, 156 N. W. 547, the title of the trustee in the land was for the creditors to the extent of their claims, and that after the debts were paid the remainder of the estate was to be turned over to the parties entitled thereto; further, the plaintiff got title to the land from two sources, through Jessie James direct, by her conveyance alleged in the complaint, and through the certificate of sale and sheriff's deed issued thereunder; that, upon taking judicial notice of these matters in connection with the demurrers, it was very clear that the plaintiff had no cause of action against the company; that without taking judicial notice the complaint itself fails to state a cause of action, for it seeks to recover the amount paid upon the grounds that the certificate of sale did not convey any interest in the land; that Jessie James was not the owner thereof, and that the execution sale did not sell any property of Jessie James.

We concur in the decision of the learned trial court. The sheriff's certificate issued upon the execution sale carried the right, title, and interest of the judgment debtor, subject to the right of redemption. § 8084, C. L. 1913. The assignment of this sheriff's certificate operated likewise to transfer the rights of the judgment debtor in the land, subject to redemption. It transferred a property right in realty. Upon the expiration of the period of redemption and the issuance of a sheriff's deed in

February, 1915, to the plaintiff, these rights of the judgment debtor were entirely foreclosed. The plaintiff then possessed all of the rights of the judgment debtor to which the judgment lien attached at the date it was docketed. The validity of such judgment and of the execution proceedings is not in any manner attacked. The decision of this court in *Buttz v. James*, 33 N. D. 162, 156 N. W. 547, determining the status of James, title was not rendered until February, 1916. Manifestly, if the decision of this court in such case had been the reverse, the plaintiff's title, pursuant to such sheriff's deed, would have remained unimpaired. Assuredly, it may not be premised, pursuant to the allegations of this complaint, that the defendant, with prescient or prophetic knowledge, could forecast the decision of this court in such case. Upon such decision by this court in that case the complaint predicates a cause of action. The decision in that case did not pretend to wholly deprive James of title in the land. It served simply to set aside the conveyance made so far as it interfered with the rights of creditors and the rights of the trustee in connection therewith. See *Buttz v. James*, 33 N. D. 162, 178, 156 N. W. 547; *Phillips v. Phillips*, 179 N. W. 671, 672; 12 R. C. L. 597; *Brasie v. Minneapolis Brewing Co.*, 87 Minn. 456, 92 N. W. 340, 67 L. R. A. 865, 889, 94 Am. St. Rep. 709. The trial court properly took judicial notice of the determination made in that case. See 7937, C. L. 1913; *Beyer v. Investors' Syndicate*, 47 N. D. 358, 182 N. W. 934.

The complaint plainly is insufficient to allege or show grounds of either fraud or conspiracy to sell or dispose of a worthless title. § 5984, C. L. 1913, has no application upon the facts as alleged. It is clear that the purchaser at the sale upon the execution proceedings was subject to the doctrine of caveat emptor. In the absence of fraud such purchaser could not complain of defects in the title.

The assignee of such purchaser, in the absence of an express warranty, stands in no stronger position. 39 Cyc. 1672. He would be in no stronger position if he had redeemed from such purchaser. See *Copper Belle Mining Co. v. Gleason*, 14 Ariz. 548, 134 Pac. 285; note 48 L. R. A. (N. S.) 481; note 36 L. R. A. (N. S.) 1218. Upon the complaint the plaintiff purchased the assignment of the sheriff's certificate with the same knowledge and notice of rights existing therein as the company possessed. He stands in no better position than the Mercantile Company. See 39 Cyc. 1415.

The order is affirmed, with costs to the respondent.

CHRISTIANSON and BIRDZELL, JJ., concur.

GRACE, J., concurs in the result.

ROBINSON, C. J. (concurring). This case presents a general demurrer to the complaint. The brief of counsel states:

"The complaint alleges that there was a complete failure of title and a complete failure of consideration for the payment of \$925. The allegation is positive and unqualified, and must be taken as true for the purpose of the argument."

Now that is a great mistake. The court will not accept as true what it knows to be untrue, and it does know that in this case there was not a complete failure of consideration. The Mercantile Company had caused three quarter sections of land to be sold on an execution against Jessie James, the married daughter of the plaintiff. She had conveyed the title to her father, and his purchase of the sale certificate answered the purpose of a redemption. It gave him title to a valuable equity in the land, subject to some mortgages and claims asserted by the creditors against the mother of Jessie James, who had foolishly conveyed the title to her daughter with intent to hinder, delay, and defraud creditors. The mother went into voluntary bankruptcy, and the trustee in bankruptcy subjected the land to the claims of creditors, but that did not divest the plaintiff of the valuable equity under the assignment of the sheriff's certificate and the deed from his daughter. The complaint does show that Mrs. Burdick had a valid defense against the claims asserted by her creditors, but that is of no consequence. It shows only that she and her counsel acted very foolishly in attempting to defend against the claims and trying to defeat them by going into bankruptcy. An attorney who advises such a foolish procedure should have to pay all damages and costs. Counsel for plaintiff cites authorities holding that the purchaser of a sale certificate may recover the purchase price in case the certificate is worthless; that it may be recovered as money paid without any consideration, and by mistake of fact. 23 Corpus Juris, 790; Vanesse Land Co. v. Hewitt, 95 Wash. 643, 164 Pac. 196; McGoren v. Avery, 37 Mich. 120.

These cases do correctly state the law, but they do not govern this case.

Affirmed.

O. H. LUMRY, Respondent, v. ANDREW KRYZMARZICK, Appellant.

(184 N. W. 254.)

Sales — delivery indicates intention to pass title, but is not conclusive of immediate transfer.

1. In an action to recover the purchase price of a second-hand tractor plowing outfit alleged to have been sold and delivered to the defendant, where the evidence was conflicting as to the place where delivery was to be made—whether upon plaintiff's farm where the tractor was situated when the contract was made or upon the defendant's farm some twenty-five or thirty miles distant—but where there was no dispute as to the obligation assumed by the seller to put the outfit in fair working condition for plowing; and where the evidence showed that the engine had never been put in fair working condition, it is *held*:

Delivery, in the sense of change of physical possession from the seller to the buyer, while a strong indication that the parties intend to pass title, is not conclusive of an intention to transfer title immediately.

Sales — where seller was to repair after delivery, inferred that title was not to pass prior thereto.

2. Where, after delivery to the purchaser in the circumstances disclosed in the evidence, work of a substantial character remained to be done by the seller to put the property in a condition in which it would be of some use to the purchaser, it is a fair inference that the parties did not intend that title should pass until this work was done.

Sales — buyer may defend for seller's breach notwithstanding prior failure to rescind.

3. Where title has not passed under a contract for the sale of specific property, and where the seller has been guilty of a substantial breach of the contract, the purchaser may defend an action for the price notwithstanding his prior failure to effect a rescission of the contract.

Opinion filed June 22, 1921. Rehearing denied September 10, 1921.

Appeal from the District Court of McLean county, *Nuessle*, J.

Reversed and remanded.

R. L. Fraser and *J. A. Hyland*, for appellant.

If under a contract for the sale of specific goods the seller is bound

to do something to the goods for the purpose of putting them in a deliverable state, that is, into a condition in which the buyer is bound to accept them unless a different intention appears; the property does not pass until such thing is done. *Simpson v. Perfett*, 36 N. D. 526; 162 N. W. 900.

Since the property was not as warranted, which is a fact found by the court, it was a bar to recovery for the purchase price. *Simpson v. Perfett*, 36 N. D. 526; 162 N. W. 900; *Holbert v. Weber*, 161 N. W. 560 (N. D.); *D. M. Osborn & Co. v. Martin*, 56 N. W. 905, (N. D.).

And no rescision is necessary. *Nat'l Cable Mfg. Co. v. Filbert*, 140 N. W. 741, (S. D.); 13 C. J. 619.

J. E. Nelson, for respondent.

BIRDZELL, J. This is an appeal from a judgment in favor of the plaintiff and from an order denying the defendant's motion for a new trial. The action is one to recover the purchase price of a secondhand gasoline tractor plowing outfit alleged to have been sold and delivered to the defendant in the spring of 1919. It was tried to the court without a jury. The facts are as follows:

The plaintiff is a dealer in implements at Garrison, N. D.; the defendant, a farmer living in the vicinity. In the fall of 1918, the defendant, being prospectively interested in the purchase of a tractor for the following year, talked with the plaintiff concerning the purchase of a 1912 model 45 horse power Mogul tractor which the plaintiff owned. The tractor had been acquired secondhand and was then located 8 or 9 miles south of Douglas upon the plaintiff's farm and some 25 or 30 miles distant from the defendant's farm. They also talked of the purchase and sale of a 10-bottom lever lift Oliver engine plow which was at the time situated at Roseglen, about 16 miles from the location of the engine. The plaintiff and defendant went to look at the engine. It had not been used that year, but the plaintiff stated, in answer to a query as to whether it would run, that one McDonald, who had previously run it for the plaintiff, said that he could start it in 15 minutes. The defendant inspected the machine particularly with reference to its bearings which, in his opinion, were not badly worn. Negotiations were renewed in February or March of the following winter, and some time in March an agreement was reached whereby the defendant agreed to pay \$1,600 for the engine, the plows, and a cook car; the plaintiff agreeing to turn the engine over to the defendant

"in good working order." The evidence is conflicting as to the portion of the agreement relating to the delivery of the engine; the plaintiff contending that he agreed to deliver it upon his own place where it was then standing, and the defendant that delivery was to be made upon his farm which, as stated, was some 25 or 30 miles distant; and that the plaintiff not only agreed to do this but to start plowing with it. The plaintiff, at the defendant's request, made arrangements to have the plows moved to a certain corner where they could be picked up by the engine en route to the defendant's farm. Some time after the deal was made (about April 20th), the plaintiff sent Frank McDonald out to get the engine in shape for delivery. The ignition system was lacking, the plaintiff having taken off the magneto to preserve it. In making the sale he agreed to repair the magneto, or, if it could not be made to work properly, that he would supply a new Atwater-Kent system.

McDonald, with a helper, worked on the engine 8 or 10 days before attempting to move it on the road to the defendant's place, and it required approximately 10 days more to move the engine to the defendant's farm. McDonald accounts for the time consumed on the road by stating that the weather was rainy, the roads muddy, and that they got stuck several times. The defendant sent for the extension arms and other parts that could be more conveniently hauled than taken with the tractor. McDonald was paid for the work done on the tractor by Lumry, the plaintiff, and it seems that he made out a separate bill to the defendant Kryzmarzick for moving the machinery amounting to about \$165, which account has never been paid by the defendant and is assigned to the plaintiff in this action but not included in the complaint. McDonald purchased from the Standard Oil Company some kerosene and gasoline needed for moving the machine, and directed it to be charged to the defendant. The defendant denies that he authorized this, but he paid the bill. When the machinery reached the defendant's farm, the plows were hitched on and McDonald started to plow. After going about 10 rods the engine stopped. McDonald says this was because the plows were not scouring, but the defendant contends it was because the engine did not have sufficient power to pull the plows. There were not as many plows attached as the engine was supposed to be capable of pulling. The engine had thus far been run on batteries, and as McDonald was leaving he took them off to use on another engine belonging to the plaintiff. Another ignition system was later put on. At the time McDonald left the engine with the defendant, he stated

that there was a loose stud bolt on one of the cylinders, but that it would give no particular trouble and advised leaving it until the season's work was done, as it was then getting late. This stud bolt was later chiseled out by one Krause, a man the defendant had hired to operate the engine. One cylinder was found to be cracked and leaking; that is, water was leaking from the water jacket into the combustion chamber. It is claimed by the plaintiff that this crack was caused by the chiseling operations, and by the defendant that the crack was there before any work was done to remove the stud bolt; one of the plaintiff's witnesses testifying that he saw the crack before the stud bolt was chiseled out. The plaintiff meanwhile had hired one Kitts to put an Atwater-Kent ignition system on the tractor, and while he was working with it, it became apparent that a new cylinder was required. The defendant requested the plaintiff to supply this cylinder and claims that he told the plaintiff that if he did not do so the deal would be off. The plaintiff agreed to furnish it. A cylinder was supplied, but it did not fit, and before it could be put on several inches had to be cut off one end and adjustments made for connecting it with the water pipes. It had originally been difficult to start the engine, a Ford automobile having been found useful for this purpose. But after the new cylinder was put in, it apparently could not be started with a small tractor capable of pulling six plows which the defendant attached to it by a belt for the purpose of turning the engine over. The tractor in question has not been used since, and the cook car has been blown to pieces. The defendant, through his attorney, very soon after the demonstrated inability of the tractor to work, served upon the plaintiff a purported rescission notice which was defective in that it did not include an offer to return the cook car. Soon after the settlement date this action was brought.

The trial court found in substance that the plaintiff warranted the engine to be in good working order; that the place of delivery agreed upon was the plaintiff's farm; that delivery was made thereat according to the terms of the contract; that the defendant accepted the property and removed it to his premises; that the engine was not at the time in good working order as warranted; and, as a conclusion of law, it was found that while there was a breach of warranty there was not a sufficient rescission of the sale contract. Judgment was entered for the plaintiff but without prejudice to the right of the defendant to bring an action for damages for breach of warranty.

We are of the opinion that the trial court erred in holding that there

was an acceptance of the engine by the defendant. While the testimony is not harmonious on the subject as to where delivery was to be made, it is notable that the plaintiff testifies to no particular conversation with reference to this subject; his testimony consisting largely of the conclusion that he was to make delivery upon his place. The defendant testifies specifically that the agreement was that the engine was to be delivered to him upon his farm in fair working condition for plowing. It is to be noted in this connection that the engine was taken to the defendant's place by the man whom the plaintiff had employed to repair it. These repairs must have been somewhat extensive, for they required at least eight days of the time of the repair man and the helper. It is a matter of some significance, too, that though this repair man was working for wages at different jobs, he never pressed his claim upon the defendant, but assigned it to the plaintiff, and the plaintiff has not seen fit to include it in this action, though it amounts to about \$165. The trial court laid stress on the fact that the defendant paid for the kerosene and gasoline that had been charged to him as showing that the moving of the engine was his obligation. To our minds, this is not a strong circumstance, as the amount involved would be so small that the defendant might not care to protest its payment. The plaintiff, it must be borne in mind, had the burden of proof upon this question of delivery, and with the evidence in the condition it is, we are of the opinion that this burden was not sufficiently sustained.

The evidence, however, is conflicting, and the trial court found in favor of the plaintiff. It might therefore be reasonably urged that we should not disturb the finding of the trial court. Even though superior weight be given to the opinion of the trial court, in so far as credibility is involved, still we are of the opinion that the judgment is erroneous; for, in view of the facts which are clearly established, the case does not properly turn upon the technical circumstance as to where delivery was to be made or as to who was to pay the expenses of moving. Admittedly the engine, at the time it was moved, was not equipped with an ignition system. The plaintiff admits that he agreed to install the magneto in proper working condition or furnish a new Atwater-Kent system. Up to the time the machine was left on the defendant's place neither had been supplied, and consequently there was lacking a vital part of a gasoline or kerosene engine. It had been moved with batteries belonging to the plaintiff, and these were promptly taken for use on another of plaintiff's engines. By the time an ignition

system was installed, the crack in the cylinder had been discovered, and the evidence concerning this crack raises a strong probability that it had been caused by frost. At least, this probability is as strong as that it had been caused by the removal of the broken stud bolt. The outstanding ultimate fact is that no tractor has been supplied to the defendant capable of doing satisfactory work plowing or in fair working condition for plowing. Whether the engine was in proper condition for plowing could not readily be determined by its performance on the road while moving, and it would hardly be a fair presumption that the defendant accepted it for this purpose with an ignition system lacking and with a cracked cylinder.

The supplying of these parts was clearly a condition precedent to the passing of title to the defendant, and any acts of his by way of participation in transporting the machinery or in changing the physical position for the purposes of convenience in facilitating a full performance of the contract cannot be said to constitute a waiver of their effect as conditions precedent. It is not shown that he made any inspection of the engine after the repairing was supposed to have been done and before McDonald started on the journey to his place. Clearly, he did not constitute McDonald his agent for the purpose of accepting the engine. At most, his authority on behalf of the defendant was limited to the mere transportation of the machinery to his place. McDonald indisputably was employed by the plaintiff to put the engine into deliverable condition, and any judgment he exercised with reference to its running condition would be a judgment exercised on behalf of the plaintiff, not the defendant. Certainly McDonald was not constituted both judge and jury to bind both parties by his action. There is, in fact, no evidence that the defendant ever accepted the engine in its present condition or that he was willing to accept it until it was rendered capable of doing the work for which the plaintiff agreed to supply it. The burden of putting it in that condition remained all the time on the plaintiff, and this burden amounted to a condition precedent to the passing of title. And, as stated, in our opinion its effect as a condition precedent is not modified or waived by any participation of the defendant in the physical delivery of the property. It is true that delivery is one of the strongest circumstances indicative of intention to transfer title immediately. Williston on Sales, § 265. But where delivery of physical possession is made only as a step in the performance of the contract and for the purpose of better enabling the seller to perform his remaining obligations, the delivery is conditional only and does not control the pass-

ing of title. And this is particularly true where the thing delivered is not capable of being used by the buyer without a more complete fulfillment of the seller's obligations. See *Kitson Machine Co. v. Holden*, 74 Vt. 104, 52 Atl. 271.

Since, in our opinion, title did not pass to the defendant, it is immaterial whether the contract was properly rescinded or not. The notice of purported rescission which was promptly given was at any rate sufficient to apprise the plaintiff that the defendant refused to recognize the contract as being any longer binding upon him in view of the failure to perform on his part.

For the reasons stated, we are of the opinion that the judgment in favor of the plaintiff is erroneous, and it is reversed. The case is remanded, with directions to enter a judgment of dismissal; defendant to recover his costs.

ROBINSON, C. J. and CHRISTIANSON and BRONSON, JJ., concur.

GRACE, J., concurs in the result.

JOSEPH WILHELM, Appellant, v. JOHN BANG, Sheriff of Dunn County, North Dakota, and State Bonding Fund, Surety, Respondents.

(184 N. W. 268.)

Sheriffs and constables — discovery of lost execution in clerk's custody held to warrant vacation of amercement judgment against sheriff for failure to return.

Where a judgment was entered against a sheriff in amercement proceedings and where the trial judge, at the time of ordering judgment, directed a stay of execution for thirty days within which time defendant might move to vacate, and during the pendency of the motion the execution, which had been lost and the failure to return which constituted the basis for the amercement judgment, was found in the custody of the clerk of the district court among excess files kept in a storage vault with a return endorsed thereon by the sheriff, it is *held* sufficient facts appeared to constitute a prima facie defense to the amercement proceedings

and that the action of the trial court in granting the motion to vacate the judgment was not an abuse of discretion.

Opinion filed June 22, 1921. Rehearing denied September 10, 1921.

Appeal from district court of Dunn County, *Pugh, J.*

Affirmed.

Halpern & Rigler, for appellant.

Tobias D. Casey, for respondents.

BIRDZELL, J. This is an appeal from an order vacating a judgment in an amercement proceeding. It appears that the plaintiff in this action was, in December, 1917, the owner of a note and chattel mortgage upon a Ford automobile which had been given by one T. E. Flowers. An action was instituted to foreclose the mortgage and obtain a deficiency judgment. Upon the filing of the complaint a warrant of seizure was issued to the defendant Bang as sheriff of Dunn county, directing him to seize the mortgaged property. It later appeared that one Boyd claimed a lien upon the property for repairs, and a complaint in intervention was filed, setting up his claims. Flowers defaulted, and the action was prosecuted to judgment and judgment entered in favor of the plaintiff. On June 27, 1919, a special execution was issued, directing the sheriff to sell the automobile in satisfaction of the judgment. The execution was placed in the hands of the sheriff on July 1, 1919. Inquiries were later made by the plaintiff's attorney concerning the execution, and, it appearing from such inquiries that the execution had not been returned, summary proceedings in amercement were begun against the sheriff. The motion was postponed from time to time and was not decided by the trial court until near the expiration of the term of the judge to whom it was presented. Upon the showing made on behalf of the plaintiff judgment was ultimately entered, amercing the sheriff. At the time the judgment was entered the court stated that the execution would be stayed for 30 days to allow the defendant sheriff time to move for opening the judgment. Within the 30 days, notice of motion to vacate the judgment was served upon the plaintiff's attorney. The motion was supported by the affidavit of the sheriff, which, among other things, stated that he had never been able to obtain

possession of the automobile under the warrant of seizure, although he had made diligent search for the same; that he had not been able to obtain possession after diligent search under the special execution; that he immediately made out and signed a return of these facts, and it was his intention to file the return with the clerk of court of Dunn county, but that through some mistake the return, as the affiant was informed, was never filed with the clerk of court. It appears, however, that before the motion to vacate was decided, the execution was found among certain files of the clerk in the basement of the courthouse where excess files were kept and that it bore a return of the sheriff. The trial court indicated in a memorandum that this was sufficient ground to set aside the judgment. Hence the order vacating the judgment.

Under the state of facts presented upon this appeal, it appears to be clear that the trial court did not commit error in exercising its discretion by vacating the judgment, as the facts, if they should ultimately be determined in accordance with the *prima facie* showing, would constitute a defense to the amercement proceedings. It also appears that the defendant was not guilty of serious neglect in his failure to discover earlier the true facts with reference to the return, as he apparently relied upon the clerk to file the execution in its proper place.

The order appealed from is affirmed.

BRONSON, CHRISTIANSON, and GRACE, JJ., concur.

ROBINSON, C. J. (concurring specially). I do concur in the opinion as written by Mr. Justice Birdzell. I do also concur in the special opinion of myself and Mr. Justice Grace in *Solberg v. Rettinger*, 40 N. D. 1, 168 N. W. 572. I wholly dissent from the amercement decision in *Lee v. Dolan*, 34 N. D. 449, 158 N. W. 1007. That decision does violence to our conscience and our sense of fairness and honesty. If the purpose of the amercement statute is to aid one person in robbing another, then it should be strictly construed or held void. It is high time for the courts to cease following bad precedents, piling error upon error and lading men with burdens that are grievous to be borne. It was for that evil practice the Master said: "Woe unto you, ye lawyers."

JOSEPH PULKRABEK, Appellant, v. OLIVE PULKRABEK, Respondent.

(183 N. W. 850.)

Divorce — maintenance money to wife may be awarded where divorce denied.

1. In an action for divorce the defendant answered denying the existence of grounds alleged in the complaint and affirmatively pleaded grounds for divorce against the plaintiff, praying for divorce and permanent alimony. At the conclusion of the trial the court found the evidence of both parties insufficient and denied the divorce. In addition it found that the plaintiff owned property worth \$10,000; that he had failed and neglected to provide the defendant with the necessities of life and had neglected to pay the temporary alimony. It is *held*:

Under § 4401, C. L. 1913, where a divorce is denied, the court may award maintenance money to the wife.
may award maintenance money to the wife.

Divorce — statutory award of maintenance may be made upon showing of reasonable necessity.

2. An award of maintenance under § 4401, C. L. 1913, is not contingent upon the existence of grounds for divorce or upon the wife living apart from her husband without her fault, but the award may be made upon facts showing reasonable necessity for action on the part of the court.

Opinion filed June 25, 1921.

Appeal from district court, Morton County, *Pugh, J.*

Affirmed.

Sullivan, Hanley & Sullivan, for appellant.

“When a decree of divorce is denied, the findings of the Trial Court must show that the parties are living apart, and that the wife needed, or would need alimony for her support and maintenance.” § 4401 Comp Laws, 1913. *Peyre v. Peyre*, (Cal.) 21 Pac. 838; California Civil Code, § 136; *Volkmar v. Volkmar*, 147 Cal. 175, 85 Pac., 413; *Bensen v. Bensen*, 129 Pac. 596, (Cal.).

Under the New York statute the Court must further find that even under this section the wife can be granted alimony only on the event that she is entitled to a decree. *Davis v. Davis*, 75 N. Y. 221; *Robinson v.*

Robinson, 146 App. Div. 533; 131 N. Y. S. 261; Warring v. Warring, 100 N. Y. 221; Palmer v. Palmer, 29 How. Prac. (N. Y.) 390; Douglas v. Douglas, 5 Hun. (N. Y.) 143.

Norton & Kelsch, for respondent.

BIRDZELL, J. This is an appeal upon the judgment roll in an action for divorce. The plaintiff, the husband, in his complaint alleged that the parties were married on May 8, 1920, and that shortly after the marriage the defendant, upon numerous occasions, treated the plaintiff in a cruel and inhuman manner, and has since pursued a course of conduct towards him that caused grievous bodily pain and mental suffering. The answer denies these allegations of grounds for divorce, and for a cross-complaint alleges that the plaintiff, shortly after the marriage, commenced a course of cruel treatment towards the defendant, and that the plaintiff—

“for the past six months has wilfully neglected and refused to provide for this defendant with the common necessities of life, having the ability so to do, and has compelled this plaintiff to live upon the charity of friends and her own labor, notwithstanding his ability to support this defendant, and that he is worth, as this defendant is informed and believes, the sum of \$20,000.”

The answer concludes with a prayer for divorce and permanent alimony. At the conclusion of the trial in the district court the following findings, among others, were made:

“III. The court finds, as a matter of fact, from all of the evidence and the record in said cause that both parties to said action have failed to prove by competent evidence the existence of any ground to entitle either party to a divorce.

“IV. That the plaintiff is the owner of 317 acres of real estate and also 6 lots with a dwelling house situated thereon in the city of Mandan, which said property is of the reasonable value of \$10,000, which is free from all incumbrances whatsoever; that the plaintiff has failed to properly furnish and equip the residence of said parties, and has failed and neglected to properly provide and care for the defendant herein with the necessities of life, notwithstanding the fact that he is well able so to do.

“V. That the plaintiff has paid the sum of \$50 to the defendant upon the order awarding temporary allowance, but has failed and neglected to pay the amount awarded to the defendant as temporary alimony by order of the court, which is on file in said cause, and that there is due to the de-

fendant the sum of \$25, payable February 22d, the sum of \$25, payable March 22d.

"VI. That the defendant does not own any real property and does not own any personal property of any value, except her personal effects, and that it will require at least the sum of \$25 per month for the support and maintenance of said defendant."

Pursuant to these findings the court concluded that neither party was entitled to a divorce; that there was due and payable to the defendant from the plaintiff the sum of \$50 upon an order awarding temporary alimony; that the defendant had a right to possess and occupy with the plaintiff the home and residence of the plaintiff situated in the city of Mandan, N. D.; that the plaintiff pay to the defendant the sum of \$100 for the purpose of buying furnishings and clothing for the defendant, or to furnish such fixtures, furnishings, and clothing as would be equivalent in value to the sum of \$100; that the plaintiff pay to the defendant the sum of \$25 as permanent alimony or allowance for her support, payable monthly beginning April 22, 1921; and that the plaintiff pay to the defendant the sum of \$75 for additional attorney's fees and costs and disbursements. Judgment was entered in accordance with the findings and conclusions. The appellant challenges the sufficiency of the findings to support the judgment, and bases his principal contention upon the proposition that the court, having denied the divorce, was without power to enter any judgment for permanent or temporary maintenance.

The appellant concedes that the correctness of his contention depends upon the construction and application of § 4401, C. L. 1913. This section reads:

"Though a judgment of divorce is denied the court may in an action for divorce provide for the maintenance of a wife and her children, or any of them, by the husband."

It will readily be seen that it is the purpose of this section to authorize the decreeing of maintenance to a wife in proper circumstances where a divorce is denied. The question is, what circumstances justify the making of such a provision? Can maintenance be awarded while the wife is living with the husband, or can it only be awarded when, for sufficient cause found by the court and on account of the husband's fault, she is living separate and apart from him? In construing an identical statutory provision, the California court said:

"The objects of the provision evidently are to enable the court in a proper case to aid in a restoration of domestic harmony, to prevent the

breaking up of the family—especially where there are children of tender age and delicate health—and to require penurious husbands to furnish decent support for their wives, and for the care and education of the children, where the parties have no cause for divorce on statutory grounds, or where the innocent party has condoned the offense.” *Hagle v. Hagle*, 74 Cal. 608, 16 Pac. 518.

See, also, to similar effect, *P. v. P.*, 24 How. Prac. (N. Y.) 197.

We think this correctly expresses the objects of the statute, and that in order to carry out these objects a fair construction must be adopted—one which will result in giving to the court ample power to make necessary provision for attaining the ends which the Legislature evidently had in view. The statute recognizes that the state is concerned in safeguarding the marital and family relation. Its interest is aroused even before the domestic ties have been strained to the breaking point. And it endeavors to continue the marital relation by commanding respect for the reasonable obligations arising therefrom.

In the instant case it will be noted that the court found the plaintiff to be the owner of property reasonably worth \$10,000; that he had failed to properly furnish and equip the residence of the parties and to properly provide the defendant with the necessaries of life, although he was well able so to do; and that the defendant is without property. It will also be seen that the provision made for her is reasonably conservative and well within proper bounds, considering the circumstances of the parties. The fact, too, that a divorce was sought by both parties without legal grounds existing therefor is a sufficient warrant for the intervention of the court to the end that recognition be given to the primary obligations of the marital tie in the supplying of the simple material things necessary to sustain life and provide reasonable comfort.

The contention is made that the statute does not authorize an award of maintenance where the decree of divorce is withheld unless grounds for divorce are established or unless the wife is living separate and apart from her husband without her fault. It is true that affirmative findings showing the necessity for action must be made. The court cannot supervise the domestic affairs of individuals merely because their mode of living does not accord with the more commonly accepted standards. But under the statute we can see no reason for limiting action to those cases where grounds for divorce exist or where the parties are living apart. The statute plainly says that when a judgment for divorce is denied the court may provide for the maintenance of the wife, and it does not make the

power contingent. It must, of course, be established as a fact, and this seems to be the determining point in the California cases cited by appellant's counsel, that there is ground for awarding the maintenance. Otherwise it must be assumed that the husband would voluntarily discharge his obligations of support.

We are of the opinion that the findings in this case support the judgment, and it is affirmed.

ROBINSON, C. J. and CHRISTIANSON, BRONSON, and GRACE, JJ., concur.

F. M. ROURKE, Appellant, v. HOOVER GRAIN CO., Respondent.

(183 N. W. 1005.)

Appeal and error — order dissolving order enjoining statutory proceedings to foreclose land contract is appealable.

1. An order dissolving an order enjoining statutory proceedings for the foreclosure of a land contract is appealable.

Vendor and purchaser — time specified in notice for cancellation of land contract fixes such time.

2. The time specified in a notice for the cancellation of a land contract fixes the time for its cancellation, subject to the statutory requirements.

Opinion filed June 25, 1921.

Proceedings in District Court, Ransom county, *McKenna, J.*, upon the cancellation of a land contract. From an order, dissolving an injunctive order theretofore issued, the plaintiff has appealed.

Reversed and remanded.

Curtis & Remington, for appellant.

C. G. Mead, for respondent.

BRONSON, J. In July, 1919, the parties made a land contract cover-

ing 320 acres of land in Ransom county. It required the payment of \$2,200 on March 1, 1920. On August 30, 1920, the defendant served a notice of cancellation of the contract by reason of default in the payment of \$2,200 and interest accrued. Therein, the date of the termination of the contract was stated to be March 1, 1921. On February 26, 1921, pursuant to statutory proceedings, the trial court issued an injunctive order requiring further proceedings upon the cancellation to be had in the district court. This order was served upon the defendant's attorney on March 1, 1921. On March 12, 1921, the trial court, upon application, issued an order to show cause why the injunctive order upon the cancellation proceedings should not be dissolved. Upon a hearing had, the previous injunctive order was dissolved. The plaintiff has appealed therefrom.

The defendant contends that the order is nonappealable, for the reason that this is not a special proceeding and is not within the terms of § 7841, C. L. 1913, specifically providing for an appeal in similar proceedings affecting mortgage foreclosures; that, furthermore, under the statute, the cancellation of the contract became effective on February 28, 1921, and was therefore complete before service of the injunctive order upon March 1, 1921. The defendant relies upon *Tracy v. Scott*, 13 N. D. 577, 101 N. W. 905, and *McCann v. Mortgage Investment Co.*, 3 N. D. 172, 54 N. W. 1027, in support of the contention that this order is nonappealable. We are of the opinion that this contention cannot be sustained.

A distinction is to be drawn between the procedure to obtain the injunctive order and the proceedings that do obtain after such injunctive order is issued. After the issuance of the injunctive order, further proceedings in cancellation, pursuant to the statute, are required in the district court. Either the cancellation proceedings must be abandoned, or the cancellation takes place through action in the district court. In any event, the proceedings are in the nature of an action. Upon issuing the injunctive order, the court had jurisdiction; a trial might have occurred; a judgment eventually might have resulted. The order, as issued by the trial court, dissolving this injunction operates, in effect, as a judgment denying the injunction and discontinuing the action pending. It thus deprives the plaintiff of a substantial right, if any he had. Furthermore, § 2 of chap. 151, Laws 1917, practically reincorporates the provisions of § 8074, C. L. 1913, and makes the same applicable to the foreclosure of land contracts. In effect, this is, by analogy, a legislative recognition of a right of appeal as provided in subds. 3 of § 7841, C. L. 1913.

The contention of the defendant that, pursuant to the statute (chap. 151, Laws 1917), the cancellation pursuant to the notice became effective February 28, 1921, cannot be sustained. The notice of cancellation specifies the time of cancellation. The statute requires the notice to state such time of cancellation. § 8120, C. L. 1913. Under the statute it may not be less than six months. It may be more, if the notice so prescribes. § 8120, C. L. 1913. See *Sylvester v. Holasek*, 83 Minn. 362, 86 N. W. 336. Accordingly this injunctive order was served anterior to time of cancellation specified in the notice. It is therefore ordered that the order be reversed, and the cause remanded for further proceedings, with costs to the appellant.

ROBINSON, C. J., and BIRDZELL, J., concur.

GRACE, J., concurs in the result.

CHRISTIANSON, J. (concurring specially). In *Tracy v. Scott*, 13 N. D. 577, 101 N. W. 905, this court ruled that an order under § 5845, Rev. Codes 1899, enjoining a foreclosure by advertisement, and directing all further proceedings for the foreclosure to be had in the district court, was not appealable. Following that decision, the Legislature amended the statute relating to appeals so as to make such orders appealable. See chap. 79, Laws 1907; § 7841, C. L. 1913. Under our laws a contract for the future conveyance of real property may be foreclosed by the service of notice upon the "vendee, purchaser, or his assigns." See §§ 8119-8122, C. L. 1913; chap. 180, Laws 1915; chap. 151, Laws 1917. In 1917 the Legislature provided that any such foreclosure of land contracts may be enjoined upon proper application by the "vendee or purchaser or his assigns," and that when it is so enjoined the order shall direct that all further proceedings for cancellation of the contract be had in the district court properly having jurisdiction of the subject-matter. Chap. 151, Laws 1917. This statute is almost an exact duplicate of the statute relative to the enjoining of a foreclosure of a mortgage by advertisement.

It is manifest, therefore, that the Legislature intended to afford to the proper parties interested in a statutory proceeding for the foreclosure of a land contract precisely the same right to enjoin such proceeding as was afforded to similar parties to enjoin the foreclosure of a mortgage by advertisement. Of course, when the Legislature enacted chap. 151, Laws

1917, it knew that orders made under the statute which authorized the enjoining of the foreclosure of a mortgage by advertisement were appealable. There is no apparent reason why any distinction should be made between orders enjoining the foreclosure of a mortgage by advertisement and orders enjoining the foreclosure of an executory land contract by service of notice, so far as the right of appeal is concerned. No reason is apparent why the right of appeal should be granted as to one class of orders and denied as to the other. And it seems quite clear that when the Legislature enacted chap. 151, Laws 1917, it intended to place the two on precisely the same plane; and intended to afford to parties interested in or affected by the foreclosure of a land contract by service of notice all the rights afforded under the then existing laws to parties similarly interested in or affected by the foreclosure of a mortgage by advertisement, including the right of appeal from orders granting, refusing, or vacating an injunction against such foreclosures. Hence, I believe that the order appealed from here is appealable.

I agree with what is said in the opinion prepared by Mr. Justice BRONSON, upon the merits of the order; i. e., I agree with that portion of the opinion covered by ¶ 2 of the syllabus.

GEORGE HIAM, Respondent, v. ANDREWS GRAIN COMPANY, (a corporation), Appellant.

(183 N. W. 1016.)

Agriculture — finding that thresher's lien claimant was owner of threshing machine sustained.

1. In an action brought by the holder of a thresher's lien for the conversion of certain grain covered by the lien, it is *held* that there is sufficient evidence from which the jury could infer that the lien claimant was the owner or lessee of the threshing machine.

Appeal and error — although not formally introduced, it will be considered on appeal that instrument has been introduced where case tried on that theory.

2. Where an action is tried on the theory that an instrument in suit

has been introduced in evidence, it will be so considered on appeal, although, in fact, it was not formally introduced.

Agriculture — payment to thresher per hour held not to invalidate thresher's lien.

3. § 6855, C. L. 1913, relating to thresher's liens does not require that such lien shall show that the parties agreed on a certain price per bushel for threshing the grain upon which a lien is claimed; and such lien if otherwise sufficient, is not rendered invalid because it shows that the parties, instead of a certain rate per bushel, agreed that the thresher should be paid so much per hour for the time employed in threshing.

Opinion filed June 27, 1921.

From a judgment of the County Court of Ransom county, *Thomas, J.*, defendant appeals.

Affirmed.

H. A. Libby, for appellant.

J. V. Backlund, for respondent.

CHRISTIANSON, J. This is an action for conversion of certain wheat on which the plaintiff claims a thresher's lien. The case was tried to a jury, and resulted in a verdict in favor of the plaintiff for \$233.22. Judgment was entered pursuant to the verdict and the defendant has appealed.

Appellant raises three questions: (1) That there is no proof that the plaintiff was qualified to claim a thresher's lien under § 6854, C. L. 1913, which provides that such a lien may be claimed only by the owner or lessee of a threshing machine; (2) that the lien was never offered in evidence; (3) that the lien statement is deficient in that it does not contain a statement of the price charged for the threshing, within the purview of the statute. We will consider these propositions in the order stated.

The plaintiff testified on his direct examination that his business consisted of farming and threshing; that he operated a threshing machine in the fall of 1920, with which he threshed grain for others; that among those for whom he threshed was one Hakanson, for whom he threshed the grain in controversy; that Hakanson had paid plaintiff part of such threshing bill. In the thresher's lien statement the plaintiff, under oath, said:

"That he is the owner and operator of the threshing machine; that he

contracted with the above-named H. O. Hakanson to do the amount and kind of threshing specified in the above account at the price therein named; that the threshing was actually done according to the contract, and the price charged therefor, was not in excess of the price usually charged for such services; that each quantity of grain specified on the above account was grown on the several tracts of land therein described."

Plaintiff was the first witness called. In the early part of his direct examination he was asked on what date he filed the thresher's lien. Defendant's counsel objected to this question, on the ground that it was not the best evidence, whereupon the court stated that the lien would be the best evidence. No further questions were asked along this line, but at the close of plaintiff's testimony plaintiff's counsel said: "We call the register of deeds for the purpose of proving the thresher's lien." Whereupon defendant's counsel said:

"If you will say that the copy of the lien attached to the complaint is a true and correct copy of the original lien filed in the office of the register of deeds, and that the same was filed on the day and hour thereon set forth, you need not call the register of deeds."

In response thereto plaintiff's counsel made the following statement:

"I, J. V. Barklund, attorney for the plaintiff, hereby state in open court that the copy of the lien which is attached to the summons and complaint in this action is a true and correct copy of the lien now on file in the register of deed's office, which lien was filed on the 27th day of October, 1920, at 8:35 a. m."

These statements appear on pp. 7 and 8 of the transcript of the evidence. The transcript of the evidence covers in all about 40 pages. At no time during the remainder of the trial—i. e., at no time after such statements were made, was the point made, nor was it even intimated, that the lien statement had not in fact been offered and received in evidence. The record indicates that counsel and court all deemed it to have been properly admitted in evidence. Thus, in the motion for a directed verdict made at the close of plaintiff's case, defendant's counsel, among other grounds, specified:

"That there is no definite evidence upon which the jury can determine the actual amount, if any, due *under the lien described in the complaint and offered in evidence.*" Transcript, p. 32.

Under the facts and circumstances established by the record in this case, we believe that appellant's first and second points are without merit.

It is true, plaintiff did not in so many words say that he was the owner or lessee of the threshing machine, but he did say that he was engaged in the business of threshing; that in the fall of 1920 he operated a threshing machine, with which he threshed grain for others; that he made a contract with Hakanson to thresh his grain; that he did thresh it, and that Hakanson paid him in part for such threshing. It appears, therefore, without contradiction, that the plaintiff was engaged in threshing grain for others, with a certain threshing machine then in his possession and under his control, and that he threshed the grain in question with such machine. These facts in our opinion established *prima facie* that the plaintiff was the owner or lessee of the threshing machine. In absence of evidence to the contrary, it is presumed, "That things which a person possess are owned by him." And "that a person is the owner of property from exercising acts of ownership over it." Subds. 11 and 12, § 7936, C. L. 1913.

See, also, *Dahlund v. Lorentzen*, 30 N. D. 275, 152 N. W. 684.

As already indicated, a certain colloquy occurred between counsel for the respective parties during the trial of the action with reference to the lien statement. The purpose of the statements then made was to dispense with the necessity of formal proof of the filing of the lien statement. After the statements were made the parties and the court proceeded on the theory that the lien statement was part of the evidence adduced in the case. No question was raised in the trial court that the lien statement was not part of the evidence in the case. The question cannot be raised for the first time on appeal.

"The theory pursued in the trial court as to the admission of or necessity for particular evidence will be adhered to on appeal. Thus, where an action is tried on the theory that an instrument in suit or other document has been introduced in evidence, it will be so considered on appeal, although, in fact, it was not formally introduced." 3 C. J. 734, 735.

The lien statement shows that plaintiff threshed, in all —
"1,900 bushels of wheat, 1,050 bushels of oats, 150 bushels of barley, and 125 bushels of rye, on certain described land in Ransom county in this state; that such threshing consumed 49 hours, at an agreed price of \$20 per hour, making an aggregate charge for such threshing of \$980, on which a credit was allowed for cash and labor."

The statute relating to thresher's liens provides:

"Any owner or lessee of a threshing machine who threshes grain for another therewith shall, upon filing the statement provided for in the next section, have a lien upon such grain for the value of his services in threshing the same from the date of the commencement of the threshing." § 6854, C. L. 1913.

"Any person entitled to a lien under this chapter shall, within thirty days after the threshing is completed, file in the office of the register of deeds of the county in which the grain was grown a statement in writing, verified by oath, showing the amount and quantity of grain threshed, the price agreed upon for threshing the same, the name of the person for whom the threshing was done and a description of the land upon which the grain was grown." § 6855, C. L. 1913.

The defendant contends that the lien statement in this case does not show the *price* agreed upon for threshing the grain, within the purview of the statute. The defendant takes the position that the statute contemplates that the price fixed or charged shall be at so much per bushel, and that a thresher's lien does not arise, and none can be claimed, where the compensation is based on any other basis than that of so much per bushel. In other words, it is contended that in this specific case a lien did not arise, and that the lien filed is fatally defective, for the reason that the lien filed does not show that a rate per bushel was agreed upon, but, on the contrary, shows that the compensation fixed was at so much per hour for the time employed. In our opinion this contention is not well founded. It will be noted that the statute does not say that the lien statement must show the rate per bushel. The statute requires that the lien show these things: (1) The amount and quantity of grain threshed; (2) the price agreed upon for threshing the same; (3) the name of the person for whom the threshing was done; and (4) a description of the land upon which the grain was grown. There are obvious reasons for requiring the lien statement to show these things. They furnish not only a statement of the amount of the claim, according to the agreement of the parties, but the facts from which the amount of the claim can be computed, and a description of the specific property upon which the lien is claimed.

The Supreme Court of Minnesota has ruled that a thresher's lien may be claimed where the threshing is done under a contract whereby the thresher's compensation is fixed at so much per day, even where the statute provides that the lien statement shall show the rate per bushel.

See *Phelan v. Terry*, 101 Minn. 454, 112 N. W. 872, 873. No such question is presented here, however. Our statute contains no such requirement.

It follows from what has been said that the judgment appealed from must be affirmed. It is so ordered.

ROBINSON, C. J., and BIRDZELL and BRONSON, JJ., concur.

GRACE, J. (dissenting). § 6855, C. L. 1913, sets out the requirements of a lien statement where a thresher's lien is claimed. Among other things, the price agreed upon for threshing the grain must be stated, as well as the amount and quantity thereof.

As we construe this statute, the words, "the price agreed upon," refer to a specific price per bushel. It is for this reason that the statute requires the amount and quantity of grain threshed to be stated in the claim for a lien. The law contemplates that each bushel of grain is subject to a lien for the agreed price per bushel for threshing it.

Let it be assumed that A., the owner of a half section of land, has thereon 100 acres of wheat, which, when threshed, yields 1,000 bushels, and 100 acres of oats, which, when threshed, yields 2,000 bushels; and that B., a creditor, has a mortgage on the wheat for \$500, and C., another creditor, a mortgage on the oats for \$300. Let it further be assumed that 10 cents per bushel is the customary charge for threshing wheat, and 6 cents per bushel for threshing oats; and that after the threshing is completed, the oats are destroyed by fire. Query: Could the thresher claim a lien on the wheat for the full amount of the threshing bill, for both wheat and oats? Query: Also, if the threshing, instead of being at the rate of so much per bushel, were for the agreed price of \$200 per day, could the thresher claim a lien on the wheat for the entire threshing bill?

We certainly do not think so. When the Legislature passed the above statute, it knew what we all know, that the customary method of charges for threshing grain is at an agreed price per bushel. It is a fact that most all grain is threshed for so much per bushel, and not otherwise. The Legislature had nothing else in mind when it enacted the above statute.

It is not difficult to see that, where, for instance, the charge is \$200 per day for threshing, instead of so much per bushel, it is in the interest of the thresher to consume as much time as he can in doing the threshing. The more time he puts in on a given job, the more his pay; and thus it is possible to consume the entire value of the crop.

On the other hand, if threshing by the bushel, even though the crop is poor, and the yield per acre is small, and the charge per bushel is double or three times what it would be in the case of an average yield, nevertheless the thresher will try to thresh enough bushels to make his work profitable to himself. In other words, he is thus urged to thresh as many bushels as he possibly can, and, in accordance with the provisions of the statute, he has a lien on the grain thus threshed; i. e., he has a lien on each bushel of the different kinds of grain.

It appears quite clear to our mind that the majority opinion erroneously interprets the statute above mentioned.

J. O. SYLVESTER and A. J. SYLVESTER, Appellants, v. AMBROSE
MACKEY, Respondent.

(183 N. W. 1019.)

Replevin — plaintiff must recover on strength of his own title, and not on weakness of his adversary.

1. In an action in claim and delivery, the plaintiff must recover on the strength of his own title or right of possession and not on the weakness of his adversary.

Replevin — direction of verdict for defendant held not error.

2. For reasons stated in the opinion it is held that the trial court did not err in directing the jury to return a verdict in favor of the defendant for a dismissal of this action, which was instituted by the plaintiff to recover the possession of certain flax.

Opinion filed June 27, 1921.

From a judgment of the District Court of Dunn county, *Crawford, J.*, plaintiffs appeal.

Affirmed.

W. A. Carns, and *W. F. Burnett*, for appellants.

The purpose of the action of claim and delivery is to determine the

right to possession of the property at the time of commencement of the action. *Kimmett v. Deitrich*, 22 S. D. 590; *Eldridge v. Sherman*, (Mich.) 38 N. W. 255; *Aber v. Bratton*, (Mich.) 27 N. W. 564; *Peterson v. Lodwick*, (Neb.) 62 N. W. 1100; *Caste v. Murray*, (Oregon) 81 Pac. 883; *Carr v. King et al.*, (Iowa) 169 N. W. 133.

"A defect in title to land conveyed by warranty deed will not defeat the vendor's right to recover the purchase price, while the presumption that he is able to respond in damages remains unchallenged. *Zerfing v. Seeling*, 12 S. D. 25; 80 N. W. 140.

"That a vendor did not have a merchantable title did not excuse the purchaser from making the payments required by the contract of sale." *Barrows v. Harter* (Cal.) 130 Pac. 1050; *Bowne v. Wolcott*, 1 N. D. 415; *Dahl v. Stakke*, 12 N. D. 325; *Bank v. Hayes*, 34 N. D. 325; *Notes 17 L. R. A. (N. S.) 1186*.

"The mere fact that a superior outstanding title to land existed, which had never been hostilely contested, would not authorize the recovery of the consideration for such land." *Wilson v. Irish*, 62 Iowa 260; 17 N. W. 511.

It is not necessary that a vendor be able to perform at the time of making the contract. *Clapp v. Tower et al.* 11 N. D. 556; *Martinson v. Regan*, 18 N. D. 467; *Golden Valley Land & C. Co. v. Johnstone*, 25 N. D. 148.

The question of title to land cannot be tried in a replevin action. Want of title to land cannot be set up as a defense. *Barnhart v. Ford* (Kan.) 15 Pac. 542; *Anderson v. Hopler*, (Ill.) 85 Am. Dec. 318; *Pines v. Good* 128 Cal. 38, 79 Am. St. Rep. 22; 60 Pac. 527; *Snyder v. Vaux*, 21 Am. Dec. 466; *Note to King v. Mason* 89 Am. Dec. 429-430.

"Where defendant received possession of land from plaintiff under a contract to purchase, which defendant forfeited, he is estopped from disputing plaintiff's right and title to the land." *Coleman v. Stalnack*, 15 S. D. 242; 88 N. W. 107.

T. F. Murtha, for respondent.

Under the circumstances in this case Mackey could question plaintiffs' title. *Newcomb v. Ogden Plow Co.* (Ia.) 95 N. W. 174; *Schiff v. Tamor*, 93 N.Y. Sup. 853; *Potter v. Ranlett*, (Mich.) 74 N.W. 661; *Harding v. Olson*, (Ill.) 52 N.E. 482; *Smith v. Glenn*, (Wash.) 82 Pac. 605 (especially § 6 of the syl.); *Siglin v. Frost*, (Mass.) 53 N. E. 820; *Kares v.*

Covell, (Mass.) 62 N. E. 244; Ft. Payne Coal Co. v. Webster, 39 N. E. 786.

In the instant case the crops were Mackey's and plaintiffs had no rights therein. And could not and cannot maintain either conversion or replevin against Mackey or his personal representatives. Moen v. Lillestal, 5 N. D. 327; 65 N. W. 694; Mpls. Iron Store Co. v. Braunn, 36 N. D. 355; 162 N. W. 543; 17 C. J. 1381; 39 Cyc. 1627; (Moen v. Lillestal is cited under Cyc. above); Golden V. L. & C. Co. v. Johnstone, 21 N. D. 101; 128 N. W. 691; Lynch v. Sprague Roller Mills (Wash.) 99 Pac. 578; Power Merc. Co. v. Moor Merc. Co. (Mont.) 177 Pac. 406.

"The occupier of land is the owner of all crops harvested during the term of his occupancy, whether he be a purchaser, tenant or a mere trespasser in possession holding adversely." Lynch v. Sprague Roller Mills, 99 Pac. 578-9-80.

"In an action for the recovery of specific personal property the jury must find by their verdict the facts as the case may be as follows." § 7635, 1913 C. L.

"In case they find against the plaintiff and the property has been delivered to him, and the defendant in his answer claims a return of the property, they must find the value thereof." 34 Cyc. 1434; 1 Sutherland on Pleading, § 1254; 3 Sutherland on Pleading, § 4143.

CHRISTIANSON, J. This is an action in claim and delivery. Plaintiffs seek to recover the possession of certain flax, or the value thereof in event delivery cannot be had. The trial court directed a verdict in favor of the defendant for a dismissal of the action, and plaintiffs have appealed from the judgment entered upon the verdict. The material facts are as follows:

On March 15, 1917, the plaintiffs entered into a written contract with one Ambrose Mackey, the defendant's intestate, wherein and whereby they agreed to sell to said Mackey, and he agreed to buy from the plaintiffs, a certain 160-acre tract of land situated in Dunn county, in this state, on the so-called crop payment plan. By the terms of the contract, said Mackey agreed to pay to the plaintiffs—

"as and for the purchase price of said premises, the sum of \$3,680, with interest on all deferred payments at the rate of 7 per cent. per annum, interest payable annually on the 1st day of January of each and every year during the life of the contract, said interest to begin March 15, 1917, said

payments to be made in the manner and at times following, to wit: All the proceeds of the crop from not less than 40 acres of land to be broken up and seeded to flax in the season of 1917, and one-half of the proceeds of the crops from not less than 100 acres of land to be sown and grown during the season of 1918, and thereafter one-half of the proceeds of the crop to be sown and grown on all of the tillable land during the life of this contract, said share of the grain belonging to the said first parties (plaintiffs) to be delivered to the elevator or on the cars at Dickinson, N. D., or at some other convenient point not more remote, as said first parties (plaintiffs) shall direct, within a reasonable time after threshing the same and free of all expense and charges to the said first parties (plaintiffs), said grain to be delivered in the name of the first parties (plaintiffs) and to be by the first parties (plaintiffs) promptly sold and the proceeds thereof applied, first, in the payment of interest on said sum, at 7 per cent. per annum, and, second, in reduction of the said principal sum."

At the time this contract was made the tract of land in question was uncultivated. In 1917 said Mackey broke and cropped about 40 acres thereof, and in 1918 he broke additional ground and cropped in all between 110 and 120 acres. The controversy here involves that portion of the crop produced during those two years which the plaintiffs claim belong to them under the terms of the contract. The evidence shows that at the time this contract was made there was an outstanding mortgage covering the land in question and three adjoining quarter sections. Default was made in the terms of said mortgage, and foreclosure proceedings by advertisement were instituted by the holder thereof, with the result that on November 12, 1917, the sheriff of Dunn county sold said four quarter sections of land covered by said mortgage, including the quarter section involved in this controversy, to one Schreiner for the sum of \$5,307.88. A sheriff's certificate of sale was thereupon issued to the purchaser, and the same was thereafter, on November 14, 1917, duly recorded in the office of the register of deeds of Dunn county. One of the quarter sections covered by said mortgage foreclosure sale had previously been sold by the plaintiffs to one Regeth, and on or about November 12, 1918, said Regeth, accompanied by one of the plaintiffs, saw the proper officers of the First National Bank of Dickinson and induced said bank to loan to said Regeth sufficient moneys to purchase the sheriff's certificate of sale from Schreiner, the purchaser at the sale and the then holder and owner of the

certificate. It was arranged that the assignment was to be taken to the First National Bank of Dickinson, which was to hold the same, together with other papers, as security for the loan made to Regeth. On November 20, 1918, said Schreiner executed and delivered to the First National Bank of Dickinson an assignment of said sheriff's certificate of sale, which assignment was recorded in the office of the register of deeds in Dunn county on December 11, 1918. When Mackey was asked to turn over to the plaintiffs the flax which the contract provided should be turned over to them, he refused to do so, for the reason that they had lost title to the land and were in no position to fulfill their contract with him. On December 3, 1918, the plaintiffs instituted this action to recover the possession of the flax or the value thereof in the event a delivery of such property could not be had. After the commencement of this action Mackey died. Subsequently the action was revived against the administratrix, and she was substituted as the party defendant.

Upon the trial of the action, the foregoing facts were established by the evidence introduced. The defendants also adduced evidence tending to show that at the time of the execution of the contract between the plaintiffs and Mackey the plaintiffs were not the record owners of the land. The defendant also applied for and was granted permission to file a supplemental answer asserting that the plaintiffs had transferred all their interest in the contract and in the land. And in support of these averments the defendant introduced evidence showing that on November 17, 1920, the plaintiffs conveyed all their interest, right, and title in and to the land in question and other lands to S. A. Sylvester and W. P. Barrett; also, that on or about the same day the plaintiffs, by a written instrument duly executed and acknowledged, transferred, and assigned to one S. A. Sylvester, trustee, "his heirs, executors, administrators, and assigns," the contract between the plaintiffs and said Ambrose Mackey. In said written assignment the said plaintiffs specifically covenanted with the said S. A. Sylvester, as party of the second part therein, that there then remained unpaid "the sum of \$4,422.12 on the purchase price of said property due and payable as of date December 1, 1919, payable from proceeds of one-half crops grown on said land." The evidence thus offered by the defendants as to the transfer of said contract and the premises stands uncontradicted and unexplained. At the conclusion of the trial, the defendant moved for a directed verdict upon the ground, among others, that the plaintiffs had assigned their rights and interest

in the contract with Mackey and in all payments then due thereunder, and that consequently they were no longer the owners of the claim they were seeking to enforce and were no longer the real parties in interest in the controversy. As already indicated, this motion was granted, and the sole question presented on this appeal is whether the trial court was correct or incorrect in so ruling.

A careful consideration of the question leads us to the conclusion that the trial court properly directed a verdict in favor of the defendant. It will be noted that the contract between the plaintiffs and Mackey specifically provides that Mackey shall pay to the plaintiffs a specified sum of money, with interest on deferred payments at a specified rate. It is true the contract further provides that Mackey shall deliver certain crops to them and that they shall have title to such crops, but, nevertheless, the contract does not measure the amount to be paid in bushels of grain but in dollars and cents. According to the terms of the contract, the grain was to be sold and the proceeds applied on the purchase price stipulated in the contract. Hence it seems clear that the assignment of the contract with all payments then due thereon made by the plaintiffs in March, 1920, defeats their right to maintain this action. The plaintiffs not only transferred the contract to another, but they specifically covenanted, in the written assignment, that there was due on the contract a sum which manifestly included the very payments which it is sought to recover in this action. It is true, as a general rule, the test of the right to maintain an action in claim and delivery or replevin is whether the plaintiff at the time of the institution of the suit is entitled to the immediate possession of the property claimed. This, however, does not mean that the court will shut its eyes to what has occurred affecting the right to possession of the property interim the commencement of the action and the trial, provided such matters are called to the attention of the court by appropriate pleadings and proof. Thus:

"It is generally held that when the plaintiff obtains the possession of the property at the commencement of the action, and the defendant, in his answer, demands a return of the property, and at the trial it appears that the defendant is not entitled to possession for the reason that his interest or right to the possession of the property has ceased intermediate the commencement of the action and the trial, and the right to the possession has vested in the plaintiff, the court will not order a return of the

property to the defendant, but will leave the property in the possession of the plaintiff." 24 Am. & Eng. Ency. of Law, pp. 484, 485.

See, also, Cobbey on Replevin (2d ed.) § 125.

By parity of reasoning, it would seem to follow that where a party institutes an action to recover the possession of certain personal property then in the possession of another, who rebonds and retains the property in his possession, the plaintiff in such action will not be awarded a judgment against the defendant therein for delivery of such property to the plaintiff, where, after the commencement of the action and before the trial thereof, such plaintiff has parted with all title and claim to the property in suit.

There were also other reasons which justified the trial court in directing a verdict in favor of the defendant for a dismissal of the action. It will be noted that before this action was commenced the time in which to make redemption from the foreclosure sale had expired. While the evidence does not show that a sheriff's deed had been issued, the right of the holder of such certificate to demand and receive such deed had become absolute. *State ex rel. Bank v. Herman*, 36 N. D. 177, 185, 161 N. W. 1017. And all the rights of the plaintiffs in and to said premises have been terminated. Such rights had been set over to the holder of the sheriff's certificate of sale. By the provisions of § 7762, C. L. 1913, the purchaser at a foreclosure sale was entitled to receive from a tenant in possession of the property so purchased the rents or the value of the use and occupation thereof. Within the purview of this statute any one occupying and raising crops on the premises, even the owner himself, will be deemed a tenant in possession. See *Clifford & Co. v Henry*, 40 N. D. 604, 612-614, 169 N. W. 508.

Hence there can be no question but that the purchaser at the foreclosure sale, or his successor in interest or assigns, had a cause of action against some one for the rents, or the value of the use and occupation. Whether this claim would be more or less than the value of the share of the crop which the plaintiffs claim, we do not know and need not determine. Nor do we need to determine the respective rights of Mackey and those who have acquired the interests of the plaintiffs through the foreclosure proceedings or otherwise. It is sufficient to note that these claims and interests are outstanding. The plaintiffs must recover on the strength of their own title or right of possession, and not on the weakness of their adversary. It seems clear, under the facts here presented,

that the plaintiffs have failed to establish their right to recover the possession either of all or of any specific portion of the flax in controversy.

Judgment affirmed.

ROBINSON, C J., and BIRDZELL, J., concur.

BRONSON and GRACE, JJ., concur in the result.

FIRST NATIONAL BANK of New Rockford, North Dakota, Appellant, v. PETER P. HALLQUIST, also known as P. P. Hallquist, Respondent.

(184 N. W. 269.)

Homestead — mortgage by husband and wife should not be deducted in determining value.

1. In determining the value of a homestead estate a prior existing mortgage executed by both husband and wife should not be deducted.

Homestead — mortgage by husband alone is valid as to excess of lands above homestead.

2. A mortgage executed by the husband alone covering land which constitutes the homestead estate is valid as to the excess in value above the homestead estate.

Opinion filed June 27, 1921. Rehearing denied September 10, 1921.

Action in District Court Eddy County, *Coffey, J.*, to foreclose a mortgage. The plaintiff has appealed.

Reversed and remanded.

N. J. Bothne, for appellant.

"A deed of conveyance by the husband without his wife joining, of lands including the homestead, is valid as to the excess in extent or value of the land above the homestead exemption." *Severtson v. Peoples*, 28 N. D. 372; 21 Cyc. 551 and citations; 13 R. C. L. 635 and citations.

"It is the homestead as created, defined and limited by law that is absolutely exempt. We have already seen what that means. A mere floating homestead right, unattached to any land in a manner that can identify the land as a homestead, cannot create an absolute exemption in land that may subsequently be designated and identified as a homestead." *Foogman v. Patterson*, 9 N. D. 254; *Severtson v. Peoples*, 28 N. D. 372.

"In determining the value of the homestead for the purpose of ascertaining and selecting therefrom the homestead exemption or estate, the amount of existing mortgages or liens thereon cannot be deducted from the value of the property." *Brown v. Starr*, 21 Pac. 973, (Cal.); *Estate of Herbert*, 122 Cal. 329; *Yates v. McKibbin*, 23 N. W. 752, (Ia.); *Arnold v. Jones*, 77 Tenn. 545; *Norris v. Moulton*, 34 N. D. 392.

R. F. Rinker, for respondent.

In this case the court found that the value of the homestead was only \$7200.00 even applying the ruling of the court in *Severtson v. Peoples*, there would be no interest in said land for appellant's mortgage to attach; its mortgage not being signed or acknowledged by the wife, under § 5808 it would be void as to the homestead interest. *Foogman v. Patterson*, 9 N. D. 254; *Helgebye v. Dammen*, 13 N. D. 167.

"Where the extent and value of the homestead does not exceed that fixed by law there is no necessity for selection or declaration of homestead exemption." *Farmers Bank v. Knife River Lumber and Grain Co.* 37 N. D. 371.

Statement.

BRONSON, J. This is an action to foreclose a real estate mortgage. The record discloses the following:

The defendant is the owner of 160 acres of farm land in Eddy county. He is a married man with a family of six children. For many years he has occupied this land as his homestead. In 1915 the defendant together with his wife gave a mortgage upon the land to the Minneapolis Loan & Trust Company to secure a note for \$2,500 and interest. There is now unpaid upon this mortgage with interest \$2,650. There are also unpaid taxes for 1919 and 1920 amounting to \$213. In 1916 the defendant alone gave a mortgage to the plaintiff upon this land to secure \$1,675 and interest. There is due and unpaid upon this mortgage including interest

over \$2,000. Witnesses variously testified that the value of the land including improvements was from \$45 to \$65 per acre. The defendant testified that the value was \$40 per acre. The trial court upon findings determined the value of the land to be \$7,200; that, after deducting the prior liens thereupon, the homestead did not exceed in value the homestead exemption; that, accordingly, plaintiff's mortgage signed by the husband alone, being a lien only for the amount above the statutory exemption, did not attach to the land. Judgment was ordered and entered in favor of the plaintiff for the amount of the note with interest and, further, that the mortgage be cancelled of record. The plaintiff has appealed from the judgment.

Decision.

Did the trial court err in deducting the prior existing incumbrance to determine the value of the homestead? It is to be noted that this prior mortgage to the trust company was made by both husband and wife so that it operated to create a lien upon the homestead. When this mortgage so signed by husband and wife was executed, there then existed, following the findings of the trial court, the sum of \$2,200 over and above the value of the homestead estate in the land. To deduct this mortgage out of the excess value above homestead estate would simply serve to place such mortgage in the position of a mortgage that did not cover the homestead estate. This court has heretofore held that in determining the value of the homestead estate existing incumbrances should not be deducted. *Calmer v. Calmer*, 15 N. D. 120, 127, 106 N. W. 684.

That a conveyance by the husband without his wife joining, of lands including the homestead, is valid as to the excess of value of the land above the homestead exemption. *Severtson v. Peoples*, 28 N. D. 372, 384, 148 N. W. 1054. These cases, upon the question herein involved support the clear weight of the authorities. 21 Cyc. 551; 13 R. C. L. 635; 15 A. & E. Enc. Law (2d ed.) 684; *Thompson on Homesteads and Exemptions*, § 477. It follows that the trial court erred in deducting prior existing incumbrances. It is true that a conveyance of a mortgage of a homestead in this state must be executed and acknowledged by both husband and wife. However, plaintiff's mortgage, so far as it covers the excess above the homestead estate, is not a mortgage upon the homestead and is therefore valid to such extent.

The judgment of the trial court is reversed, and the case remanded for further proceedings consonant with this opinion. The appellant will recover costs.

ROBINSON, C. J., and CHRISTIANSON and BIRDZELL, JJ., concur.

GRACE, J. (dissenting). This action is one to foreclose a certain real estate mortgage. The defendant is the owner and occupant of a certain 160-acre tract of land located in Eddy county. This is his homestead. It is exempt from judgment lien, and from execution or forced sale, except for the value thereof, in excess of \$5,000, except for debts secured by mechanic's or laborer's liens for work or labor done or material furnished exclusively for the improvement of the same; or on debts secured by a mortgage on the premises, executed and acknowledged by both husband and wife, or an unmarried claimant, who, in conditions specified in statutory provisions, may be permitted to make the claim of homestead exemption; or debts created for purchase price thereof, and for taxes accruing and levied thereon.

The material facts are as follows:

On February 15, 1916, defendant made and delivered his promissory note to plaintiff for \$1,675, due December 1, 1916, bearing interest at 9 per cent. per annum. On the same date to secure the payment of the note, he executed and delivered a mortgage on the land. At the time defendant signed the mortgage, he, together with his wife and six children, were residing on the land. His wife did not join with him in giving the mortgage. The mortgage was recorded. The note was not paid at maturity. Plaintiff served notice of intention to foreclose the mortgage, and in October, 1919, commenced the foreclosure thereof by action. The complaint is in the ordinary form, for the foreclosure of a real estate mortgage by action. Defendant answered, and among other things alleged that the mortgage was null and void for the reason that his wife had not joined therein, and that the land covered by the mortgage was exempt as a homestead. There was a prior valid mortgage of \$2,500, executed by defendant and wife, on which there was accumulated \$150 interest.

The case was tried to a court without a jury. It made findings of fact and determined that the land was worth \$7,200 and that it was subject to the \$2,500 prior mortgage and interest and unpaid taxes; and, after the deduction of these amounts, defendant had an interest in the land of

less than \$5,000, and set aside the whole tract of land to defendant as exempt.

The court gave a personal judgment against the defendant for the amount of the note and interest. It also ordered and decreed that plaintiff's mortgage was no lien on the land.

A determination of whether plaintiff's mortgage is a lien on the land will dispose of the case, for if it is not a lien, no other question presented here will really be material.

§ 5608, C. L. 1913, provides:

"The homestead of a married person cannot be conveyed or incumbered, unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife."

This identical statute was construed in the case of *Swingle v. Swingle*, 36 N. D. 611, 162 N. W. 912. See, also, *Farmers' Bank of Mercer County v. Knife River Lumber & Grain Co.*, 37 N. D. 371, 163 N. W. 1053; *Yusko et ux. v. Studt et al.*, 37 N. D. 221, 163 N. W. 1066; *Rasmussen v. Stone*, 30 N. D. 451, 152 N. W. 809; *Severtson v. Peoples*, 28 N. D. 372, 148 N. W. 1054.

In *Swingle v. Swingle*, supra, it in substance was held that the homestead, as defined by § 5608, can be conveyed or incumbered only where the instrument of conveyance, is executed and acknowledged by both husband and wife. The mortgage here was executed and acknowledged by the husband only. It is certain that the land in question is the homestead of the defendant and his wife. The mortgage, as so executed and delivered, was absolutely null and void.

Again, this court has, as early as 1906, settled the question that a mortgage similar to the one in the case at bar was absolutely null and void. In the case of *Garr, Scott & Co. v. Collin et al.*, 15 N. D. 627, 110 N. W. 81, this court, speaking through Judge Young, construed § 5608, C. L. 1913, which was § 5052, Rev. Codes 1905, and § 3608, Rev. Codes, 1899, and there used the following language:

"The Constitution of this state (§ 208) charged the Legislature with the duty of protecting the homestead by suitable laws. One of the means adopted by the Legislature for accomplishing this end, and it is common to many states, is the requirement that a conveyance thereof shall not be effective unless signed by both husband and wife. There is no constitutional restriction in this state inhibiting this legislation. It, on the contrary, merely carried into effect the mandate of

the Constitution. That it is competent for the Legislature, in the absence of constitutional restriction, to *prohibit the alienation of the homestead without the wife's signature is well settled.* * * * § 5052, Rev. Codes 1905 (now 5608, Comp. Laws 1913), in force when the mortgage in suit was given, required the wife's signature. She did not sign it. It was therefore invalid. In some states a conveyance of the homestead executed by the husband alone is not wholly void, but has the limited effect of transferring the husband's interest, but subject to the homestead estate. *Gee v. Moore*, 14 Cal. 472. *In this state*, however, a conveyance of the homestead which is not executed by both husband and wife *is void.*"

The case from which we have just quoted is directly in point. The conveyance there involved, as here, was a mortgage, and it was determined to be invalid, and, for this reason, of no effect. The statute prohibiting the alienation of the homestead, unless the instrument of conveyance is signed and acknowledged by both husband and wife, a conveyance not so executed is wholly void, regardless of the value of the homestead.

Though the homestead exceed in value \$5,000, it cannot be incumbered, except both husband and wife join in the conveyance, though, according to the statutes hereinafter cited, it may be levied on under execution, for the enforcement of a judgment, and the interest of the claimants to the homestead, over and above \$5,000, subjected to the satisfaction of the judgment. See §§ 5611 to 5620, both inclusive, Comp. Laws 1913. But that is an entirely different matter than placing a voluntary incumbrance thereon, which only may be accomplished by compliance with the provisions of § 5608, *supra*.

But here arises, out of § 208 of the Constitution, a very important question, viz., Can a homestead, in any event, even though it exceed in value \$5,000, be sold at a forced sale?

§ 208 of the Constitution provides that—

"The right of the debtor to enjoy the comforts and necessities of life shall be recognized by wholesome laws, *exempting from forced sale to all heads of families a homestead*, the value of which shall be limited and defined by law, and a reasonable amount of personal property; the kind and value shall be fixed by law. This section shall not be construed to prevent liens against the homestead for labor done and materials furnished in the improvements thereof, in such manner as may be prescribed by law."

It is thus seen that this constitutional provision requires the Legislature to pass laws exempting the homestead from forced sale.

§ 5616, Comp. Laws 1913, provides in effect that where the homestead can be divided without material injury there shall be set off to the claimant thereof so much of the real property, including the residence, as will amount in value to the homestead exemption, and that an execution may be enforced against the remainder of the real property. In such case, of course there is no forced sale of the homestead.

But § 5617, Comp. Laws, provides, in substance, that where the homestead exceeds in value the amount of the homestead exemption, and where it cannot be divided without material injury, the court shall make an order directing its sale under execution; and § 5618 provides, in substance, that where the sale is thus made, the proceeds to the amount of the homestead exemption must be paid to the homestead claimant, and the residue applied to the satisfaction of the execution.

These two latter sections provide for a forced sale of the homestead, and thus directly contravene the provisions of § 208, and hence they are invalid. The object of that constitutional provision is to keep the homestead intact and to prohibit a forced sale of it. Its purpose is to protect the home and to prevent its disintegration. It were better that the creditor should lose his claim, even though the homestead exemption is of a greater value than \$5,000 and is indivisible, than that the home should be destroyed and the family set adrift.

True it is, if a conveyance, not executed and acknowledged by both husband and wife, should include a greater area of land than that allowed by law as a homestead, and in which the homestead was included, it would be void as against the homestead; it would, nevertheless, be valid as to that part which is in excess of the lawful area of the homestead. That question is not presented in this case. Here, the tract involved does not exceed in extent that prescribed in § 5605, C. L. 1913.

Assuming, however, that §§ 5617 and 5618, supra, are not invalid and not contrary to the provisions of § 208 of the Constitution (though we are certain those sections are clearly invalid), nevertheless the plaintiff's mortgage is, for additional reasons, ineffective and nonenforceable, and this for the reasons now to be stated.

The trial court found that the value of the homestead was \$7,200. At the trial, testimony as to the value of the land was given by quite a number of witnesses. The trial court saw these witnesses and heard them testify; and, in the circumstances of this case, we think its finding as to value is determinative of that question.

In determining the value, for the purpose of ascertaining the extent of the exemption right, as it existed at the time of the trial, the trial court deducted the amount of prior incumbrance, which, as represented by a prior mortgage on the premises, executed and acknowledged by both husband and wife, was \$2,500 plus \$150 interest.

After this deduction, the value of the homestead exemption was less than \$5,000, and the trial court accordingly set the whole of the homestead aside as exempt, and afforded the appellant no relief, other than a personal judgment against the defendant, which if this holding is correct, would not be a lien against the homestead, nor could the plaintiff procure an execution on the judgment and levy on a homestead, nor proceed in any manner to sell the homestead to satisfy its claim, as the exemption, after the deduction of the prior incumbrance, did not exceed \$5,000.

We think the trial court's finding and conclusion in this regard is correct, for if the prior incumbrance of \$2,500, instead of being a mortgage, were a judgment, there could be no controversy concerning the correctness of the trial court's conclusion, for the prior judgment would be a lien on the value of the homestead in excess of \$5,000, and it could be sold on an execution issued on the prior judgment, for the satisfaction of it, in pursuance of law in that regard, as above referred to. So, too, could the \$2,500 prior mortgage be foreclosed, and the premises sold to satisfy it. In either case, there would be a sale of the premises to satisfy a lien, and, under either, when sale was made, the exemption remaining would be less than \$5,000.

We realize that a different holding was made in the case of *Calmer v. Calmer et al.*, 15 N. D. 127, 106 N. W. 684. We think, however, that the rule announced there is one which protects the creditor and not the claimants of the homestead. It is not difficult to see that, under that rule, the benefits intended to be preserved to homestead claimants, under our statutes providing for homestead exemptions, and under § 208 of the Constitution, could be entirely withheld from them, and the purpose thereof largely defeated.

The provision of the Constitution and of our laws creating homestead and exemption rights should be liberally construed to effect their beneficent purpose, to wit, to protect the debtor and his family in the possession, ownership, and control of a homestead of definite area and value, to which creditors cannot resort by a process of levy of execution on a judgment and forced sale, except as to the excess of value, over and above

\$5,000, and not then unless the homestead is divisible and the excess not theretofore conveyed by a conveyance executed and acknowledged by husband and wife or claimant.

The writer is of the opinion that justice and protection to homestead claimants require that the rule announced in *Calmer v. Calmer*, supra, be overruled, in so far as it holds that, in determining the value of the homestead exemption, existing incumbrances should not be deducted.

The appellant's mortgage being entirely null and void, for the reasons above set forth, the trial court properly ordered its satisfaction, discharge, and cancellation of record. It was unnecessary for respondent to make selection or file declaration of homestead exemption. His homestead consisted of a single tract of land. It was not necessary for him to file declaration of his homestead, or claim his homestead exemption, until his right thereto was in some way challenged.

The judgment appealed from should be affirmed.

ANDREW GERRARD, Respondent, v. LESTER KELLER, Appellant.

(183 N. W. 975.)

Elections — appeal will be dismissed where appellant in contest complied with judgment and received benefits thereunder.

This is an appeal from a judgment in a case of an election contest. The appellant has both complied with the judgment and received benefits under it. Hence the appeal is dismissed.

Opinion filed June 27, 1921.

Appeal from the District Court of Towner County; *Kneeshaw*, J.

Appeal dismissed.

Verret & Stormon, for appellant.

Kehoe & Moseley, for respondent.

"Domicile of choice is entirely a question of residence and intent, or, as it is usually put, the factum and the animus. Both must concur in order that the domicile may be deemed established." 14 Cyc. 838.

"A new domicile is not acquired until there is not only a fixed intention of establishing a permanent residence, but until also this intention has been carried out by actual residence there." *Boyd's Executor v. Commonwealth* (Ky.) Am. & Eng. Ann. Cas. 1914 B. 481.

"To effect a change of domicile there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence within another jurisdiction, coupled with the intention of making the last required residence a permanent home." *In re Moir's Estate* (Ill.) 69 N. E. 905; *Holt v. Hendee* (Ill.) 93 N. E. 749, 21 Am. & Eng. Ann. Cas. 202; *Stoddert v. Ward* (Md.) 100 Am. Dec. 86.

"The term 'residence' is synonymous with 'domicile,' which imports not only intention to reside in a fixed place, but also personal presence in that place, coupled with conduct indicative of such intention, a fixed and permanent home, a voting residence." *Driscoll v. Bender*, 144 N. Y. Sup. 145; *McCord v. Rosene*, (Wash.) 80 Pac. 793; *Hart v. Lindsay* (N.H.) 43 Am. Dec. 597; *Hairston v. Hairston* (Miss.) 61 Am. Dec. 530; *Newcomb's Estate* N. Y. 84 N. E. 950; *People v. Turpin* (Colo.) 33 L. R. A., N. S., 766 and note.

ROBINSON, C. J. At the general election in 1920 the parties to this suit were opposing candidates for the office of county commissioner of the Third commissioner district of Towner county. On the face of the returns Gerrard had 463 votes; Keller, 464. Gerrard contested the election. The court held and adjudged that each party had received an equal number of votes, and that to determine the matter the county auditor of Towner county should give due notice to both parties to attend at his office at a time to be appointed by him, and that he then and there proceed to publicly decide the election by lot, as provided by statute. Comp. Laws 1913, § 1010. Pursuant to the judgment the county auditor gave due notice to each party, with a copy of the judgment, and at the time and place stated in the notice each party appeared at the office of the county auditor and fairly drew lots. The lot fell to Andrew Gerrard, and he was given the certificate of election and installed as county commissioner. Then, after taking the

benefits of the drawing and the benefit of the judgment, Mr. Keller appeals to this court.

Mr. Gerrard moves to dismiss the appeal, on the ground that a party may not take the benefit of a judgment and then appeal from it. There is no claim that the drawing was in any respect fraudulent or unfair. It was conducted in this manner: The parties met in the office of the county auditor and agreed as to the method of drawing, and agreed that the name of each party should be written on a separate slip of paper, the slips placed in a hat, and with the hat held above the heads of those present Miss Gibbons should be called to draw one of the slips from the hat, and that the party named on the slip drawn should be held the duly elected county commissioner. The drawing was accordingly made, and it was in all respects fair and deliberate. Then Mr. Keller congratulated the plaintiff, saying:

"This has been a square deal, and you are the more lucky; and are our county commissioner."

Mr. Moseley, state's attorney of Towner county, advised the parties that they did not have to participate in the drawing. The affidavit of Mr. Keller shows that he was advised and believed that his participation in the drawing would not in any manner affect his right to appeal from the decision of the district court. According to the decision of the district court the vote was a tie, and in case of a tie vote the statute is that the county auditor shall give notice to the several persons having an equal and the highest number of votes for one and the same office to attend at his office at a time appointed by him, and then and there proceed publicly to decide by lot which of the persons shall be declared duly elected, and that the auditor shall make and deliver to the person thus declared duly elected a certificate of election. Comp. Laws 1913, § 1010.

The judgment is in accordance with the statute. By the drawing of lots for the office appellant submitted his case to the umpire of chance, whose decision was above any suspicion or bias or unfairness. He accepted the benefits of the judgment, by taking the chance of obtaining an immediate decision in his favor, without trouble or expense, and surely the benefit was real and obvious, and there is no way to refund it. Obviously, the drawing was a solemn and public procedure, and not a mere mockery or child's play. In such a case an adult party may not play boy or pig and puppy. It is idle for appellant to say that he did not know the law of the case. Plain common sense clearly indicates that the drawing was not an

idle ceremony, and that it was binding on each party according to the code of law and the code of honor.

After compliance with the judgment, an appeal will be dismissed. *American Book Co. v. State of Kansas*, 193 U. S. 49, 50, 24 Sup. Ct. 397, 48 L. ed. 613. So, where an appellant receives benefits under a judgment, the appeal will be dismissed. In this case the appellant has both complied with the judgment and received benefits under it.

The appeal is dismissed.

BIRDZELL and CHRISTIANSON, JJ., concur.

BRONSON, concurs in result.

GRACE, J. (specially concurring). § 1010, Comp. Laws 1913, describes the method of deciding a tie vote of candidates for an office. In pursuance of the provisions of that statute, the tie here was decided. All the proceedings had in pursuance of the statute were free from fraud or unfair practice of any kind, and were had on due notice.

Irrespective of the judgment, this decided the tie, and with it the right to the office.

FRIDOLIN KRIEGER, Plaintiff, v. MAX SCHULTZ and ALEXANDER TOPPINS, co-partners as Schultz and Toppins, and FARMERS & MERCHANTS STATE BANK of New Salem, Defendants, and FARMERS AND MERCHANTS STATE BANK of New Salem, Appellant.

(183 N. W. 1021.)

Mortgages — second mortgage was extinguished by foreclosure, so that second mortgagee, as purchaser first foreclosure sale, was not entitled as mortgagee to demand that proceeds of insurance policy should be applied by first mortgagee to his mortgage.

This is an action to foreclose a first mortgage on real property. The buildings situated on the realty were injured by fire, and upon adjustment of the loss the plaintiff received a draft from the insurance company for the amount thereof; he did not retain it, but endorsed it over to the mortgagors upon their promise to expend the funds in repairing the build-

ings. A second mortgagee likewise collected the proceeds of another fire insurance policy and credited the same upon its mortgage, and, thereafter, upon foreclosure of its second mortgage, became the purchaser and eventually the owner of the premises through issuance of a sheriff's deed. It is *held*, for reasons stated in the opinion, that the amount of the draft received by the first mortgagee and by him turned over to the mortgagors should not be deducted from, or credited upon, the amount due on the first mortgage.

Opinion filed June 27, 1921.

From a judgment of the District Court of Morton county, *Hanley, J.*, defendant, Farmers and Merchants State Bank of New Salem, appeals.

Affirmed.

Newton, Dullam & Young, for appellant.

"No matter what device or shift the holder of the first lien may resort to, every attempt to evade his duty to the owner of the inferior lien will be thwarted by the law. In equity he has a lien on the particular land covered by both incumbrances only as to the amount due after applying the value of the other security in extinguishment of his debt." *Union National Bank v. Moline et al*, 7 N. D. 213; Citing 3 Pom. Eq. Jur. § 1414; *Gotzian & Co. v. Shakman*, 89 Wis. 52, 61 N. W. 304; Also 1913 Revised Codes, § 6716; *The case of Sarles v. McGee*, 1 N. D. 365.

The holder of the first mortgage, having knowledge of the second lien, cannot release his security on the fund on which he alone holds the lien and put the whole burden against the one on which there is a second mortgage. If the mortgagee does so, he must account to the second mortgagee for the value of the fund so released. *Pom. Eq. Jur. § 396*; 5 L. R. A. 276.

Sullivan, Hanley & Sullivan, for respondent.

"A subsequent purchaser or incumbrancer has a right to rely on the record, as to the original amount." But he takes his chances as to how much, if anything had been paid, and buys subject to the state of account as then existed between mortgagor and mortgagee, and has no better or other rights than the former in that respect." *Lash v. Edger-*

ton, 13 Minn. 210; March v. Lennon, 19 Minn. 75; Carson v. Cochran, 63, N. W. 1130, Minn.

CHRISTIANSON, J. On February 2, 1915, the plaintiff loaned \$1,500 to the defendants, Schultz and Toppins. Those defendants thereupon executed and delivered to the plaintiff a first mortgage on the property described in the complaint to secure the payment of said \$1,500. The mortgage provided that the buildings should be insured. They were so insured, and a clause attached to the policy, making the loss, if any, payable to the plaintiff. On November 3, 1915, the defendant Farmers & Merchants State Bank of New Salem took a second mortgage on the property described in the complaint to secure the sum of \$2,404.86, then due to it from the defendants Schultz and Toppins. The plaintiff had knowledge of such second mortgage. In November, 1916, one of the buildings situated on the real property in question was destroyed, and another partially destroyed, by fire. After the fire and before payment was made by the insurance company, the cashier of the defendant bank saw the plaintiff, and demanded that whatever moneys the insurance company paid to the plaintiff be retained by the plaintiff and applied on the debt secured by the first mortgage so as to reduce such indebtedness. Upon the adjustment of the loss the insurance company issued a check for \$606.39, payable to the plaintiff. The plaintiff, however, did not cash the check and apply the proceeds thereof on the indebtedness secured by the first mortgage, but indorsed and turned it over to the mortgagors on their promise that they would expend such moneys in rebuilding and repairing the buildings. The mortgagors did not comply with this agreement, although they made some repairs, and, out of the proceeds of the check, paid the plaintiff some \$120 accrued interest on the mortgage. The mortgagors are insolvent. The defendant bank contends that it made demand on the plaintiff that he retain and apply the moneys received from the insurance company on the debt secured by the first mortgage. The then cashier of the bank testified:

"I told him (Krieger), once on the street and once in the bank, not to turn over this money; that it must be applied on the mortgage, because the building is worth that much less. He did not say anything.

"Q. Did you see the money for the fire insurance paid to Mr. Krieger, the check? A. I saw Mr. Krieger sign it. I was behind the

case in the bank at the customer's desk, and Mr. Krieger indorsed it, and that is the last I saw of it. * * *

"Q. Did you have any talk with Mr. Krieger after the check was turned over? A. I asked him why he turned the money over. He said that Mr. Schultz wanted the money to fix that building up with it.

"Q. You say that you saw Mr. Schultz sign his name to that check? A. Mr. Krieger signed it.

"Q. Did you do anything at that time? A. I shook my head at him when he turned the check over to Mr. Schultz."

This statement of transaction in the bank is corroborated by another employee of the bank, but is contradicted by the testimony of the plaintiff. The plaintiff testified that the first time he knew that the defendant bank claimed that plaintiff should have applied the money received from the insurance company on the indebtedness secured by the first mortgage was some four weeks after he received the check from the insurance company and indorsed and turned it over to the mortgagors. The plaintiff gives this version of a conversation which he claims was had between himself and an officer at the defendant bank:—

"I said: 'Why did you not tell me that before?' He said: 'We don't have to. You ought to know that yourself.'"

There was also an insurance policy on the property under the terms of which the loss was made payable to the defendant bank as its interests might appear. When the loss was adjusted the defendant bank received some \$749.

The undisputed evidence is to the effect that in January, 1918, the defendant bank paid the plaintiff the full amount of interest on plaintiff's mortgage. In other words, the defendant bank paid interest on \$1,500. Later, in April, 1918, the defendant bank foreclosed its mortgage on said property by advertisement, and bid the property in at the mortgage foreclosure sale for the full amount due on its said mortgage. No redemption was made. And on April 22, 1919, the sheriff's deed was issued to said bank upon its foreclosure. Subsequent to the issuance of said deed, the plaintiff brought this action to foreclose his mortgage on the property, claiming the full face amount thereof to be due. The defendant bank, as owner of the premises by virtue of the sheriff's deed, interposed an answer, wherein it challenged the right of the plaintiff to recover the amount demanded in the complaint. It asserted that the moneys paid by the insurance company to the plaintiff under the loss

payable clause and by the plaintiff turned over to the defendants Schultz and Toppins, should be allowed as a credit on plaintiff's demand in this action, and that judgment should be rendered in his favor only for the balance due upon said \$1,500 mortgage, after the allowance of such credit. The trial court overruled the contention of the defendant bank, and made findings and ordered judgment in favor of the plaintiff for the full amount demanded. The bank has appealed from the judgment so entered, and the sole question presented on this appeal is whether, under the facts here involved, the contention of the defendant bank relating to the moneys paid to the plaintiff under the insurance company is correct or incorrect.

After a careful consideration of the question we are of the opinion that the contention of the defendant bank cannot be sustained. We are not dealing here with a case where the holder of the second mortgage has demanded of the holder of the first mortgage that he apply certain payments on such first mortgage or enforce the same against certain other property than that covered by the second mortgage so as to leave the holder of the second mortgage in a better position to enforce his claim. In this case, the appellant has no claim to enforce. Its claim has been extinguished, and it has succeeded to the interest of the mortgagors in the property on which plaintiff holds a mortgage. According to the undisputed testimony, the defendant bank knew that the plaintiff did not in fact receive and apply the moneys paid by the insurance company. Having such knowledge, it did in January, 1918, pay to the plaintiff the full amount of interest due upon the mortgage according to its original tenor and effect. In other words, the bank paid interest upon the theory, and in effect recognized that there was due to the plaintiff the full principal sum named in the mortgage, namely, \$1,500. Shortly thereafter, namely in April, 1918, the defendant bank purchased the premises at the foreclosure sale, and bid therefor the full amount then due on its mortgage, with interest and costs of sale. As a result, the mortgage of the defendant bank was wholly extinguished (§ 6721, C. L. 1913; *Harvison v. Griffin*, 32 N. D. 188, 155 N. W. 655), and when the sheriff's deed was issued to the defendant it became the owner of the premises, and as such it stands precisely in the same position as any other person who might have purchased at the foreclosure sale. As was said by this court in *Harvison v. Griffin*, 32 N. D. 188, 196-198, 155 N. W. 655, 657:

"The fact that the statute gives them (the mortgagees) the right to

purchase at their own sale and under their own foreclosure and power does not give them any greater right than any other purchaser at the sale. Whatever amount they bid is credited on the indebtedness, and, if sufficient to pay the indebtedness, operates to wholly extinguish the same and to release and satisfy the mortgage, and they then become, when a deed is issued, the owners of the premises, subject to prior incumbrances, the same as any other purchaser. If the mortgagee purchaser at such a sale had any rights more valuable as a purchaser than a third party purchaser, it would necessarily result in unfair competition at the public sale. The mortgagee after becoming the purchaser, for the full amount of the indebtedness, certainly cannot claim any rights by virtue of the mortgage, after having extinguished the same and putting himself in the same position as any other purchaser. * * * By its purchase at the foreclosure sale, the mortgagee acquired the same title which the mortgagors possessed at the time the mortgage was executed and delivered, which was a title incumbered by the prior liens. In other words, it acquired through sheriff's deed the same rights, that, and none other than the mortgagors possessed at the date of the mortgage or which were subsequently acquired by them, which was the equity subject to the prior liens. * * * The instant that appellant's liens were satisfied, its right to invoke the rule as to marshaling of securities ceased. It was no longer necessary for its protection that it should invoke such rule. The object sought thereby no longer existed. * * *

"It should be borne in mind that the appellant acquired title through the foreclosure sale, not as mortgagee, but as purchaser, and consequently, as before stated, its rights are no greater than those of a stranger, had such a third party purchased the premises.

"Appellant suggests that a court of equity may treat a mortgage as still alive where the interests of the mortgagee require this to be done. This is, no doubt, abstractly correct, but this equitable doctrine is invoked only where the equities demand that it be done. Having purchased the premises, not as a mortgagee, but as any other purchaser, a mere stranger to the mortgage, might have done, we see no tenable ground for invoking such doctrine. Furthermore, we fail to see wherein appellant's equities preponderate over those of respondent."

In our opinion this reasoning and language are directly applicable to the facts in the case at bar.

The judgment appealed from is affirmed.

ROBINSON, C. J., and BRONSON, BIRDZELL, and GRACE, JJ., concur.

WILLIAM LANGER, Plaintiff, v. THE COURIER NEWS, a corporation, WM. LEMKE, GEORGE F. McPHERSON, and HERBERT E. GASTON, Defendants.

(183 N. W. 1009.)

Appeal and error — application to supreme court for order fixing amount of supersedeas bond denied where similar application pending before district court.

1. An application to the Supreme Court for an order allowing and fixing a supersedeas bond on appeal from an order denying an application for a change of venue will be denied where it appears that a similar application is pending before the District Court, which has neither refused nor neglected to act.

Opinion filed July 1, 1921.

Original application for an order fixing the amount and conditions of a supersedeas undertaking on appeal.

Denied.

Per Curiam Opinion.

Harry Lashkowitz, for motion.

W. S. Lauder, and *A. G. Divet*, contra.

PER CURIAM: This is an original application to this court for an order fixing the amount and conditions of a supersedeas undertaking on appeal. The facts, briefly stated, are:

This action was commenced in the District Court of Cass county. The defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The trial court

overruled the demurrer and on appeal to this court the complaint was held to be sufficient. *Langer v. The Courier News, et al.*, 179 N. W. 909. Subsequently the defendants moved for a change of venue from the county of Cass. An order was accordingly entered transferring the case to Richland county for trial. Afterwards defendants made an application for a change of venue from Richland county. The District Court of Richland county denied the application for a change of venue. The defendants appealed from such order by serving and filing notice of appeal and the usual cost bond. It is undisputed that an application similar to that now made to this court was pending before the district court at the time the application to this court was made. The application was made to this court and the order to show cause issued June 22d. It is undisputed that an application was served June 21st and noticed to be heard before the District Court of Richland county on June 23d. There is no showing that the trial judge has neglected or refused to act on the application. On the contrary, on the hearing in this court the trial judge filed a verified return, wherein he says: "That the matter of granting or refusing a stay of proceedings pending said appeal was never in any proper or formal way presented to him * * * that he knew of the pendency of said motion returnable on June 23d, 1921; that he expected to hear such motion and after the same had been heard to determine the same on the merits * * * that he has not yet determined such motion and that the defendants' application for a stay of proceedings has not been denied * * * that he had no intention of trying the said cause or permitting the same to be tried until after the defendants' said motion for a stay of proceedings had been fully heard and determined."

Upon the hearing before this court, respondent's counsel urged that it was for the trial court in the first instance to say whether the stay should be granted and that this court is vested with authority only to review the decision of the trial court. In our opinion this objection is well taken, where, as in this case, it appears that the trial court has not refused to act. § 7832, C. L. 1913, provides:

"When the appeal is from an order the execution or performance thereof shall not be delayed, except upon compliance with such conditions as the court or presiding judge thereof shall direct, and, when so required, an undertaking shall be executed on the part of the appellant by at least two sureties in such sums and to such effect as the court or presiding judge thereof shall direct; such effect shall be directed in

accordance with the nature of the order appealed from, corresponding to the foregoing provisions in respect to appeals from judgments, when applicable and such provision shall be made in all cases as will properly protect the respondent and no appeal from an intermediate order before judgment shall stay proceedings unless the court or presiding judge thereof shall in his discretion so specially order."

This section is directly applicable to the situation before us. We must assume that the trial court will do its duty and render such decision as the ends of justice require and that the legal discretion with which it is vested will be fairly and honestly exercised to the end that the rights of all the parties may be protected and that all parties may have the fair trial to which they are entitled under our laws. Manifestly this court may not anticipate a decision one way or the other and has no more right to instruct the trial court how this question should be decided than any other question properly triable to the District Court in the first instance. We deem § 7832 controlling in the light of the facts before us. Accordingly, the application here is denied and the order to show cause vacated.

CHRISTIANSON, BRONSON, GRACE, and BIRDZELL, JJ., concur.

ROBINSON, J. (dissenting in part.) From an order made by Judge Allen on June 14, 1921, denying a change of the place of trial, defendants duly appealed to this court. The appeal was perfected on June 21, 1921. A stay bond of \$2,000 was served and Judge Allen was requested to order a stay. The motion was captiously opposed and delayed because it was not made on a proper notice. Then a proper notice was given. But as the case was on the court calendar for trial and subject to a peremptory call defendants became fearful of the delay and on a truthful showing obtained from this court an order to show cause why a stay should not be allowed. Before this court the motion was opposed with amazing bitterness, which seems to have prevailed. A majority of the judges deny the motion on the ground that it was prematurely made, the trial court not having failed or neglected to grant a stay.

The case is controlled by this section of the statute. Comp. Laws, § 7836: When the court or the judge thereof from which an appeal is taken or desired to be taken shall neglect or refuse to make any order or direction not wholly discretionary necessary to enable the appellant to

stay proceedings upon an appeal, the Supreme Court or one of the Justices thereof, shall make such order or direction.

There can be no mistaking the statute. When an appeal is taken there must be a stay pending the appeal. It would be no less than a mockery to permit the trial of the case pending an appeal. Hence when the trial judge refuses to grant a stay, the Supreme Court or one of the justices thereof must allow the stay.

Under the circumstances of the case defendants were put in a dilemma. They were put on the ragged edge of uncertainty; the case being on the calendar subject to a peremptory call, it was not safe for them to rely on oral assurances of time to prepare for trial. The trial court should have allowed the stay immediately or should have made a written order protecting the rights of defendants and giving them ample time to apply for a stay to a judge of this court. Under the circumstances and emergencies this court might well conclude that the trial court had neglected to grant a stay, and in a commonsense businesslike way this court should dispose of the matter by allowing the stay, and not subjecting the defendants to the mercies of the trial court and the chances of having to make another application to this court or a judge thereof. In such a petty litigation, it seems the judges should deal out remedial justice in a prompt and businesslike way.

This case has a status and a history which may well be considered. It is an action to recover damages for a political libel. Such an action is commonly a nuisance *per se*, a public nuisance and a private nuisance. The complaint, though sworn to, is commonly framed without any regard for truth. It affirms that the complainant has sustained damages to the amount of \$50,000 or a million dollars, when in fact he has sustained no damages. It affirms that certain words or phrases have a meaning which cannot be justified by the words themselves or by evidence. The old rule is that on a demurrer the court must hold as true every averment of the complaint, even though the same be obviously untrue. The new and better rule is that on a demurrer the judges will not hold as true any averment which they know to be false. That is a long step in the right direction.

As we say, a libel suit is commonly a public and a private nuisance. Its trial does commonly last for a week or a month and results in a verdict for six cents or nothing. Here is the complaint in this action:

"LANGER WANTS CONTROL.

"It became clear early in the referendum campaign that two factions were seeking control of the I. V. A. One was headed by Attorney General Langer and the other by President Iverson. Langer visited heads of Minneapolis and St. Paul corporations that are financing the I. V. A. early this year and demanded that he be made custodian of the *slush funds* that were expected in North Dakota. His record was against him and these gentlemen turned him down, though politely. Because of this Langer is sore, it was said yesterday, and is attempting to build up a machine of his own." 179 N. W. 915.

The case having come before this court on a general demurrer to the complaint, three of the judges sustained the complaint because of its untrue innuendoes and two judges held that the complaint does not state a cause of action. That was in October, 1920. When the case was remanded defendants offered to serve an answer, which was unjustly refused and was not admitted until after a fight of several months. Now as the appeal was manifestly taken in good faith, the answer should have been received or allowed as a matter of course and without any conditions. Then a motion was made to change the place of trial from Cass county and Judge Cole made an order that the place of trial be changed to Richland county on this condition: "This order is subject to a further hearing on good cause shown therefor." The good cause was shown and Judge Cole made an order that plaintiff show cause why the place of trial should not be changed from Richland county, but in the meantime the papers had been sent to Richland county, and, in his turn, Judge Allen made an order to show cause why the order made by Judge Cole should not be vacated. Then, on July 14, 1921, defendants duly moved Judge Allen for an order changing the place of trial. The motion was strenuously opposed and it was denied. Then, on June 21, 1921, defendants duly appealed to the Supreme Court and on a stay bond for \$2,000 requested Judge Allen to grant a stay pending the appeal. Objection was made to the hearing for want of a sufficient notice of motion. A proper notice was at once prepared and served, but as the case was on the calendar of the trial court and on the peremptory call, and as the stay was bitterly opposed, defendants became fearful of delay and rushing to this court obtained an order to show cause, with a stay pending the motion. Instead of courteously assenting to the motion, it was opposed with the greatest bitterness, as if counsel had some hope of forcing the

case to an immediate trial in Richland county and there obtaining a verdict because of public prejudice. However, the storms may clear the atmosphere and show that there can be no mockery of justice by forcing a case to trial pending an appeal, and in time counsel may learn that even in a political libel suit, honesty is the best of policy.

PAUL OLSON, Respondent, v. THE GRAND LODGE OF THE
ANCIENT ORDER OF UNITED WORKMAN OF NORTH DA-
KOTA, a corporation, Appellant.

(184 N. W. 7.)

Insurance — beneficial order held not estopped to interpose defense that insured died in military service within insurance regulations.

1. The failure of a beneficial order to demand or secure from its insured member, an application for war permit and the payment or refusal of an extra war premium provided by its regulations for its members engaged in military service, and the reception of regular assessments and lodge dues while knowing that the insured member was in the service do not constitute, for reasons stated in the opinion, waiver or grounds of estoppel.

Insurance — provisions of beneficial certificate limiting liability where insured engages in military service held to state grounds of a status and not of causation.

2. The provisions in a beneficial certificate or insurance which limits the liability of the beneficial Order if the insured member shall engage in the occupation of a soldier in time of war, engage in military service in time of war, or, shall enter in the service of the United States army, state grounds of a status and not of causation as a test, where no provisions otherwise indicate.

Opinion filed July 5, 1921.

Action in District Court, Stark county, *Crawford*, J.

Defendant has appealed from a judgment in plaintiff's favor.

Reversed and remanded.

J. J. Mulready, and W. F. Burnett, for appellant.

L. A. Simpson, and J. W. Lee, for respondent.

Statement

BRONSON, J. This is an action upon a policy of life insurance. Trial was held before the court upon stipulated facts. On April 6, 1918, the defendant, a fraternal beneficial association, issued its policy of \$1,000 upon the life of the insured, payable to his father, the plaintiff. Then the insured was a blacksmith at Tolna, N. D., aged 21 and unmarried. The application for insurance, signed by the insured, contained an agreement that if he "should hereafter enter the occupation of a soldier in time of war" his membership in the order would become null and void, and the rights of himself and his beneficiary in life insurance waived; further, that he agreed to be subject at all times to all laws, rules, and regulations of the Grand Lodge, existing or thereafter to be adopted. Law 200 of the order provides that no person shall be admitted to membership who "is engaged in the occupation of "soldier in time of war." Law 222 provides that any member who shall hereafter enter any of the prohibited occupations enumerated in Law 200 shall forfeit his membership, and that "his beneficiary certificate shall become null and void without the action of any lodge or officer thereof."

At the time when the policy was issued there was in force a regulation (adopted pursuant to a resolution of the advisory board of the Grand Lodge on September 1, 1917), which provided that any insured member, if he shall enter the service of the United States army may keep his insurance certificate in force and effect to the extent and upon the terms mentioned in three options: (1) That any member may, after first receiving a war permit, continue in force his entire insurance (not exceeding \$2,000) upon the payment of an extra war premium of \$50 per \$1,000; (2) any such member, after first receiving a war permit, may continue his insurance (not exceeding \$2,000) to the extent of 20 per cent. of the amount thereof; (3) any such member may avail himself of option 1 as to \$1,000 and option 2 as to another \$1,000.

It also provided that any such member desiring to avail himself of the options, shall make, within 30 days after he has been mustered into the service of the United States, application to the Grand Recorder for a war

permit, upon blanks to be provided by the Grand Lodge, and that any such member who failed to avail himself of such options would forfeit all of his rights and benefits for himself or his beneficiary, notwithstanding the fact that he might continue to pay regular assessments and lodge dues and the Grand Lodge may have known of his entry into such service.

Attached to the beneficiary certificate, issued to the insured member, appears the following:

"This beneficiary certificate is issued and accepted upon the express consent of the member that in the event he engage in military, naval, submarine, or aerial service in time of war, without first obtaining a permit signed by the Grand Master Workman and Grand Recorder, and availing himself of one of the options adopted by the advisory board of said Grand Lodge at its meeting held on September 1, 1917 (numbered one, two or three) the amount payable upon this beneficiary certificate in the event of his death during such service shall be the reserve actually maintained by the Grand Lodge in respect to this beneficiary certificate."

On June 23, 1918, the insured through the selective service law became a private in Company B, 313th Engineers, of our army, while at war with Germany. He went to France with his company. On July 29, 1918, Mr. Kiland (apparently a local officer of the order) wrote the plaintiff, as follows:

"I am in receipt of money order from you for \$2.92 being for assessment No. 6 and lodge dues. This will serve as a receipt. Being that Henry is in the service he will have to sign the inclosed application for war permit, which they require to hold. As I do not know his address, I wish that you would send it to him and have him sign it and return to us as soon as possible."

The insured did not present nor sign the application for a war permit. The extra war premium was not paid.

On October 8, 1918, the insured, while in France in a hospital under the control of our government, afflicted with influenza, died, without ever having been in the zone of hostilities. Up to the time of his death all regular and other assessments and dues upon his insurance certificate and due the lodge had been paid. On November 11, 1918, the advisory board of the Grand Lodge adopted a resolution which provided that the board recommended to the finance committee the allowance of all claims in behalf of members in the service who had not received war permits upon the basis of 20 per cent. under option 2.

The plaintiff duly submitted proofs of the insured's death, and demanded payment of \$1,000. The defendant offered to pay \$200 in settlement of the policy, and also judgment in such amount with costs. The plaintiff rejected the offer. Pursuant to an order of the trial court without findings, judgment for the full amount of the policy was entered. The defendant has appealed therefrom.

Decisions

The sole legal question involved in this case is whether the insured at the time of his death was subject, concerning his insurance contract, to the regulations of defendant restricting and concerning liability upon engaging in the occupation of a "soldier in time of war," upon engaging in military service, or upon entering the service of the United States army. The plaintiff contends that three months before the death of the insured the order had notice and knew that the insured was in the service; that it thereafter received payment of assessments and lodge dues of the insured, and thereby waived the rules and regulations upon which it relies, and is estopped from urging the same; that under the regulations providing for a war permit and the payment of an additional war premium the order made provisions for the signing of an application upon a blank to be furnished by it, and that thereunder it was incumbent upon the order to establish that an opportunity was accorded to the insured to make such application while the order continued to receive the payment of the insured's regular assessments and dues; that the record does not disclose that the death of the insured was occasioned by any increase of hazard through his entrance into military service or being a soldier in time of war; and that, pursuant to the decisions of this court in *Myli v. American Life Insurance Co.*, 175 N. W. 631, 11 A. L. R. 1097, and *Gorder v. Lincoln National Life Insurance Co.*, 180 N. W. 514, 11 A. L. R. 1080, the plaintiff is entitled to recover the entire amount of the insurance.

When the insured, while a civilian, became a member of the order with beneficial insurance, there was then in force the rules of the order concerning the options concerning which he agreed, and notice thereof was attached to the beneficial certificate issued to him. This regulation, accepted by the insured, provided that if he should enter the service of the United States army or should engage in military service he could continue his entire insurance in force by the payment of an additional war premium

of \$50 and securing a war permit, or in force to the extent of 20 per cent. of the face thereof, upon securing a war permit only. The validity of that rule on grounds of public policy or otherwise is not attacked. It formed a part of the insurance contract. We are of the opinion that no acts of waiver nor such as to create an estoppel are shown. The order knew that the insured was in the service; it sent to his father, the beneficiary, a blank application for a war permit, with the request that it be sent to the insured for signature and return as soon as possible, the order stating that it did not know the address of the insured. The father, as the record shows, did pay one assessment and lodge dues for the insured; the stipulated facts do not show that the insured paid any of such assessments or lodge dues after he entered the service. The necessity of a war permit has been voluntarily waived by the order. The failure of the order to demand or secure from the insured direct the payment of the extra war premium, and this application for a war permit, did not operate to make option 1 effective, in the absence of express acts of waiver. Neither the insured nor his father, the beneficiary, made any attempt to exercise option 1. The assessments and lodge dues were paid so as to invoke and make applicable option 2. The order has not attempted to claim or enforce a forfeiture of the policy. On the contrary, they assert a continuance of the policy under the limited liability of option 2. The knowledge of the order that the insured was in the service, and its continued acceptance of the assessments and lodge dues, operated, therefore, neither as a waiver or an estoppel. See *Huntington v. Reserve Assoc.* (Wis.) 181 N. W. 819; *Miller v. Bankers' Life Assoc.*, 138 Ark. 442, 212 S. W. 310, 7 A. L. R. 378. The limited liability under the rules of the order therefore applies, unless the provisions concerned, upon interpretation and construction, establish as grounds for the limitation causation, and not status.

In *Myli v. American Life Insurance Co.*, supra, where the policy provided that if, within five years from date, the death of the insured shall occur while engaged in military or naval service in time of war, the company's liability shall be limited, etc. This court held, upon construction of other provisions of the policy, that such provision did not exempt from liability where the death of the insured was not occasioned by extra hazard incident to military or naval service; further, that, where status or occupation are not clearly the basis for exemption from liability, and where the language employed indicates a desire to rely only against

an extra hazard, the policy will be construed to avoid forfeiture of the insurance. The court in such opinion further stated that if the provision of the insurance policy in question had stated:

"If within five years from date the insured shall enlist or become inducted into the military or naval service without having obtained a permit therefor, etc., then status would clearly have been a test."

In *Gorder v. Lincoln National Life Ins. Co.*, supra, where the insured was required to obtain permission from the insurer to engage in military or naval service in time of war and to pay an extra premium, and, upon failure so to demand, and in the event of death of the insured in consequence of such service, there was a stipulated limitation of liability not greater than the legal reserve on the policy, this court recently held that the provision concerned limited the liability of the company only where death occurred in consequence of military or naval service. In other words, the character of the service, again, not the status, was the test. Those cases have quite fully discussed the test of status or causation. In some recent cases status has been recognized as the test of limited liability as follows: Where the insured shall die while serving in any branch of the United States army or navy (*McQueen v. Woodman* S. C. 106 S. E. 32); if the insured shall engage in the occupation of a soldier in the regular army in time of war (*Huntington v. Reserve Assoc.* Wis. 181 N. W. 819); if insured shall engage in military or naval service in time of war (*Bradshaw v. Insurance Co.*, 107 Kan. 681, 193 Pac. 332, 11 A. L. R. 1091); where insurance policy excepts military and naval service in time of war (*Ruddock v. Insurance Co.*, 209 Mich. 638, 177 N. W. 242); if insured shall engage in military or naval service in time of war (*Field v. Indemnity Co.* Tex. Civ. App. 227 S. W. 530); where policy exempts death while in the service of the army or the navy of the government in time of war (*Miller v. Life Association*, 138 Ark. 442, 212 S. W. 310, 7 A. L. R. 378). But, see *Long v. Insurance Co.* (Mo. App.) 225 S. W. 106. Do the provisions applicable to the insurance contract involved establish status as a test? We are of the opinion that the provisions "engage in military service in time of war," "engage in the occupation of a soldier in time of war," and "enter the service of our United States army" fixed and were intended to establish the status of the insured, and not the character of the service, as the test of the restriction of liability. We are unable to discover any provisions that indicate the contrary. The judgment accordingly is reversed, with directions to enter judgment for

the plaintiff as offered by the defendant. The defendant will recover costs of this court.

ROBINSON, C. J., and ENGLERT and COFFEY, District Judges, concur.

CHRISTIANSON and BIRDZELL, JJ., disqualified, did not participate; ENGLERT and COFFEY, District Judges, sitting in their stead.

GRACE, J. (dissenting). This action is one to recover on a life insurance policy. The trial was to the court upon stipulated facts. On the 6th day of April, 1918, the defendant, a fraternal benefit association, issued its policy, in the sum of \$1,000 on the life of the insured, payable at death to his father, the plaintiff. Insured was 21 years of age and unmarried.

We are of the opinion, the judgment should be affirmed, and this principally for three reasons:

Firstly. The following provision in the certificate, relied on by the defendant to avoid liability, is void, as being against public policy, and as tending in some degree to deter enlistments in military service in time of war. The provision is as follows:

"This beneficiary certificate is issued and accepted upon the express consent of the member that in the event he engage in military, naval, submarine, or ærial service in time of war, without first obtaining a permit signed by the Grand Master Workman and Grand Recorder, and availing himself of one of the options adopted by the advisory board of said Grand Lodge at its meeting held on September 1, 1917, (No. 1, 2 or 3), the amount payable upon this beneficiary certificate in the event of his death during such service shall be the reserve actually maintained by the Grand Lodge in respect to this beneficiary certificate."

If, for example, one of military age possess a beneficiary certificate for \$2,000 at the time war was declared by the United States against Germany, and he at that time understood that, if he enlisted in military service without the consent of the insurance company, the certificate would become void, or largely so, it can hardly be doubted that he would in some degree be deterred from enlisting; or, even after the passage of the Selective Service Act, he might for the same reason hesitate to comply with its requirements, knowing, in the circumstances, that his act might avoid the certificate.

If such, in some degree, should be the effect, it cannot well be denied

that such provision is void. It would perhaps be otherwise if the certificate provided that, in the event of his entrance into military service, or in any of the various branches of it mentioned in the provision, a stated sum, over and above the regular assessment, would be charged as additional premium for extra hazard incurred during each year he was in military service, and that such sum should be and remain a charge against the amount named in the policy; or if there were a provision contained in the certificate that, if this extra premium were not paid within a reasonable time after the termination of the military service, then, in that event, the certificate would be void; or even if it provided that the certificate would be void after service of notice by the defendant on the insured and his beneficiary that, if the extra premiums demanded were not paid within a reasonable time after they became due, as, for instance, within six months, the policy would be of no further effect; but such is not the tenor of the provision we are here considering. Furthermore, it is unreasonable, in that it seeks to make the status of military service, regardless of the increase of hazard, the sole cause for limiting or avoiding liability on its certificate.

In other words, if the insured should enlist in the military service, in the defense of his country, whether there was any increase in hazard or not, by his so doing his certificate of insurance is absolutely void, unless he first gets permission from the insurance company, and pays the extra premium, etc.

Assume, for instance, that in a real estate mortgage there was a provision that, if the mortgagor, a person of military age, should engage in military service in time of war, such act would constitute a default, and be sufficient authority for the mortgagee to foreclose the mortgage. Can any one believe, or reasonably contend, that such a provision would not be against public policy, and for that reason void. We think not. And so we might further illustrate by numberless contracts of different nature, but it would seem unnecessary to do so.

An insurance certificate or policy is nothing but just an ordinary contract. There is no reason why such a provision should be regarded any more favorably in an insurance contract than if it occurred in any other form of contract. The entire contract is to be construed to determine its purpose and effect, and, when so construed in the light of what has above been said, the defendant cannot, on account of the provision above mentioned, avoid its liability.

Secondly. The death of the insured being caused by influenza and not by any increased hazard because of military service, the prohibition contained in the provision is not effective to relieve the defendant of liability.

In the case of *Myli v. American Life Ins. Co.*, 175 N. W. 632, 11 A. L. R. 1097, which was an action to recover on an insurance policy, where the insured died while in military service, not, however, from any extra hazard occasioned thereby, but from the disease of influenza, this court, speaking through Mr. Justice Birdzell, construed the following provision contained in the policy:

"If, within five years from the date hereof, the death of the insured shall occur while engaged in military or naval service in time of war without previously having obtained from the company a permit therefor, the company's liability shall be limited to the cash premiums paid hereon for the three years from date of issuance and thereafter to the legal reserve on this policy."

The identity of meaning between that provision and the one presented for our consideration in the present case is indeed exceedingly marked.

Of the provision under consideration in the *Myli* case, we said:

"The argument is that the above provisions reduce liability to a return of the premium in this case by reason of the fact that the insured was at the time of his death an enlisted man in the naval service. It is contended that the effect of the provision is to automatically cancel the life insurance stipulated in the policy the moment the policy holder becomes enlisted or inducted into the military or naval service without having previously obtained a permit therefor, and without complying with whatever provisions (not named in the policy) the company might wish to require concerning additional premiums. As against this contention the respondent asserts that it is the evident purpose of the stipulation to provide only against the consequences of extra hazard incident to actual service in connection with hostilities.

"Before the harsh construction in the direction of forfeiture can be supported it must be found to result necessarily from the provisions of the policy. The policy must be read in the light of the obvious purpose of the particular provision, and it must be found that the exemption falls clearly and directly within its terms. It seems clear to us, upon a view of the whole policy and the evident purpose underlying the particular

stipulation, that the circumstances of this case do not bring the defendant within the exemption contracted for. * * *

"Reading the whole policy, we deem the intention of its various provisions with regard to the restrictions concerning military or naval service to be clear. The express intention does, in reality, conform to the purpose of the provision as stated in the deposition of an officer, of the company, namely, to except the policy from applying where the insured has come to his death from a hazard connected with military or naval service. In short, the status of the insured is not made the test, but the character of the service. The important words in the clause relied upon and those which signify its correlation with the other provisions hereinbefore referred to are 'while engaged in military or naval service.' These words are descriptive of two forms of hazardous service that are not intended to be covered, and it is only while the insured is engaged in such service that the exemption is applicable. It is idle to say that because one's status is such that he must respond to orders from military or naval authority, he is in military or naval service within such a provision, when in fact there is nothing about his daily activities that suggests the least physical danger that would enhance an insurance risk."

That language and reasoning is directly applicable to the case now before us. It is idle to say that, because the insured here died in the hospital, from influenza, his death was caused by military service.

Thirdly. The defendant had notice and knew that the insured was in military service, and thereafter it received payment of assessments and lodge dues, with full knowledge of this fact. Hence it waived any defense, if any it had, with reference to the insured entering the prohibited occupation of military service, unless under conditions specified in the foregoing provision. It is therefore estopped to assert that defense.

For the foregoing reasons, the court did not err in refusing to render judgment for the plaintiff for the sum of \$200 as requested by the defendant and appellant, and did not err in ordering judgment for the plaintiff in the sum of \$1145.90.

The judgment appealed from should be affirmed.

FRANK ISAAC PLOTNER, Respondent, v. NORTHWESTERN NATIONAL LIFE INSURANCE CO., a corporation, Appellant.

(183 N. W. 1000.)

Insurance — insured's omission of one instance of consulting physician and failure to state disease from which she was suffering held not a warranty voiding policy.

1. Where an applicant for life insurance was requested in the application therefor to name all causes for which she had consulted a physician in the last ten years, and to give the name and address of physician, the date of consultation, duration of disease and remaining effects, and where, in her answer, she omitted to name one instance when she consulted a physician; and further failed to state what, if any, disease she then had, as informed thereof by the physician, it is *held*, for reasons stated in the opinion, that her failure to do so was merely a representation and not a warranty, and did not, in the circumstances considered in the opinion, operate to void the policy.

Insurance — where policy incontestable after one year, there was no defense thereon when premium paid.

2. The policy of insurance contained a provision, in substance, that, after the expiration of one year from the date of issuance thereof, it would be incontestable for any reason except the nonpayment of premiums, as provided by the policy. It was not rescinded, nor any steps taken to contest the same, until after the expiration of the year. It is *held*, that, in these circumstances, there being no default in the payment of premium, that there is no defense to an action for the recovery of the amount specified in the policy.

Opinion filed July 22, 1921.

Appeal from a judgment of the District Court of Williams county, and from an order denying judgment in defendant's favor on the special verdict, *Fisk, J.*

Judgment affirmed.

Fisk & Murphy, for appellant.

"No oral or written misrepresentations made in the negotiation of a

contract or policy of insurance by the insured or in his behalf shall be deemed material or defeat or avoid the policy or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter misrepresented increased the risk of loss." Compiled Laws, § 6501; Soules v. B. of Am. Yeoman, 19 N. D. 23; 120 N. W. 760; Donohue v. Mutual Life Ins. Co. 37 N. D. 210.

"Where the applicant is asked whether he consulted a physician, been prescribed for, or professionally treated he must answer truthfully and it is immaterial whether he was prescribed for on account of disease or only temporary or trivial ailment; this has been held to include medical treatment two years previous." 1 Bacon L. & Acc. Ins. § 284; citing many authorities under notes 386 and 387.

Craven & Converse, and T. F. Burns, for respondent.

Mut. Life Ins. Co. v. Buford, (Okla.) 160 Pac. 928.

"Where petition states and evidence shows, a good cause of action upon a policy of life insurance, containing a condition of non-forfeiture after two years from date of issuance of policy, and the only defense pleaded is breach of warranties contained in the application for the insurance, pleaded more than two years after policy became incontestible such breach constitutes no defense and the court should direct a verdict for plaintiff." 42 L. R. A. 249, note.

"If the insurer desired to avoid the policy, on the ground of misrepresentation * * * it should, in the absence of the consent on the part of the insured and the beneficiary, have taken legal steps to do so within the two years from the date of issuance of the policy and failing to do so * * * the policy was incontestable." Bibble v. Ins. Co. (Cal.) 149 Pac. 171; and cases therein cited; Clement v. Ins. Co. (Tenn.) 42 L. R. A. 247 and note, "Incontestability by terms of policy"; Patterson v. Ins. Co. (Wis.) 42 L. R. A. 253; Ins. Co. v. McGuinis, (Ind.) 101 N. E. 289; 45 L. R. A. (N. S.) 192; Duvall v. Ins. Co. (Idaho) 154 Pac. 632; L. R. A. 1917E, 333 and note at 338 and particularly subdivision of said note "Construction of clause as regards fraud," at p. 341.

GRACE, J. This is an appeal from a judgment in plaintiff's favor, for \$2,200.45, entered on a special verdict, and from an order denying judgment in defendant's favor on a special verdict.

The action was brought to recover on a joint policy of life insurance,

issued by the defendant to plaintiff and wife on the 28th day of July, 1919. The complaint is in the ordinary form in such cases.

The answer admits that defendant is a foreign corporation, engaged in business in its special line, in the state of North Dakota, and that plaintiff and Amelia Victoria Plotner were, prior to the 28th day of July, 1919, and until decease of the latter, husband and wife. It admits the death of the latter, which occurred on December 15, 1919; that due proof of death was furnished to it, and that it refused payment of the claim. Otherwise, it interposed a general denial to the allegations of the complaint, and, in addition thereto, pleaded as part of its defense certain questions propounded by a medical examiner to the insured, and the answers given thereto by her. Those questions are as follows:

Name all causes for which you have consulted a physician in the last 10 years; illness, name and address of physician, date, duration, any remaining effects. Answer: Appendicitis; Dr. Sweitzer; St. Paul, 1915; 10 days; good recovery.

Have you had gallstones, or any disease of the liver? Answer: No.

Give full particulars of any other diseases or injuries you have had. Answer: None.

Are you now in good health as far as you know and believe? Answer: The best.

All of which answers are alleged as false and untrue, and made for the purpose of deceiving and defrauding the defendant.

The case was submitted to a jury for a special verdict, by 21 special questions. The first 6 of these are not necessary to discuss, as they relate to matters concerning which there is no controversy. The remainder and the answers thereto are as follows:

Question No. 7: Did Amelia Victoria Plotner, in her application for insurance to the defendant and in consideration therefor, expressly declare that all of her statements and answers as written or printed therein, and also in part 2 of such application, were full, complete, and true, whether written by her own hand or not? Answer: Yes.

Question No. 8: Did Amelia Victoria Plotner expressly agree that every such statement and answer is and was material to such risk? Answer: Yes.

Question No. 9: Were the following questions propounded to Amelia Victoria Plotner by the medical examiner and the following answers given thereto in said application? "Q. 7. Name all causes for which you

have consulted a physician in the last 10 years; illness, name and address of physician, date, duration, any remaining effects." To which she answered: "Appendicitis; Dr. Sweitzer, St. Paul; 1915; 10 days; good recovery." "Q. 8. Have you ever had gallstones or any disease of the liver?" To which she answered: "No." "Q. 9. Give full particulars of any other disease or injury you have had." She said: "None." "Q. 10. Are you in good health as far as you know and believe?" She answered: "The best." Answer: They were.

Question No. 10: Did the defendant company believe said answers and all of them to be true? Answer: Yes.

If you answer question No 10 in the affirmative, then answer No. 11.

Question No. 11: Did the defendant, in full reliance upon said answers being true, and not otherwise, issue and deliver said policy of insurance? Answer: Yes.

Question No. 12: Were said answers and all of them false? Answer: No.

Question No. 13: Were said answers, or any of them, false? Answer: No.

If you answer the last question in the affirmative, then answer question No 14.

Question No. 14: Which one or ones were false? Answer: ———.

Question No. 15: Were they known to be false by the said Amelia Victoria Plotner when made? Answer: No.

Question No. 16: Were they made with the corrupt and fraudulent intent of inducing the defendant to issue said policy of insurance? Answer: No.

Question No. 17: Did Amelia Victoria Plotner, on or about June 28, 1919, consult Dr. C. I. Oliver, a physician of Graceville, Minn.? Answer: Yes.

Question No. 18: Did the said physician at said time given her a thorough examination, consisting, among other things, of an X-ray examination of the stomach? Answer: Yes.

Question No. 19: Did said physician at said time diagnose Amelia Victoria's ailment as cholecystitis or gallstones? Answer: No.

Question No. 20: Did said physician at said time so inform Amelia Victoria Plotner of said diagnosis? Answer: No.

Question No. 21: Did the defendant company promptly upon learning of such facts rescind said contract of insurance, and tender back to the

plaintiff all premiums paid thereunder? Answer: Yes, after death of applicant.

The appellant assigns the following errors:

(1) The court erred in overruling defendant's objections to the admission in evidence of the testimony of the plaintiff and various other lay witnesses, tending to show that from their observations the insured was apparently enjoying good health in the summer of 1919.

(2) The court erred in denying defendant's motion for a directed verdict, made at the close of the testimony upon all the grounds and for all the reasons stated in said motion.

(3) The court erred in denying defendant's motion, made on December 28, 1920, on the minutes of the court, for judgment non obstante or for a new trial, based upon specifications of error served with notice of such motion.

(4) The court erred in overruling defendant's objection to the following question asked plaintiff: "Did you yourself have anything to do with the preparation of Exhibit E at all?"

The court erred in overruling defendant's objections to the following questions: "Q. I will ask you, Mr. Plotner, before you signed and delivered to the defendant company Exhibit F, you read or had read to you No. 13 thereof?" which is as follows: "When did you first notice or learn of any symptoms of failing health in deceased? In other words, before you signed that, was that specific question read by or to you?" Also: "And in answer to that question did you state to the party who wrote the answer therein, 'About a year'?"

It will not be necessary to set out a statement of the material facts, as they sufficiently appear from the special verdict. The assignments of error are so interrelated that a separate analysis of each is unnecessary, and hence all will be considered under a general discussion of the legal questions presented, which naturally arrange themselves in three groups, to wit: (1) Those relating to the reception or exclusion of evidence; (2) those relating to alleged fraud or deception, by Amelia Victoria Plotner, in procuring the policy of insurance to be issued; (3) those relating to the rulings of the court in denying defendant's motion for a directed verdict, and for judgment non obstante or for a new trial.

The defendant complains of the admission of certain evidence, given by several lay witnesses, in support of plaintiff's cause of action, which related to the state of health of the insured at the time she signed the ap-

plication, and during several months immediately preceding and several months immediately subsequent to that time. The tenor of this testimony is, as to her general appearance of health, her ability to do her ordinary housework on the farm where she and her husband lived, her participation in social affairs, and considerable other evidence of the same character, all of which tended to show that during said time she was in a normal state of health.

The evidence shows that plaintiff and his wife resided on a farm for about 14 years, near Tioga, Williams county. They were residing on this farm at the time the application was made. The mother of the deceased, Mrs. Theimer, resided near Graceville, Minn., where lived one Dr. Oliver. In the latter part of June, 1919, the insured visited her mother, Mrs. Theimer, and on or about June 28, 1919, visited Dr. C. I. Oliver, of Graceville, who examined her to ascertain her state of health, took an X-ray of her stomach, and who had her detail her health history. The evidence would seem to indicate that she had been having severe pains in the upper part of her stomach for some time prior to that time, having at times, after eating, a very uncomfortable feeling, and experiencing accumulation of gas in the stomach. Her mother, Mrs. Theimer, also testified by deposition to her having pains, and that she consulted Dr. Oliver, with reference thereto.

It is claimed Dr. Oliver diagnosed the trouble as cholecystitis, and that he so informed the insured, but the jury found that he did not do so. He prescribed for her. He testified that, so far as he could tell from examination, all her organs were normal, with the exception of the lining of the gall bladder. He found a little tenderness in the upper part of the stomach. She weighed from 165 to 170 pounds.

The defendant contends that all of the evidence of plaintiff given by the lay witnesses, relating to the condition of her health at or about the time above stated, was incompetent, irrelevant, and immaterial, and should not have been admitted to rebut what it claims to be the positive, undisputed, and conclusive evidence of Dr. Oliver, as to her condition at the time he made the examination.

It will be noticed, on reading Dr. Oliver's testimony, that he depends about as much on the personal history, as given him by the insured at the time she consulted him, as he did on his examination of her. In other words, the result at which he arrived was not wholly determined from his examination of her, but partly on the statements of her condition, as

she understood it. In these circumstances his testimony, to a considerable extent, may be regarded as opinion evidence. It was not by any means absolutely conclusive. It was some evidence as to the state of her health at that time, and the weight of it, as of all the evidence, was for the jury.

We are of the opinion it was proper to permit the introduction of evidence by lay witnesses as to the apparent condition of her health at the time of making the application, and for a reasonable time prior and subsequent thereto. *Rondinella v. Metropolitan Life Ins. Co.*, 24 Pa. Super. Ct. 293; 7 Ency. of Evidence, 527, note 76, First Supplement; *Baldi v. Metropolitan Ins. Co.*, 18 Pa. Super. Ct. 599; 5 Ency. of Evidence, 713; *Reininghaus v. Merchants' Life Association*, 116 Iowa, 364, 89 N. W. 1113; *Stone v. Moore*, 83 Iowa, 186, 49 N. W. 76; *Tierney v. Minneapolis & St. Louis Railway Co.*, 33 Minn. 311, 23 N. W. 229, 53 Am. Rep. 35; *Federal Betterment Co. v. Reeves*, 77 Kan. 111, 93 Pac. 627, 15 Ann. Cas. 796; *Perry v. Mutual Life Ins. Co.*, 143 Mich. 290, 106 N. W. 860; *Johnson v. Union Pacific Railroad Co.*, 35 Utah, 285, 100 Pac. 390; *Hubbard v. Mutual Reserve Fund Life Association*, 100 Fed. 719, 40 C. C. A. 665.

We have examined other objections by defendant to the introduction of certain evidence, and its objections to rulings of the court on certain evidentiary matters complained of, and find no reversible error therein.

We are next to consider defendant's claim that the insured made false answers to certain questions contained in the application, with the intent to mislead, deceive, and defraud it, by inducing it to issue the policy, which it would not have done had true answers been given to the questions. In the application, insured was requested to name all causes for which she had consulted a physician in the last 10 years. See question 9 of the special verdict *supra*. The question required her to state the nature of the illness, the date, duration, and remaining effects of it, if any, and the address of the physician who attended her on those occasions, if any. Her answer to this was appendicitis; that the duration of the sickness was 10 days; that she had a good recovery; and that she was attended by Dr. Sweitzer, of St. Paul.

It will be noticed from what has above been stated that she did consult Dr. Oliver on June 28th, and that in the following month, on July 18, 1919, she signed the application.

Section 6501, C. L., provides:

"No oral or written misrepresentation made in the negotiation of a

contract or policy of insurance by the insured or in his behalf shall be deemed material or defeat or avoid the policy or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter misrepresented increased the risk of loss."

The application and policy also declare the answers of the insured to questions contained in the application to be representations only. It is clear, under the terms of the policy, and the section above cited, that none of the insured's answers to the questions were warranties, but merely representations.

The question of whether there was any deception or fraud on the part of the insured in procuring the issuance of the policy was a question of fact for the jury. An examination of the special verdict will disclose that they found specifically that none of her answers were false, that she did not know them to be false, and that they were not made with any corrupt or fraudulent intent of inducing defendant to issue the policy. It is true she did not state she had consulted Dr. Oliver, but there are many reasons why she may have not done so. It is possible that she overlooked that matter at the time she gave the answers; and, further, being one of robust physique, weighing 160 to 170 pounds, and apparently in good health, as shown from the testimony of many witnesses, and having experienced only at times pains in the stomach, and the accumulation of gas, etc., as above mentioned, and being able to perform her ordinary household duties, which, of common knowledge, we know are not light in a farm home, she may have regarded the incident of seeing Dr. Oliver as trivial, not worthy to be mentioned. She may have regarded any ailment she had as of no consequence, temporary in character, and merely an indisposition which might occur in one of perfect health. In view of all the evidence and circumstances, the jury were warranted in finding that she made no false answers and committed no fraud.

As we view the matter, the evidence as a whole, on part of the defendant, fails to establish any intention on her part to defraud it, and wholly fails to establish fraud. She answered truthfully when she stated that she did not have gallstones. It also may be observed that statements by her as to whether she was in good health should be considered to a large extent the mere expression of an opinion. See *Donahue v. Mutual Life Ins. Co.*, 37 N. D. 203, 164 N. W. 50, L. R. A. 1918A, 300.

Subdivision 15 of the policy is entitled "Policy Contains Entire Contract." The part that is material here is as follows:

"It is agreed that this policy shall constitute the entire contract between both parties, and that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and that no such statements shall void the policy unless it is contained in the written application therefor, copy of which is attached when issued."

There is no stipulation in the policy that a misrepresentation, not constituting fraud, but which increases the risk, shall void the policy.

Part of § 6501 reads: "Or unless the matter misrepresented increased the risk of loss." This provision was made for the protection of insurance companies and for their benefit, but unquestionably it may be waived by them, and we think the defendant has done so in this case by specifically stipulating that the policy constitutes the entire contract between both parties. But, however this may be, the jury has made no finding that there was any increase of risk, and, further, has specifically found that the insured made no false answers.

There is another reason why the defendant is wholly prevented from avoiding its liability. Subdivision 20 of policy provides:

"Incontestability.

"This policy shall be incontestable after one year from its date, except for nonpayment of premium."

There was no default in payment of premiums, so no question in that regard arises. The policy is dated the 28th day of July, 1919. This action was commenced by the issuance of a summons on July 31, 1920, and, together with the complaint, was served on the defendant August 3, 1920, by an admission of service by S. A. Olsness, Insurance Commissioner of this state.

It clearly appears, and in fact it is indisputable, that more than one year had elapsed since the issuance of the policy before any act was done or action taken by the defendant to contest it. Thus the defendant thereafter is, by the terms of its contract, precluded from voiding the policy for any cause whatever, except failure to pay the premium as provided in the policy.

A different question might arise if the incontestability clause became operative at the date of the issuance of the policy, so that, if there were

fraud in procuring the issuance thereof, there would be no opportunity to discover it before the policy became operative, but here the defendant had an entire year from the date of the policy in which to discover fraud, or any other sufficient cause, to rescind the policy and tender back the premium. It wholly failed to do so within that time, after which, by the terms of the contract, it had no right for any cause whatever, except the nonpayment of premium, to rescind it and void the policy.

In other words, after the expiration of a year, where there is no default in the payment of the premium, and thereafter the death of the insured should occur, the defendant has no defense against the collection or payment of the amount specified in the policy. It, in substance, has stipulated to that effect in its policy.

As above stated, the jury specifically found there was no fraud. That determined that question. We think it is a general rule, however, that, whatever form fraud may assume, or in whatever guise it makes its appearance, it is not countenanced by the court. Here, however, the defendant reserved a specific period of time, it must be presumed, within which to examine every reason, if any existed, why it should not continue the policy in force. If it had done so, it could perhaps have discovered within the year the facts with reference to the insured's consultation with Dr. Oliver. It did not, however, so far as this record shows, make any investigation of any kind or character, within the year as to the truth of any of the statements of the insured, made in her application, nor otherwise do any act looking toward rescinding the policy.

It is not a case where there were no means, opportunity, or possibility of discovering fraud. The incontestability clause is one, no doubt, used by the defendant as an inducement to those desiring to purchase insurance. It, no doubt, points out to them, by its agents, that by the terms of the policy after the expiration of the year there can be no defense of any kind or character interposed against the collection of the amount specified in the policy, in case the death of the insured should occur and proceedings were had to collect the amount specified in the policy, except only for the nonpayment of premium. The defendant ought not be permitted to lull the insured into a feeling of security by the use of the incontestability clause, and then endeavor to avoid its contract when death has forever sealed the lips of the insured, after having had the time specified by that clause to rescind the whole contract, which it wholly failed to do.

It would seem the same rule is applicable as that which obtains where

a suicide clause provides for nonliability in the event of suicide within one year after the issuance of the policy, with reference to which 14 R. C. L. at § 413 sets out the following:

"A provision in a policy for nonliability in the event of suicide within one year 'after the issuance' of the policy means a year after its date where premiums are paid from its date, and the other parts of the policy show that the day of its date was considered the day of its issuance."

The following cases are there cited in support of that principle: *Anderson v. Mutual Life Ins. Co. of New York*, 164 Cal. 712, 130 Pac. 726. Ann. Cas. 1914B, 903; *Harrington v. Mutual Life Ins. Co. of New York*, 21 N. D. 447, 131 N. W. 246, 34 L. R. A. (N. S.) 373.

"A provision that suicide shall be no defense to an action to recover the insurance money if the policy had been in force for one year at the time of the death relates to the time of the suicidal act, and therefore if the insured commits suicide while sane, after the expiration of one year from the date of the policy, the company is liable, even though it appears that the suicide was premeditated before the expiration of the year, and was delayed to avoid its effect on the policy."

So by analogy it would appear that, where as in this case the defendant specified that after the expiration of one year the policy would be incontestable, the premium having been fully paid and the policy being in full force and effect from its date, unless it rescinded and repudiated it within one year from its date, thereafter, under its stipulation, it had no defense against the payment of it, excepting only for the nonpayment of premium. It permitted the year and more to expire before it took any action to avoid and rescind the policy, and, there being no default in premium, it has, as before stated, no defense to the collection of the full amount of it. The incontestability clause is a part of the policy which is in evidence. The entire contract, including that clause, is to be construed to ascertain the intentions of the parties. Further discussion cannot further clarify this particular point. The intent and language of the clause is so plain that it construes itself. It is susceptible of but one meaning, and that is such as we have accorded it.

The trial court properly granted the motion of plaintiff for judgment on the special verdict, and properly denied a similar motion of defendant, as well as one for judgment non obstante. We have carefully examined all the errors assigned, and find none that are reversible. From what has been said, it is clear that the judgment appealed from should be affirmed.

It is affirmed. The respondent is entitled to his statutory costs and disbursements on appeal.

CHRISTIANSON, J., being disqualified, did not participate, *Hon. M. J. Englert*, one of the Judges of Fifth Judicial District, sitting in his stead.

BRONSON, J., concurs in result.

Englert, District Judge. I concur in the affirmance of this case, but I express no opinion on the question of whether or not the incontestable provision of the policy applies to those instances wherein the insured dies before the expiration of one year from the date of the policy.

ROBINSON, C. J., dissents.

BIRDZELL, J. (concurring specially). I concur in the affirmance of the judgment on the ground that the effect of the incontestable clause was to obviate the defense upon which principal reliance is placed to defeat liability on the policy. Since the defendant did not contest liability nor seek a rescission within the time provided in the policy itself, it is unnecessary, in my opinion, to consider the merits of the defense unsuccessfully urged in the lower court, and which is made the principal basis of this appeal. Obviously, if the incontestable clause operates to cut off the defense, its merits become moot as conceded by appellant's counsel.

Incontestable provisions in insurance policies are generally held valid as creating by contract a short statute of limitations in favor of the insured within which time the insurer must take affirmative action to cancel or rescind the contract. The clause in question fixes the date within which any such attempt may be made by the insurer as one year from the date of the policy, and it does not embrace the contingency of the lifetime of the insured. That is, it does not say that the policy shall be incontestable after one year from its date during the lifetime of the insured, but merely that it shall be incontestable after one year from its date. It is held in *Monahan v. Metropolitan Life Insurance Co.*, 283 Ill. 136, 119 N. E. 68, L. R. A. 1918D, 1196, that the incontestable clause in a life insurance policy inures to the beneficiary after the death of the insured as much as it inures to the insured during his lifetime, and that even though some of the rights and obligations of the parties to the contract of insurance become fixed upon the death of the insured, the rights, as affected by the incontestable clause, do not become fixed at the date of the death. It is held that such clause continues operative for the period of time speci-

fied in the contract. In the instant case the policy is joint, insuring the lives of the plaintiff and the deceased. The contract was directly with the plaintiff as much as with the deceased. The reasons for holding that the incontestable clause operates in favor of the beneficiary after the death of the insured apply with even greater force where the plaintiff is not merely a beneficiary, but a contracting party as well.

In the case of *Ramsay v. Old Colony Life Insurance Co.*, 131 N. E. 108, decided April 21, 1921, the Illinois Supreme Court adhered to its decision in *Monahan v. Metropolitan Life Insurance Co.*, *supra*, and held that the defendant, when sued upon the policy by the administrator of the insured, could not interpose the defense of fraud in procuring the contract if it did not act within the time stipulated in the policy, although the insured died within that time. In my opinion, under such an incontestable clause as the one in question, any defense to liability on the contract which arises out of the transactions leading up to the policy must be asserted within the time prescribed.

While it is urged in this court that the plaintiff should not on appeal have the benefit of the incontestable clause, inasmuch as the matter was not suggested in the court below, it would seem that no useful purpose would be served by a reversal where, on the record as a whole, it clearly appears that the plaintiff is entitled to a judgment. Occasionally new grounds may be resorted to in an appellate court for sustaining a judgment where they would not be heeded if relied upon for reversal. See 3 C. J. 738.

ANDREW WEBER, as guardian of the estate of Fred Bodman, Estelle Bodman, Esther Bodman, Maxine Bodman, and Myron Bodman, Minors, Respondent, v. INTERSTATE BUSINESS MEN'S ACCIDENT ASSOCIATION, a corporation, of Des Moines, Iowa, Appellant.

(184 N. W. 97.)

Insurance — by-law as defense must be pleaded and proved.

1. The defendant, an Accident Insurance Company, relied on a cer-

tain by-law, to avoid liability on a certain policy of insurance. It neither pleaded nor proved the by-law nor the substance thereof.

It is *held*, that, if such by-law, in any circumstances, might constitute a defense, a prerequisite thereto would require it to be properly pleaded, and its contents established by competent evidence; and that not having been done, the defense in that regard, if any, is not available.

Insurance — suicide while insane is death by “accidental means.”

2. Where the insured, in an Accident Insurance Policy, commits suicide while so insane as not to comprehend the nature of the act nor the physical result which would flow from it, his death is caused by accidental means within the meaning of the policy insuring against bodily injury from external, violent and accidental means.

Opinion filed July 22, 1921.

Appeal from judgment and order of the District Court of McIntosh county; *Allen, J.*

Order and judgment affirmed.

G. M. Gannon, and *R. M. Haines*, of counsel, *A. A. Ludwigs*, for appellant.

The provisions of the contract are not void as being against public policy. *Vidal v. Girard's Executors*, 2 How. 127; *Printing Co. v. Sampson*, 19 Eq. 462; *Page on Contracts*, Vol. 1 p. 503; *Interstate B. A. A. v. Atkinson*, 165 Ky. 537 and 538. See also *Begelow v. Berkshire Life Ins. Co.* 93 U. S. 284; 23 L. ed. 918.

The provisions are of different effect and scope than the provisions against “suicide,” “Self-destruction” and like acts while insane. *Blunt v. Fidelity & Casualty Company*, 145 Cal. 268; 67 L. R. A. 793, *Manhattan Life Ins. Co. v. Beard*, 112 Ky. 455.

In this case the insured shot his wife and then shot himself producing instant death. It was alleged in the petition that the shooting “sprang from an insane impulse of a disordered and unsound mind. The evidence clearly established insanity of more than three years standing and the trial court directed a verdict for the defendant. On appeal the judgment was affirmed. *Layton v. Interstate Business Men's Accident Ass'n.* 158 Ia. 356; 139 N. W. 463.

I. A. Mackoff, *Curtis & Remington*, and *E. T. Burke*, for respondent.

Words and phrases, Vol. 1, p. 70.

"Where the insured killed himself while insane, and not conscious of what he was doing, such act was not suicide within the meaning of the policy and a recovery could be had on the policy." *Blackstone v. Life Ins. Co.* 42 N. W. 156; *Crandall v. Accident Ins. Co.* 33 U. S. 236; 30 Law ed. 740; *Rodel v. Life Ins. Co. (U.S.)* 24 Law ed. 433.

"Where defendant relies upon rules and by-laws of the association they must be set out in the answer, and it is not sufficient to allege merely that they have been violated." 1 Cyc. 288; 1 Corpus Juris 494; *Gray v. National Benefit Association. (Ind.)* 11 N. E. 477; *Stevens v. Cont. Ins. Co.* 12 N. Dak. 463.

"A stipulation is a judicial admission, and is absolutely conclusive upon the parties agreeing to it, prohibiting any further dispute of the fact admitted or waived, and any use of evidence to disprove or contradict it, or inconsistent with it. 12 Enc. of Ev. p. 100 and many cases cited.

"When admissions of this character are formally made for the purpose of waiving certain proofs or rules of practice, they are conclusive upon the client and *cannot be withdrawn.*" *Jones on Ev.* p. 324; *Greenleaf on Ev.* ¶ 339; *Wigmore on Ev. Vol. 4, ¶ 2588-2592*

GRACE, J. This appeal is from a judgment in plaintiff's favor for \$5,000, with interest and costs, and from an order denying defendant's motion for a new trial.

The action is brought by plaintiff as guardian of the estate of the minor children of Fred J. Bodman, deceased, to recover on what purports to be a certain accident insurance policy in the sum of \$5,000 issued by the defendant to Fred J. Bodman in his lifetime.

The insurance is against injury or death by violent, external, and accidental means. On December 11, 1913, defendant issued its policy to the insured. It would appear from the testimony, that this policy (Exhibit A) may not have been the one in force at the time death occurred. There is some evidence to indicate that it lapsed; that the insured applied for reinstatement, and requested a duplicate of the policy, claiming that he was unable to find the old one.

A discussion of this point is not very material, as will appear from the following stipulation:

"(1) That Fred Bodman, Estelle Bodman, Esther Bodman, Maxine Bodman, and Myron Bodman are the infant children of Fred J. Bodman,

deceased, and that Andrew Weber, the plaintiff in this action, is the duly appointed, qualified, and acting guardian of their estates.

"(2) That the defendant, the Interstate Business Men's Accident Association of Des Moines, Iowa, is a corporation engaged in the business of insurance against accident, and that during the lifetime of Fred J. Bodman the defendant issued a policy, in which policy it insured the said Fred J. Bodman against injury or death by violent, external, and accidental means, and that said policy was fully paid up and in full force and effect on the 12th day of May, 1919.

"(3) That the wards of the plaintiff, hereinbefore named, are the beneficiaries named in the said policy, and are entitled to the full benefit of all of the benefits thereof.

"(4) That the amount payable under the terms of the said policy in case of accidental death of the said Fred J. Bodman is the sum of \$5,000.

"(5) That no part of the same has been paid to the wards of the plaintiff nor to any one authorized to receive the same in their behalf."

The plaintiff claims that on the 12th day of May, 1919, insured came to his death by external, violent, and accidental means, to wit, by the wheels of a railroad coach running over his neck.

The complaint states a cause of action for recovery on the policy. In substance, the answer admits the issuance and delivery of the policy, the payment of the premiums, and that the policy was in full force and effect at the time of the death; and, after denying the allegations not admitted, it alleges that the death of Bodman was not caused by external, violent, and accidental means, but was caused by the willful and premeditated self-destruction of the deceased, with suicidal intent, and was due wholly to his own acts, and not to the acts of any other person or agency.

The only issue presented by the pleadings is whether the death of the insured was due to an act of suicide committed while he was sane. The answer does not allege that he was sane. It states, however, that the act of self-destruction was willful and premeditated. If it were premeditated, it would tend to denote sanity, and to some degree the word means deliberation. If there is any other issue in the case—and we do not think there is—it arose from the introduction in evidence of what purports to be a portion of the by-laws of the defendant association which, so far as material here, is as follows:

"Limitation of Risk.—The accident department of the association does not assume any liability for accidental injury sustained * * * if the

occasion of the accident be disease, bodily or mental infirmity, *insanity*," etc.

The defendant introduced Exhibit A in evidence (a synopsis of the by-law being on the back thereof), it would appear, for the sole purpose of establishing proof of this particular by-law. The defendant did not plead the by-law, and, we think, in order to adduce proof of it, it should have been pleaded either in the original pleading or by an amendment thereof, or, in any event, even though improperly received in evidence, by reason of not being pleaded, if it were to be given any consideration as evidence, the defendant at least should have made a motion to amend the pleadings to correspond with the proof. No amendment nor any such motion was made, and from this it would appear that the by-law should not have been received nor admitted as evidence, and we so determine. It must follow, in these circumstances, that the alleged by-law is no defense, and does not prevent a recovery on the policy. 1 Cyc. 288; 1 C. J. 494; Gray v. National Benefit Ass'n, 111 Ind. 531, 11 N. E. 477; Stevens v. Cont. Ins. Co., 12 N. D. 463, 97 N. W. 862; Ennis v. Retail Merchants' Ass'n, Mutual Fire Ins., 33 N. D. 21, 156 N. W. 234.

On the back of the policy is the following:

"The following is a synopsis of the provisions of the articles of incorporation and by-laws now in force and effect: The right of any member to claim benefits or indemnity will be determined by the provisions of the articles of incorporation and the by-laws in force at the time the accident happens, out of which any claim arises."

Assuming for the present that under the laws of this state the by-laws of the defendant could be proved as a part of its contract or policy of insurance—a subject which will be treated later in the opinion—it is clear that the identical by-law or by-laws relied on in force at the time of the happening of the accident out of which the claim arises should be pleaded. To plead a synopsis or abbreviation of it would not be sufficient, for those relying on its terms, to limit liability, might omit an important part of it, or might omit a part which to them might seem immaterial, and yet which might have an important bearing on their liability.

It must also appear by the pleadings that the by-law is the one in effect at the time the accident occurs. The synopsis of the by-law above set forth, and contained in Exhibit A, if it were ever a by-law, was perhaps in force on the 11th day of December, 1913, the date of the policy. But the by-laws of the company are subject to change from time to time, and those

which are in force at the time of the accident are the ones only which are operative.

It was approximately six years from the date of Exhibit A until the accident. The above by-law may have been entirely changed or eliminated, or another of entirely different meaning and phraseology enacted since that time, which in that event would be the one in effect at the time of the accident. In that case the above by-law would be of no force nor effect. So that it would appear that it was incumbent on the defendant, not only to plead the above by-law in full, but, as well, to adduce competent evidence to show that it was in full force and effect at the time of the accident. There was no foundation laid for any such proof, and no competent evidence of the actual, complete by-laws, if any, in force at the time of the accident.

The general rule is that, if the defendant desired to assert nonliability on the policy by reason of the protection afforded it by certain by-laws or provisos or conditions which are claimed to be a part of the policy, or referred to and claimed to be made a part of it, they should be fully pleaded and established by competent evidence.

A pleading of the synopsis is not sufficient, nor are the conclusions of the pleader, as drawn from and based on the by-law, proviso, etc. It would appear that the admission in evidence of the synopsis of the by-law above mentioned was not evidence of a by-law in force at the time of the accident.

Furthermore, if the by-law were properly pleaded and proved, it still would not be effective to avoid liability on the policy, as it is contrary to the specific provisions of § 6638, C. L. 1913, which, so far as material here, is as follows:

"No policy of insurance against loss or damage by the sickness, bodily injury or death by accident of the assured shall be issued or delivered in this state if it contain any of the following provisions."

Subdivision 2: "A provision referring to the constitution, by-laws or rules of the company or association or attempting to make the same a part of the policy."

The other subdivisions of the section need not be here considered.

It is clear from the above section that the by-law could not become a part of the policy. Such a provision, if inserted in it or attached to it, is absolutely void and of no effect. Evidence of it should not have been received, and it could not be pleaded nor in any manner used as a de-

fense. The by-law being prohibited by law from becoming a part of the policy, it is for that reason void, and for the same reason is void as being against public policy.

The Legislature, in enacting the above law, intended, no doubt, to prohibit accident insurance companies from adding subsequent provisos or conditions to a policy, through the medium of by-laws the enactment and terms of which were consented to in a way by the insured at the time of the issuance of the policy. No doubt the Legislature was aware that this practice had been resorted to to such a degree that it in effect destroyed the consideration for the payment of the premium. In other words, the Legislature, no doubt, was aware of a practice among insurance companies writing the class of insurance specified in the section above mentioned, whereby subsequent to the date of issue of the policy it was practically made worthless to the insured by the incorporation therein of new provisos and conditions through subsequently enacted by-laws made a part of the policy by which they were largely relieved of liability. In other words, they greatly decreased the risk, and thus made the policy largely worthless to the insured or the beneficiary, or, perhaps, the Legislature acquired knowledge that such insurance companies were making immense profits by these various practices, now prohibited by the law, which, when permitted, assisted the company to avoid a large portion of its risks. Whatever may have been the cause which moved the Legislature to enact the law, it has done so, and its act in that regard would seem to be one of wisdom, founded on a sound public policy, and intended to protect the insured against impositions, which are prohibited by the law.

Whether the contract is an Iowa contract is not a matter pleaded nor proved. That should have been done if defendant desired to avail itself of any benefit or advantage in that regard. Having failed to do so, it waived them. In the absence of pleading and proof to the contrary, it should be deemed a North Dakota contract, and the laws of this state are applicable to it in determining its legal effect.

It is not necessary here to determine what application the above section would have if the contract had been properly asserted and proved to be an Iowa contract. That question is not in this case, and needs no further consideration. It is proper here to consider the only defense interposed, which is to the effect that the insured came to his death by willful and premeditated self-destruction with suicidal intent. We are clearly of the opinion that this defense must fail for want of proof. The evidence

clearly tends to show that the insured took his life while not in the possession of his mental faculties, and when they were disordered, and thus his mind was unsound and not in a condition to reason; in other words, he was then violently insane.

Further proof of insanity is afforded by the physical facts, for it would appear to a reasonable mind that no person possessed of any reason, or, in other words, unless wholly insane, could terminate his own life in such a cruel, inhuman, and fiendish manner. The testimony shows that the body was found on one side of one of the rails of the railroad, and the head on the other side of it, indicating that, if he committed suicide, he placed his body in such position on the rail that the wheels of one of the trucks of a car, which was part of a moving train, would pass over his neck, and thus sever the head from the body, which was virtually what happened. It may also be noted that the defendant, in attempting to prove the by-law, in effect conceded the insanity.

We are of the opinion that the evidence is in such state as to show that the insured at the time he destroyed his own life was so insane as not to comprehend the nature of the act or of the physical result which would flow from it, and for this reason his suicide was caused by accidental means within the meaning of this policy, insuring against bodily injuries from external, violent, and accidental means. *Tuttle v. Iowa State Traveling Men's Association*, 132 Iowa, 652, 104 N. W. 1131, 7 L. R. A. (N. S.) 223; *Accident Ins. Co. v. Crandal*, 120 U. S. 527, 7 Sup. Ct. 685, 30 L. ed. 740; *Blackstone v. Standard Life Accident Ins. Co.*, 74 Mich. 592; 42 N. W. 156, 3 L. R. A. 486; *Grand Lodge, I. O. M. A., v. Wieting*, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123.

Here we will consider another important feature of this case. Dr. C. A. Campbell, a duly licensed and practicing physician of Ashley, N. D., the village where the accident happened, testified as a witness on behalf of plaintiff. The evidence shows he examined the dead body of Fred J. Bodman. In addition to other testimony, he stated that the jaw was broken, and that there were several contusions and bruises on one side of the face; that the angle of the right lower jaw was broken. His further testimony, in the form of questions and answers, is as follows:

"Q. From the position that you saw the head, and from its location adjacent to the rail, what would you say caused the fracture of the jaw?
A. I couldn't say, except that the jaw had been hit.

"Q. Might not that have happened by the pressing down of the

wheel upon the neck and pressing the head and jawbone into the cinders and track? A. That wouldn't be the easiest way of explaining it.

"Q. How would you explain that? A. I should fancy that he was struck first by some projecting iron or thing.

"Q. You mean to say that from the position of that body that he might have been struck by something besides the car wheel? A. Yes, sir.

"Q. There is nothing that I can think of on a car that would hit him there, and at the same time cut off his head and break the jaw. Do you think that that blow to the jaw might have taken place and broken the jaw before the head was cut off? A. It might have been.

"Q. Was that a serious event, that breaking of the jaw? A. If the person were alive; yes.

"Q. From the position of the body you would not think that that injury to the jaw resulted from any other cause than the passing of the wheel over the neck, would you? A. The break of the jaw was not caused by the severing of the neck, something hit him."

Dr. Campbell was a disinterested witness. His evidence, above set forth, is of a substantial character, and sufficient to show that in some unaccountable and unknown manner the insured was struck by something besides the car wheel; and the jury, from the evidence above set forth, could draw the conclusion that, from being struck on the jaw with such force as to break it, he was thereby thrown on the rail and further injured, as the evidence shows. In other words, the testimony of Dr. Campbell in this regard is substantial in character and sufficient to sustain the verdict of the jury.

It will also be noticed that nowhere does the defendant claim that the evidence is insufficient to sustain the verdict. But, if the defendant had assigned as a cause for reversal of the judgment the insufficiency of the evidence to sustain the verdict, the general rule is well settled on an appeal from a judgment entered on a verdict that, if there is any substantial evidence to sustain the verdict, the judgment should be affirmed. That rule is applicable here, and, applied, the evidence of Dr. Campbell is sufficient to sustain the verdict.

There is error assigned by reason of the court having given a certain instruction, and particular stress is placed on the following part of it:

"If you find that he was impelled to an act of self-destruction by an insane impulse which the reason that was left in him did not enable him to resist, or if his reasoning powers were so far overcome by his mental con-

dition that he could not exercise his reasoning faculties on the act which he was about to do, the company is liable."

Other extracts from the instruction are as follows:

"I instruct you further, gentlemen, in connection with this matter, that the only defense that the defendant has interposed to the demand of the plaintiff is that the death of Mr. Bodman, while admitted, was not accidental, but was self-inflicted, and was what is ordinarily termed suicide. In this connection, you are instructed that, if you find that the deceased, Fred J. Bodman, did place himself upon the rail where the wheels of the train were about to pass, you must determine whether or not he was insane or sane at the time. If you do find that he placed himself in the way of the train and he was a sane man at that time, then the death was not accidental, and under those circumstances your verdict should be for the defendant. If, however, you find that he did place himself in the way of the train, but he was at that time insane, and that his act was the mad act of a man bereft of his reason, then the death was an accident, and you should find for the plaintiff and against the defendant.

"In other words, self-destruction of a sane man knowingly and deliberately making way with himself is not an accident, but the self-destruction of a man whose mind is deranged and whose reason is gone, when the self-destruction results from such insanity, is accidental.

"I instruct you further, gentlemen, that it is not every kind or degree of insanity which will so far excuse the party taking his own life as to make the company insuring him liable. To do that the act of self-destruction must have been caused by insanity, and the mind of the deceased must have been so far deranged as to make him incapable of using rational judgment in regard to the act which he was committing."

The instruction is too lengthy to set out in full, but sufficient has been above set forth to demonstrate that it was quite comprehensive. We think, as a whole, it fully and fairly states the law applicable to the issues involved in the case. It is therefore clear to our minds that there was no reversible error in giving the instruction, nor was there reversible error in refusing to give the instruction requested by the defendant, the contents of which is as follows:

"The jury are instructed that by the terms of the insurance contract upon which this action is based, and which is in evidence before you, it is provided, among other things, that the defendant insurance company does not assume any liability for death resulting from accident occasioned by

mental infirmity or insanity; and I instruct you that, this being a part of the insurance contract, it is binding upon the parties thereto, and that therefore in this case, if you should find that the deceased, Fred Bodman, came to his death by his own act of self-destruction, even if you should also find that his act in taking his own life was due to disease or mental or bodily infirmity or insanity or fits, yet there could be no recovery in this case by plaintiff, and that because of the terms of the insurance contract above mentioned.

"I instruct you, gentlemen of the jury, that there is just one question for you to determine in this action, and that is: Did the deceased, Fred Bodman, come to his death from an act of self-destruction, or, in other words, did he commit suicide? If you should find that he did not commit suicide, then your verdict should be for the plaintiff; but, on the other hand, if you should find from the evidence that he did commit suicide, then the plaintiff cannot recover, and your verdict must be for the defendant."

The court, in its general instruction, did submit to the jury the question of whether the insured committed suicide while sane, and gave full instructions covering that question. The court properly refused to give the remainder of the instruction for the reason that the defendant did not, and, further, could not, plead and prove as a defense that the act of suicide was committed while the insured was insane.

We have above analyzed these questions quite fully, and have shown that such a condition, contained in a by-law, would be contrary to the laws of this state. In short, by-laws, in this class of insurance, cannot in this state be interposed as a defense to a liability on the policy, if they are against the law, and hence against public policy. They cannot be made a part of the policy by a provision referring to the constitution, by-laws, or rules of the company attempting to make the same a part of the policy.

The instruction requested was contrary to the law above mentioned, and hence the court did not err in refusing to give it. The instruction requested also related to issues not formed by the pleadings, and was properly denied.

The verdict is not contrary to the evidence, and there was no error in the court denying defendant's motion for a new trial.

The order and judgment of the court appealed from are affirmed.

Respondent is entitled to his statutory costs and disbursements on appeal.

CHRISTIANSON, J. (concurring specially). This is an action upon an accident insurance contract. The complaint alleges:

"(1) That he (Weber) is the duly appointed, qualified, and acting guardian of the estates of Fred Bodman, Estelle Bodman, Esther Bodman, Maxine Bodman and Myron Bodman, who are the infant children of Fred J. Bodman, deceased.

"(2) That during the lifetime of the said Fred J. Bodman he was the holder of a policy issued by the defendant which is an accident insurance corporation, in which said policy the said defendant did insure the said Fred J. Bodman against injury or death by violent, external, and accidental means, and that said policy was fully paid up and in full force and effect upon the 12th day of May, 1919.

"(3) That the wards of the plaintiff hereinbefore named are the beneficiaries named in the said policy, and are entitled to the full benefit of all the provisions thereof.

"(4) That on the said 12th day of May, 1919, the said Fred J. Bodman came to his death by external, violent, and accidental means, to wit, by being run over and decapitated by a railroad train.

"(5) That the amount payable under the terms of the said policy in case of accidental death of the said Fred J. Bodman is the sum of \$5,000.

"(6) That no part of the same has been paid to the wards of plaintiffs, nor to any one authorized to receive the same in their behalf."

The defendant in its answer admitted the allegations of paragraphs 1, 2, 3, 5, and 6 of the complaint. The answer also contained the following allegation:

"Further answering, it alleges that the death of the said Fred J. Bodman was not caused by external, violent, and accidental means, but was caused by the willful and premeditated self-destruction of the said deceased with suicidal intent and was due wholly to his own acts, and not to the acts of any other person or agency."

The action was tried to a jury upon the issues framed by these pleadings. The jury returned a verdict in favor of the plaintiff. The defendant moved for a new trial on the grounds: That the verdict is contrary to the evidence; that the verdict is contrary to the court's instructions; that the court erred in giving, and in refusing to give, certain instructions to the jury. The motion for a new trial was denied, and the

defendant has appealed to this court from the judgment and from the order denying a new trial. While the defendant specified, in the language of the statute, as grounds for a new trial, that the verdict was contrary to the evidence and contrary to the court's instructions, these grounds were apparently abandoned, and the only question presented on this appeal is whether the trial court erred in giving and in refusing to give certain instructions. The instructions given and refused upon which error is predicated relate to the question whether the deceased was sane or insane at the time of his death. The trial court instructed the jury thus:

"If you find that he was impelled to the act of self-destruction by an insane impulse which the reason that was left in him did not enable him to resist, or if his reasoning powers were so far overcome by his mental condition that he could not exercise his reasoning faculties on the act which he was about to do, the company is liable."

The defendant requested that the jury be instructed that by the terms of the insurance contract—

"The defendant insurance company does not assume any liability for death resulting from accident occasioned by mental infirmity or insanity, * * * and that therefore in this case, if you should find that the deceased, Fred Bodman, came to his death by his own act of self-destruction, even if you should also find that his act in taking his own life was due to disease or mental or bodily infirmity or insanity or fits, yet there could be no recovery in this case by the plaintiff, and that because of the terms of the insurance contract."

The trial court refused to give this instruction.

It will be noted that the requested instruction refers to, and purports to be based upon, certain provisions of the insurance contract involved in this suit. The defendant does not challenge the correctness of the rule announced in the instruction given by the trial court, considered as an abstract proposition. On the contrary, it admits on this appeal that the authorities sustain the rule that death from suicide is caused by accidental means within the meaning of a policy of insurance against bodily injuries from "external, violent, and accidental means," if the insured was at the time of the act so insane that he did not understand the nature of the act or that death would result therefrom. But appellant contends that this rule is not applicable in this case for the reason that the policy here involved contained a provision that "the accident department of the asso-

ciation does not assume any liability * * * if the occasion of the accident be * * * insanity." Hence, in considering appellant's specifications of error, the first pertinent question to determine is whether its premise is correct, viz. whether the insurance contract in suit contains the provision defendant asserts that it contains.

It will be noted that the complaint did not purport to set out the policy or the terms and conditions thereof. The complaint merely averred that the deceased was the holder of an accident policy issued by the defendant whereby he was insured "against injury or death by violent, external, and accidental means." The only issue tendered by the answer was as to the character of the death. The answer alleged affirmatively "that the death was not caused by external, violent, and accidental means, but was caused by the willful and premeditated self-destruction of the said deceased with suicidal intent and was due wholly to his own acts and not to the acts of any other person or agency." There was not even an intimation in the answer that the policy contained a provision relieving the defendant from liability from accidents occasioned by insanity. But the defendant contends that, regardless of the issues framed by the pleadings, the defendant became entitled to the benefit of the provision in the policy and to have appropriate instructions given as regards thereto by reason of the evidence admitted upon the trial of the case.

Let us see how well this contention is founded. At the commencement of the trial the parties entered into the following stipulation:

"It is stipulated by and between the plaintiff and the defendant that the following facts are conceded by both sides upon the trial of this action.

"I. That Fred Bodman, Estelle Bodman, Esther Bodman, Maxine Bodman, and Myron Bodman are the infant children of Fred J. Bodman, deceased, and that Andrew Weber, the plaintiff in this action, is the duly appointed, qualified and acting guardian of their estates.

"II. That the defendant, the Interstate Business Men's Accident Association of Des Moines, Iowa, is a corporation engaged in the business of insurance against accident, and that during the lifetime of Fred J. Bodman the defendant issued a policy, in which policy it insured the said Fred J. Bodman against injury or death by violent, external, and accidental means, and that said policy was fully paid up and in full force and effect on the 12th day of May 1919.

"III. That the wards of the plaintiff, hereinbefore named, are the

beneficiaries named in the said policy, and are entitled to the full benefit of all of the benefits thereof.

"IV. That the amount payable under the terms of the said policy in case of accidental death of the said Fred J. Bodman is the sum of \$5,000.

"V. That no part of the same has been paid to the wards of the plaintiff, nor to any one authorized to receive the same in their behalf."

In presenting his case in chief the plaintiff, in addition to the foregoing stipulation, offered the testimony of only one witness, who testified to the fact that the insured, Fred Bodman, came to his death on May 12, 1919, by being run over by a railroad train at Ashley in this state. No reference was made to the mental condition of the deceased. The first evidence adduced by the defendant consisted of certain testimony tending to lay a foundation for the introduction in evidence of the policy of insurance. The policy sought to be and eventually admitted in evidence did not purport to be the original one issued to the deceased, but purported to be merely a copy. Defendant's counsel spent much time and adduced considerable testimony for the purpose of laying a foundation for the admission of the copy in lieu of the original, and there was and is the gravest doubt if in fact a sufficient foundation was laid to justify the admission of the copy. At all events the question which must have been uppermost in the mind of the trial judge at the time was whether a sufficient foundation had been laid to admit the proffered exhibit at all. The face of the policy received in evidence was as follows:

"Number 66707.

Not Exceeding \$5,000.00.

"Certificate of Membership.

"Interstate Business Men's Accident Association of Des Moines, Iowa.

"This certifies that Fred J. Bodman is a member of the Interstate Business Men's Accident Association, and is entitled to such benefits as may be provided in and by the articles of incorporation and by-laws of said association in force and effect at the time the accident occurs from which a claim for benefits arises, and by the acceptance of this certificate he agrees to the several provisions and conditions of the said articles of incorporation and by-laws as from time to time they may be amended or changed.

"In witness whereof the said Interstate Business Men's Accident Association at its home office in Des Moines, Iowa, has caused this certificate

to be signed by its president and secretary, and its corporate seal to be hereunto affixed this 11th day of December, A. D. 1913.

“Ernest M. Brown,
“Secy. & Treas.
“G. S. Gilbertson,
“President.

“C. P. W. Registered.”

On the back of the certificate is the following heading in large type, viz.:

“The following is a synopsis of the provisions of the articles of incorporation and by-laws now in force and effect. The right of any member to claim benefits or indemnity will be determined by the provisions of the articles of incorporation and the by-laws in force at the time the accident happens out of which any claim arises.”

Immediately following this heading is what purports to be a synopsis of the provisions of the articles of incorporation and by-laws in force at the time the certificate was issued. Among other things stated therein is the following:

“The accident department of the association does not assume any liability * * * if the occasion of the accident be * * * insanity.”

Immediately following the synopsis of the articles of incorporation and by-laws, at the bottom of the page, is the following, also, printed in large type:

“A printed copy of the articles of incorporation and of the by-laws is inclosed with this certificate. The member should read the same carefully and inform himself of the rights and duties of membership. This duty you owe to yourself and the association.”

The certificate of insurance also contains a copy of the application. The original application was also offered in evidence. In the application no reference is made to the fact that the association is not liable “if the occasion of the accident be * * * suicide.” In fact, no reference is made to the question of limitation of liability. The application, however, contains this declaration on the part of the applicant:

“I hereby agree that I will accept the certificate of membership which may be issued to me subject to all the provisions, conditions, and limitations contained in the articles of incorporation and by-laws of said association, as the same now are or as they may be legally amended or changed, and I agree to comply with all the provisions thereof.”

It will be noted that the certificate of membership states that the assured—

“is entitled to such benefits as may be provided in and by the articles of incorporation and by-laws of said association in force and effect at the time the accident occurs from which a claim for benefits arises.”

These statements speak for themselves. The certificate of membership by its express terms did not purport to be the whole contract. It specifically referred to the articles of incorporation and the by-laws as establishing the essential elements of the contract. When the contest was raging, during the trial of the cause, as to whether the certificate should be admitted, the trial judge by a mere inspection of the certificate was advised that the benefits conferred upon the assured were those provided in the articles of incorporation and by-laws of the association in effect at the time the accident occurred. This necessarily inferred that whatever limitations there were as to liability were also specified in such articles and by-laws. It was necessary that the certificate of membership be introduced as a foundation for the admission of the articles of incorporation and by-laws. But there is no good reason why the trial court should have believed that the defendant, when it offered the certificate in evidence also, thereby sought to prove the contents of the articles of incorporation and by-laws. Manifestly the articles of incorporation must have been a matter of public record in the state where the association was incorporated; and it is a matter of common knowledge that the by-laws of a corporation are generally entered in some appropriate record of the corporation. Not only is it presumed that the ordinary course of business has been followed, but the very “synopsis” which defendant asserts constitutes evidence of the articles of incorporation and by-laws shows that it is not a copy thereof, but is merely a statement of conclusions as to the contents and effect of the articles and by-laws. It also shows that the articles of incorporation and by-laws are not contained in or in any manner made part of the certificate of insurance, but are extraneous thereto and were set forth in some other document inclosed therewith. It was deemed necessary to conclude the so-called “synopsis” by stating in large type that “the member should read the inclosed copy of the articles of incorporation and of the by-laws carefully and inform himself of the rights and duties of membership” in the association. This was urged upon him as a duty which he owed to himself and to the association. Of course, if the “synopsis” had been a copy or even a complete statement of

the contents of the articles of incorporation and of the by-laws, this statement and caution would hardly have been necessary.

In the circumstances, how can it be said that the trial court erred in not considering the articles of incorporation and the by-laws of the defendant corporation in the instructions to the jury? How can it be said that the trial court in admitting the certificate of insurance must, for the purposes of the submission of the case to the jury, be deemed to have admitted the certificate, among others, for the purpose of proving the articles of incorporation and the by-laws? There is nothing obscure about the rules of evidence relating to the mode of proving the contents of the articles of incorporation and the by-laws of a corporation. Aside from the applicable statutory provisions, the various legal treatises deal fully with the subject. See 3 Ency. Evidence, 657; Jones' Commentaries on Evidence. §§ 200a, 522; Bacon, Life & Accident Insurance (4th ed.) § 103; Fletcher's Ency. of Corporations, § 488. See, also, §§ 7909, 7919, subd. 7, C. L. 1913.

In the case at bar the defendant was permitted to introduce the certificate of insurance in evidence. This constituted an essential foundation for the introduction of proof as to the contents of the articles of incorporation and of the by-laws. Whether defendant had or desired to present such proof was a matter for it to determine. It failed to present such proof. As the trial court said in a memorandum opinion filed with the order denying a new trial in this case:

"As the matter now stands, there is no proof of the existence or contents of the by-laws."

This, in my opinion, correctly states the condition as it existed at the time when the trial court instructed the jury; and, of course, the instructions given were properly limited to the issues raised by the pleadings and the proof. As already stated under the pleadings, only one issue was preserved, namely, whether the death of the insured was occasioned by accidental means, or whether such death was occasioned by "the willful and premeditated self-destruction of the said deceased with suicidal intent." Upon this issue the court had before it the policy of insurance, which specifically referred to the articles of incorporation and the by-laws of the corporation for the other elements of the contract. No attempt was made to prove the contents of such articles or by-laws. There was, however, not only the admission in the defendant's answer, but the stipulation made at the commencement of the trial that "during the lifetime of Fred

J. Bodman, the defendant issued a policy in which policy it insured the said Fred J. Bodman against injury or death by violent, external, and accidental means." So, leaving wholly on one side the question of the sufficiency of defendant's pleading to raise the issue of its limited liability, it seems clear to me that the trial court committed no error in giving the instruction which it gave and in refusing to give the instruction which defendant requested. The instruction which it gave is concededly correct in the absence of evidence on the part of the defendant showing that its liability was limited by virtue of provisions in its articles of incorporation or by-laws. The instruction which defendant requested purported to be based upon, and asked that there be submitted to the jury for consideration, provisions of the by-laws of the defendant corporation which were not in evidence. In other words, the trial court did what the law required it to do—instructed upon the issues which were properly raised by the pleadings and the proof, and refused to instruct with respect to matters for which there was no basis either in the pleadings or in the proof.

I concur in an affirmance of the judgment and the order appealed from. My reasons for doing so are those set forth above. I express no opinion upon any question except those discussed by me in this opinion.

BRONSON and BIRDZELL, JJ., concur.

ROBINSON, C. J. I dissent. In this case there has not been a fair trial on the merits. There is a question as to whether or not the insurance policy is in evidence. The pleadings are dead wrong. There should be a new trial on amended pleadings and a judgment based on real facts, and not on finespun theories. This court should see that the legal procedure is not made a game of skill and chance, and that a decision for \$5,000 does not turn on the skill or adroitness of counsel in the making of stipulations or in anything they may do or leave undone.

THE STATE OF NORTH DAKOTA, ex rel. C. F. Truax and C. D. Colcord, copartners under the firm name and style of Truax & Colcord, Respondents, v. W. M. SMART, as president of, and C. D. SHAFT, OTTO GROSS, D. W. BOWKER, and A. BRATSBERG, as members of the Board of City Commissioners of the City of Minot, North Dakota, and Karl Dickinson, City Auditor of said City of Minot and H. E. Montgomery, J. C. Blaisdell and G. S. Reishus, as members of the Special Assessment Board of said City, Appellants.

(184 N. W. 623.)

Statutes — initiated measure amended or repealed only by a two-thirds vote of all members elected to each house.

1. Article 26 of the Amendments to the state constitution requires a two-thirds vote of all the members elected to each house of the legislative assembly to effect an amendment or repeal of any initiated measure adopted by the electors.

Newspapers — city special assessment notices must be published in elected official newspapers in such cities.

2. § 5 of chap. 187 of the Laws of 1919, as amended by an initiated measure approved at the general election in 1920, requires the publication in the elected official newspaper of special assessment notices in cities in which such official newspapers are published.

Opinion filed Sept. 22, 1921.

Appeal from district court of Ward County, *Lowe, J.*

Affirmed.

John J. Coyle, for appellants.

McGee & Goss, for respondent.

BIRDZELL, J. This is an appeal from a judgment awarding a peremptory writ of mandamus. The facts upon which the judgment is based are as follows:

The relators, Truax & Colcord, are the owners of a paper published in the city of Minot and known as the Ward County Independent. This paper was a candidate upon the election ballot of 1920 for official news-

paper, and, receiving a majority of the votes cast at the election, it was elected official newspaper and qualified as such. The defendants in this action are the members of the city commission, members of the special assessment board, and the city auditor of the city of Minot. Just prior to the beginning of the action the defendants had prepared for publication nine notices of special assessments which are required by law to be published, once each week for two successive weeks before being spread on the tax lists. The defendants refuse to cause the publication of these notices in the Ward County Independent. They base their refusal on the ground that the city commissioners had previously designated the Minot Daily News, a paper of general circulation in Minot and northwestern North Dakota, as the official newspaper of the city; and it is the contention of the defendants that the notices of special assessments may properly and legally be published in the Minot Daily News as the official newspaper of the city.

The question presented is a narrow one, depending upon the construction of recent legislation. Chap. 187 of the Laws of 1919 is an act entitled "An act providing for the selection and designation of one state, county and municipal official newspaper in each county in the state, prescribing the manner of its selection and duties." § 5 of this act provides that—

The official newspaper chosen in the manner prescribed by the preceding sections as the state, county, and municipal official newspaper, "shall publish all official proceedings of the board of county commissioners in said county and all other notices and publications that are now required by law to be published by county officers; all summons, citations, notices, orders and other process in actions or proceedings in the Supreme, district, county or justice courts, which are or may hereafter be required by law to be published in the respective counties of the state. All publications of every nature that now are or may hereafter be required to be published by state officers, elective or appointive; all notices of foreclosure of real estate or chattel mortgages or other liens on real estate or personal property foreclosed by advertisement in said county; and all legal notices of whatsoever kind and character required by law to be published or which may hereafter be required to be published in said county. Provided, however, that in organized cities, towns and villages where no official newspaper is published, said city, town or village, board, council or commission may designate an official newspaper for the pub-

lication of such notices; and legal publications as are now or hereafter may be required by law for said cities, towns and villages, including legal notices and official statements of the schools within such cities, towns and villages, and the statements of banks and other corporations therein; *but, in cities, towns or villages where the state, county and municipal official newspaper is published such notices and legal publications as are now or may hereafter be required by law to be published, shall be published in such official newspaper.*"

(The italicized portion is applicable to the case in hand by reason of the fact that the Ward County Independent is published in the city of Minot.)

The section quoted above was amended by an initiated measure submitted at the general election in November, 1920. This section, as embraced in the initiated measure, is as follows:

"No. 5. *Defining Duties of Such Official Newspaper.*—Such official newspaper as shall be chosen by the voters in said county as the state, county and municipal official newspaper therein, shall publish all official proceedings of the board of county commissioners in said county and all other notices and publications that are now required by law to be published by county officers; all publications of every nature that are now, or may hereafter be, required to be published by state officers, elective or appointive. Provided, however, that in organized cities, towns and villages where no official newspaper is published, said city, town, or village board, council or commission may designate an official newspaper for the publication of such notices and legal publications as are now or hereafter may be required by law for said cities, towns and villages, including legal notices and official statements of the schools within such cities, towns and villages, but in cities, towns or villages where the state, county and municipal official newspaper is published such official notices and legal publications as are now or may hereafter be required by law to be published, shall be published in such official newspaper."

The text of the original section was not changed in the initiated measure, except that in the latter certain matters such as summons, citations, orders, and other process in court proceedings, foreclosure notices, and corporation statements were omitted, so that their publication would not be required in the official newspaper. The initiated measure was carried in the general election.

In the legislative session of 1921 the following statute was enacted:

"An act to compel city councils to publish proceedings of all meetings in official paper to be designated by them.

"Be it enacted by the Legislative Assembly of the State of North Dakota:

"Section 1. *Publication of Proceedings*.—Hereafter it shall be the duty of city councils to cause to be published in an official paper, designated by them, a complete record of all proceedings of said councils.

"Sec. 2. *Repeal*.—All acts or parts of acts, in so far as they conflict with the provisions of this act are hereby repealed."

This act was passed in the Legislature by the following vote: In the Senate, ayes 45, nays 0, in the House of Representatives, ayes 67, nays 22; absent and not voting, 24. Sixty-seven is less than two-thirds of the membership elected to the House of Representatives. Article 26 of the Amendments of the State Constitution provides that no measure enacted or approved by a vote of the electors shall be repealed or amended by the Legislature except upon a yea and nay vote upon roll call of two-thirds of all the members elected to each house. Conceding—though it is not decided—that chap. 35 of the Session Laws of 1921 would, if properly enacted, authorize the publication of special assessment notices in the official newspaper designated by a city commission, we have to determine whether or not it can be given that effect as against the requirements contained in § 5 of chap. 187 as amended by the initiated measure.

We are clearly of the opinion that the initiated law requires the publication in the elected official newspaper of special assessment notices in cities in which such official newspapers are located; and there being no amendment or repeal of this law, enacted by the Legislature by the requisite two-thirds vote, it remains in full force and effect.

While counsel have argued the question of the constitutionality of chap. 35 of the Laws of 1921, and also whether it be partially or wholly unconstitutional, we find it unnecessary to consider these matters.

The judgment appealed from is affirmed.

ROBINSON, C. J., and GRACE, BRONSON, and CHRISTIANSON, JJ., concur.

ALLIANCE HAIL ASSOCIATION, a corporation, Appellant, v.
JOSEPH B. PLATZER, Respondent.

(184 N. W. 573.)

Insurance — evidence held to sustain findings for plaintiff for part of relief.

In an action involving loss sustained under a hail insurance policy, the evidence is examined, and it is *held* that the findings of the trial court have substantial support in the evidence.

Opinion filed Sept. 23, 1921.

From a judgment of the County Court of Renville County, *Crewe, J.*, plaintiff appeals.

Affirmed.

C. S. Buck, for appellant.

B. H. Bradford and *J. E. Bryans*, for respondent.

CHRISTIANSON, J. Plaintiff brought this action to recover on a note executed and delivered by the defendant to the plaintiff in May, 1910, in the sum of \$151.68. The defendant in his answer admitted the execution and delivery of the note, and, by way of counterclaim, alleged that the plaintiff is an insurance corporation organized under the laws of this state, engaged in the business of writing hail insurance; that the note in suit was executed and delivered by the defendant to the plaintiff as a premium for an insurance policy issued by the plaintiff to the defendant wherein it insured the defendant against loss or damage by hail, during the year 1910, in the sum of \$2,500 upon 100 acres of barley, 100 acres of oats, and 400 acres of wheat sown, planted, and raised on certain lands in sections 29, 31, 32, and 33, township 160 north, of range 85 west, in Renville county in this state; that the defendant was the owner of all crops so insured and that by said insurance policy the plaintiff promised and agreed to pay the defendant all damages occasioned to such crops by hail during the year 1910, not exceeding the sum of \$8 per acre; that on or about the 1st day of August, 1910, and while said policy of insurance was still in

force, all of said crops heretofore mentioned were damaged and partly destroyed by hail; that by reason of such destruction the defendant was damaged in the sum of \$1,000; that defendant has fulfilled all of the conditions of the insurance policy on his part required to be kept and performed and gave plaintiff due notice and proof of such loss; that, although said plaintiff examined such loss, it failed, refused, and neglected to pay the defendant therefor. The plaintiff interposed a reply, wherein it alleged that upon notification of the loss it sent its adjuster, who, on or about August 19, 1910, adjusted the loss at \$66, and that said amount was credited upon the note. In the reply it is further alleged that, inasmuch as the defendant did not notify the secretary of the plaintiff association that he was dissatisfied with the adjustment and demanded a readjustment, the adjustment so made became binding upon him by virtue of the provisions of the by-laws of the association. The cause came on for trial upon the issues framed by these pleadings. At the conclusion of all of the testimony both parties moved for directed verdicts. The court thereupon discharged the jury and made findings of fact in favor of the defendant and against the plaintiff. The court found that defendant had been damaged in the sum of \$1,000 and ordered judgment in his favor for that amount. The plaintiff has appealed from the judgment entered upon such findings.

The only question argued on this appeal relates to the sufficiency of the evidence submitted by the defendant as to the amount of damages sustained. A careful consideration of the evidence leads us to the conclusion that there is substantial evidence in support of the findings of the trial court. It is true the defendant admitted that he did not remember the value per bushel of the grain at and prior to the time of the hailstorm, but in answer to the last questions asked him he testified positively that the crop destroyed was worth at least \$8 per acre. He also testified that up to the time of the hailstorm the crops looked good; that he threshed only 175 bushels of wheat; and that prior to the hailstorm he figured the wheat was good for 10 bushels to the acre. Elsewhere he testified that he originally estimated his loss at about 90 per cent., but on sending in a report of the loss put in a claim wherein the loss was stated to be in amounts ranging from 40 per cent. on flax and barley to 80 percent. on wheat.

Plaintiff attempts to demonstrate that defendant's loss, according to his own testimony, could not have been as much as the court allowed. This is based upon taking the number of bushels of grain which the de-

defendant later threshed and the percentage as stated in the notice of loss on the other. This was doubtless an argument to be used in considering defendant's testimony. But it was for the trial court to pass upon the testimony, and, as already stated, the very last testimony of the defendant upon the subject contained in the record was to the effect that the crop destroyed was worth at least \$8 per acre, and according to this testimony, if he sustained the percentage of loss stated, both in his testimony and in the notice of loss submitted to the company he sustained a greater loss than that allowed by the trial court. In this connection, it should be stated that the testimony of the defendant as to the amount of the loss is undisputed. The plaintiff did not see fit to put in any testimony whatever tending to contradict the defendant's testimony on this point. Ordinarily, an owner is competent to testify to the value of his own property, and upon the record before us we cannot say that the findings of the trial court as to the amount of damages sustained by the defendant is not supported by substantial evidence.

It follows from what has been said that the judgment appealed from must be affirmed.

It is so ordered.

BRONSON, ROBINSON, and BIRDZELL, JJ., concur.

GRACE, C. J., being disqualified, did not participate.

ARTHUR PEARSON and HANNAH PEARSON, Appellants, v.
CLARENCE ELLITHORPE and K. R. ELLITHORPE, Respondents.

(184 N. W. 672.)

Mines and minerals — lease will not be cancelled without showing of legal, equitable or contractual cause, forfeiture not being favored.

The plaintiff brings this action to cancel a coal mining lease, but there is no showing of either a legal, an equitable or contractual cause for cancelling the lease.

Opinion filed Sept. 26, 1921.

Appeal from the District Court of Williams County; *Fisk, J.*

Affirmed.

Geo. A. Gilmore, for appellants.

"Lessees are obliged to work a mine for the best interest of the owner or lessor, and with reasonable diligence and in proper manner, and if not so expressed in the lease, the law implies said conditions." 27 Cyc. 705 and cases cited thereunder.

"When a minimum royalty is provided in the lease, this does not excuse lessee from not operating the mine diligently and mining all he can." 27 Cyc. 705-706 and cases cited in the case of *Chauvenet v. Person* 11 L. R. A. (N. S.) 417 and foot note cases cited thereunder.

"A mining lease may be cancelled by a Court of Equity if the terms and conditions in the lease are not complied with; and when no time is stated in the lease the law implies that the acts must be done in a reasonable time and manner." 27 Cyc. 708-709 and foot notes cited. *Howerton v. Kansas Natural Gas Co.* 34 L. R. A. (N. S.) 34.

L. M. Ellithorpe & McGee & Goss, for respondents.

"The rule that a proviso for forfeiture, or re-entry upon breach of a covenant or condition, must be inserted in the lease, is also applied, and if the instrument expresses the particular causes for which a forfeiture may be claimed, it cannot be inferred that any other grounds of forfeiture exist." 27 Cyc. 708. Citing cases under notes 24 and 25.

"The instrument executed by Marks and Thompson, was a lease for a definite period, as well as an option, and as it did not contain any expressed provision for a forfeiture it may be doubted whether such a forfeiture could be enforced." 27 Cyc. 708, Note 24, *Grandt Chrome Co. v. Marks* (Ore.) 181 Pac. 345.

"Where the terms of the lease as a whole, show that it was the intention to accept a sum of money in lieu of development of the land, the acceptance of the money by the lessor will be a waiver on his part of the right to insist upon a forfeiture of the lease for failure of the lessee to explore and develop the lands for minerals, according to its terms." 11 L. R. A. (N. S.) 417; case note at p. 419.

Equity is very slow granting relief by forfeiture in coal and iron mine cases. *Huggin v. Daley* 40 C. C. A. 15.

ROBINSON, J. The plaintiffs bring this action to cancel the lease of a coal mine and mining privileges on 80 acres of land, the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$, 20—124—100. The lease is dated April 5, 1912, and it continues for 35 years, unless sooner terminated by the lessees. It includes the dwelling house and wagon scale, which the lessee agrees to keep in repair. As rental the lessee agrees to pay for all coal mined 25 cents a ton, and to pay the same on the 1st day of each month, and to pay not less than \$4.17 a month, or \$50 a year, and the lessee agrees to use his best efforts to open up and mine the coal for the best interests of both parties. It appears the lessee has made the regular minimum monthly payments, and has paid 25 cents for all coal taken from the mine, and has made extensive progress in the development of the mine to the amount of perhaps \$3,000 or \$4,000. He has constructed a long horizontal shaft leading to the mine, which is now in a fair way to operate with profit.

The complaint avers that the defendants are assignees of the lease, and that they have failed to keep the house in repair, and suffered it to go to wreck and ruin, and have not weighed all coal mined, and have not used their best efforts to open up and operate the mine for the best interests of the plaintiffs. Also, that Clarence Ellithorpe took possession of the mine on April 1, 1916, and since then, until November 21, 1919, has paid 25 cents a ton on only 2,004 tons of coal, and that most of his time is given to the development of an adjacent coal mine owned by him. Hence the plaintiffs demand that the lease be cancelled, and appeal from a judgment dismissing the action.

The lease does not reserve to the lessor any right of forfeiture, and forfeitures are not favored at law or in equity. Indeed, the granting of relief against forfeitures is one of the most favored heads of equity jurisdiction. And by statute a condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created. Comp. Laws, 1913, § 5777. The transcript of the testimony, motions, exceptions, and objections cover nearly 200 pages. A review would serve no purpose. The case does not appeal to equity. There is no showing of either a legal, an equitable, or contractual cause for cancelling the lease. The lease does not bind the lessee to rush in mining or to do it any faster than it has been done. It binds the lessee to pay for all coal mined 25 cents a ton, and to pay a minimum of not less than \$50 a year. The lease contemplates a coal output

of not less than 200 tons a year, and in case of a failure the penalty is that the lessee must pay a royalty on 200 tons. The case is not one of doubt. Indeed, there is no showing of facts sufficient to constitute a cause of action for the cancellation of the lease.

Judgment affirmed.

GRACE, C. J., and CHRISTIANSON and BIRDZELL, JJ., concur.

BRONSON, J., concurs in result.

MARY WORLITZ, Respondent, v. MAX MILLER, Appellant.

(184 N. W. 806.)

Appeal and error—exclusion of testimony as to plaintiff's chastity held not error, where witness did not know meaning of word and other testimony was introduced.

1. Certain rulings on the admission of evidence examined and, for reasons stated in the opinion, held to be non-prejudicial.

Appeal and error—erroneous instruction ordinarily presumed prejudicial.

2. While the giving of an erroneous instruction ordinarily raises a presumption of prejudice, yet a case will not be reversed by reason thereof, where it is clear from the record that the complaining party could not have been prejudiced thereby.

Appeal and error—erroneous instruction does not require reversal where there could be no prejudice.

3. Certain instructions given in this case examined and for reasons stated in the opinion held to be non-prejudicial.

Opinion filed Sept. 26, 1921. Rehearing denied Oct. 29, 1921.

From a judgment of the District Court of Kidder County, *Coffey, J.*, defendant appeals.

Affirmed.

Geo. Musson and *E. T. Burke*, for appellant.

Cameron & Wattam and Arne Vinje, for respondent.

Where evidence cumulative in its nature is excluded or stricken out, even though done so improperly it is not prejudicial if the issue covered thereby is not in dispute. *State v. Moeller*, 20 N. D. 114.

The question of the competency of a witness, after hearing the evidence, is so largely a question of fact, and so particularly within the knowledge and discretion of the trial court, that the appellate court will not interfere unless the record shows a clear case of error. *Guthre v. Shafer*, 7 Okla. 459; *Mills v. Cook*, (Tex.) 57 S. W. 81; *People v. Harrison* 18 Cal. App. 285; 123 Pac. 200; *People v. Tyree* (Cal.) 132 Pac. 784.

The question whether the witness offered has sufficient understanding to be competent as a witness is a preliminary question for the court. *Pittsburg and W. R. Co. v. Thomson*, 82 Fed. 720; *McKinstry v. Tuscaloosa*, 54 So. 629; *Covington v. O'Meara*, 133 Ky. 762; *Bowdle v. Detroit Street Ry. Co.* 103 Mich. 272.

The question as to whether a witness possesses the requisite qualifications is for the trial court, and its ruling will not be reversed in the absence of palpable error. *Booneman v. Chicago, St. P. M. & O. R. Co.* 19 S. D. 459; 104 N. W. 808.

The rulings of the trial court as to the qualifications of a witness offered as an expert will not be reversed in the absence of palpable error appearing in the record. *Waterhouse v. Jos. Schlitz Brewing Co.* 16 S. D. 592; 94 N. W. 587.

CHRISTIANSON, J This is an action for indecent assault. The plaintiff recovered a verdict of \$700, and defendant has appealed from the judgment entered upon the verdict. The defendant is the owner of a store in the village of Tuttle in Kidder county in this state. The plaintiff is a married woman, living with her husband and two children in said village of Tuttle. Her husband is a laborer. In the fall of 1920 the plaintiff and her husband rented from the defendant a small building which adjoins his general store, for the purpose of operating a cream station therein, and the plaintiff thereupon engaged in the business of buying cream in that place. The only method of closing or locking the cream station at night was by locking the door leading to the street from the inside and passing out through a door leading into the store. The complaint alleges, and the plaintiff testified, that on the evening of August 25, 1920, after turn-

ing out the electric lights in her place of business and on attempting to pass out through the door leading into the store as usual, the plaintiff was confronted by the defendant who had placed himself in the door and who solicited her to have sexual intercourse with him; that upon her refusal to accede to his demands he seized her violently and forcibly by the arms, leaving black and blue marks thereon; that he placed his hands on her breasts and lifted her dress, and placed his hand on her private parts; that after a struggle of some duration, during which the plaintiff slapped the defendant and kicked his shins, the defendant released the plaintiff, and she thereupon left the place and went to her home. The defendant denied the whole transaction as testified to by the plaintiff, except that he admitted that he was in the cream station with the plaintiff on the evening in question. He claimed, however, that she called him into the cream station for the ostensible purpose of having him help her prepare the report of the day's business, and that after he came in there, she placed her arms around his neck and kissed him, and told him that she wanted some loving and kisses, and that he repelled her advances. It is apparent therefore that there was a square conflict in the evidence, and that it was for the jury to say whether the version of the plaintiff or that of the defendant was the true one. The sufficiency of the evidence is not questioned. On the contrary, on the oral argument, appellant's counsel expressly stated that he did not question the sufficiency of the evidence; but contended that the evidence was of such unsatisfactory nature that the errors, which he asserted occurred during the trial of the cause, required the granting of a new trial.

Three assignments of error are specified and argued on this appeal.

(1) It is contended that the court erred in refusing to permit one Amelia Hoher to testify regarding plaintiff's reputation for chastity. An examination of the record bearing upon this feature of the case leads us to the conclusion that no error was committed. The record shows that shortly before the witness Amelia Hoher was called another witness, Lenofred Elliott, was permitted to testify, and did testify, that the reputation of the plaintiff, Mary Worlitz, for chastity was bad. The witness Amelia Hoher was asked the following questions, and gave the following answers thereto:

"Q. When I ask you this question, answer yes or no; do you know the reputation of Mrs. Worlitz for chastity? A. Yes.

"The Court: Where, and when?

"Q. Do you know the reputation of Mrs. Worlitz for chastity, on August 25, 1920, in Tuttle? A. Yes.

"Q. What was that reputation? A. Bad."

On cross-examination she stated that she did not know what the word "chastity" meant and "had never heard the word before." The court thereupon directed that her testimony to the effect that Mary Worlitz's reputation for chastity was bad be stricken. Defendant's counsel in effect conceded the correctness of this ruling, because when another question relating to this matter was put and objection thereto sustained defendant's counsel stated:

"We don't want to insist upon this, your honor; we understand that the witness cannot be asked in regard to this word 'chastity' again, as she has already made the statement she does not know what it means."

Immediately following this statement defendant's counsel made the following request:

"The defendant would ask a few minutes' recess at this time, as there are some new witnesses that have just come in and we would like to interview them."

The court thereupon directed that a five-minute recess be had. Immediately following the recess the witness Amelia Hoher was recalled, and she was again asked if she knew the reputation of Mrs. Worlitz for chastity on August 25, 1920. Plaintiff's counsel objected to the question on the ground that the witness had already admitted that she did not know what the word meant. Thereupon, in answer to questions propounded by defendant's counsel, she testified that during the recess she had consulted a dictionary and ascertained the meaning of the word "chastity." Plaintiff's counsel asked for permission to cross-examine before the question was put, and upon asking her what the word "reputation" meant she refused to testify, and from answers given to questions formerly propounded it appeared that she did not know the meaning of the word "reputation." The court sustained an objection to the question on the ground that the witness had not shown herself qualified to answer. No request was made that the witness be given an opportunity to consult a dictionary or otherwise inform herself as to the meaning of the word "reputation." And as already stated, it also appears that one other witness did testify that the reputation of the plaintiff for chastity was bad. The plaintiff offered no testimony tending to contradict the testimony offered by the defendant on this point, so that so far as the record is con-

cerned the testimony adduced by the defendant that plaintiff's reputation for chastity was bad was uncontradicted. It would also seem that if the plaintiff's reputation for chastity was bad must have been a matter of such common comment that other witnesses could readily have been procured to testify to that fact. Under all the circumstances we cannot say, upon the record before us, that the trial court abused the judicial discretion with which it was vested in ruling as it did.

(2) It is next contended that the trial court erred in instructing the jury as follows:

"A woman has a right in pursuit of her walk of life to be free from molestation and assaults, whether they be physical assaults, or indecent assaults, as alleged in this case, and she has such a right to be free from these assaults, and any violation of this right that would cause her humiliation, pain, and suffering, or mortification such as charged in this complaint, would entitle her to damages for such violation of her rights. It would be the province of the jury, if they find that such rights have been violated, to award damages, such as would compensate her for injuries sustained."

The argument is made that under this instruction the jury might have awarded damages to the plaintiff merely for molestation, even though no assault was committed at all. We do not believe that the instruction is susceptible of such interpretation. The instruction refers to assaults "as alleged in this case." Under the evidence in this case the jury could not, in our opinion, possibly have found a verdict for the plaintiff under this instruction, unless they believed plaintiff's story that defendant actually committed an assault upon her such as she testified to. If her story was true he did commit such assault; if defendant's story was true he did not, and was wholly blameless. In our opinion the instruction given was in no manner prejudicial to the defendant.

(3) The defendant also predicates error upon the following instruction:

"If any witness has willfully testified falsely, in your judgment, you are at liberty to wholly disregard the testimony of such witness, except in so far as the same is corroborated by other credible evidence in the case; by other evidence which you have confidence in and believe. That would be as to material points."

It is contended that it is only where a witness has willfully testified falsely as to any material fact in the case that the jury is justified in dis-

regarding his testimony, and that the instruction in this case is erroneous because it did not so inform the jury. In appellant's brief it is stated that defendant's counsel called the trial court's attention to this omission, and that the trial court thereupon added the sentence at the end of the instruction, to wit, "That would be as to material points." Conceding, without deciding, that the instruction is erroneous, it does not follow that the cause must be reversed.

It is true that ordinarily, where an erroneous instruction is given which might operate to the injury of the party who assails it, a presumption of prejudice arises; but it is equally true that when the error could work no injury to the complaining party the case will not be reversed by reason thereof. In other words, a cause will not be reversed because an erroneous instruction has been given, where it appears from the record that the instruction could not have prejudiced the complaining party. See *National Bank v. Lemke*, 3 N. D. 154, 159, 54 N. W. 919, and authorities therein cited. The record in this case shows that the defendant could not possibly have been prejudiced by the language in which the instruction was couched, for whatever conflict there was in the evidence was upon material facts. Hence, the jury could not have found that any of defendant's witnesses testified falsely upon any fact, unless it was upon a material fact. So, upon the record in this case, the instruction could in no event be prejudicial. This disposes of all the errors assigned and argued on this appeal, and it follows from what has been said that the judgment appealed from must be affirmed.

BIRDZELL, BRONSON, and GRACE, JJ., concur.

ROBINSON, J. (dissenting). In this case the majority decision is strictly in accordance with the law as commonly administered. However, I am inclined to dissent from a decision which makes it unsafe for a man of means to be alone with a needy or adventurous woman. I also dissent from any verdict when it appears beyond doubt that it is clearly and grossly untrue. The verdict in this case is, for actual damages, \$500, for punitive damages, \$200. Now, on the testimony of the plaintiff herself it cannot be truly said that her actual damages amounted to \$10, nor half of \$10. She does testify that defendant pinched her arms so as to make black and blue spots, but on that she has no corroboration, and it is probably untrue. She does testify, in effect, that defendant forced his presence on her for half an hour from 8 to 8:30 p. m. by the watch. That

is not true. If the defendant had been an intruder in her room she could have dismissed him in a moment with a few sharp words. If he was in her room half an hour, it was with her assent and dalliance. Her complaint avers that on August 25, 1920, at Tuttle, the defendant assaulted her with intent to ravish her. That is false, and she knew it to be false. There is not in the record a thing to indicate that defendant ever thought of ravishing the plaintiff. As a place to buy cream the plaintiff rented from defendant a 10x12 shack at the rear of his store. It had two windows; it had two doors. One door opened out to the street, and one into the store. She swears she paid defendant two \$10 bills for two months' rent in advance. That is not true. She paid only one month in advance, and it seems that the trouble commenced when the defendant demanded rent in advance for the second month. Plaintiff swears that defendant made advances to her. He swears that she made advances to him. The truth of the matter cannot be determined. But this is certain: defendant kept a general store which was well lighted by electricity, and the light shone into the 10x12 shack at the rear end of the store. The store was open for customers. If the defendant remained in the shack half an hour, then it must have been a case of dalliance, a mutual courtship. The plaintiff was not hurt. She swears her dress was not torn. She does not swear to any injury except the pinching of her arms.

As we read in scripture, when Joseph met Potiphar's wife, all the advances were made by her, though he was the slave of her husband. There was no gentle dalliance or half-hour courtship. When Joseph said "No," it was said in a way to indicate that he meant it, and that was the end of it. But she was persistent, and at last, after several denials, she caught Joseph by his garment, and he left his garment in her hand and fled and got out. Then she took the garment with her and said unto her husband:

"The Hebrew servant, which thou hast brought unto us, came in unto me to mock me; and it came to pass, as I lifted up my voice and cried, that he left his garment with me and fled."

Then, of course, the husband believed her, and Joseph was taken and put in prison, where he remained until he interpreted the dreams of Pharaoh, which made him ruler of all the land of Egypt. From such evidence as Mrs. Potiphar gave, the Tuttle jury would doubtless have convicted Joseph, and assessed heavy damages against him. What fools we mortals be! In cases of this kind it is high time for the courts to get

away from the habit of washing their hands like Pilate and throwing the blame on the jury.

C. C. MARTIN, Appellant, v. N. B. LUDOWESE, Police Magistrate of Williston, North Dakota, Respondent.

(184 N. W. 575.)

Certiorari — will not lie where magistrate is acting within statutory authority and other remedy is available.

1. Where a magistrate is acting within his statutory authority and there exists otherwise a remedy available, a writ of certiorari will not issue.

Opinion filed September 26, 1921.

Appeal from order of District Court, Williams county; *Moellring, J.*, denying a writ of certiorari.

Affirmed.

Fisk and Shafer, for appellant.

An action against Egge for costs without relying on the undertaking given is not a plain, speedy and adequate remedy as contemplated by the statute on certiorari, § 8445, where we were entitled to have the amount determined in a summary manner by arbitration as provided in the Estray Law. *Re Enderlin State Bank*, 4 N. D. 319; 58 N. W. 514; *Leonard v. Peacock*, 8 Nev. 157.

Even though Egge is not a party to this proceeding we are entitled to have costs taxed against him by bringing him in with proper notice. § 7793 C. L. 1913 provides for costs in special proceedings; *State ex rel Surety Trust Co. v. Probate Court*, 69 N. W. 908 (Minn.); *Coffey v. Gamble*, 94 N. W. 936, Iowa; *Hickman v. Hunter*, 140 N. W. 425, Iowa.

Ivan V. Metzger, for respondent.

BRONSON, J. The appellant, on April 5, 1921, found upon his premises and within the vicinity of his residence ten head of horses. He took them as estrays, and within two days thereafter published a notice under the estray law. § 2658, C. L. 1913. On April 11, 1921, the appellant and one Egge, the owner of the horses, appeared before the respondent, who is a police magistrate in Williston. Over the objection of the appellant, questioning the jurisdiction of the magistrate, Egge offered an undertaking for the payment of all costs and expenses that might be awarded to appellant and all damages sustained through trespass of the horses, pursuant to § 8503, C. L. 1913, relating to trespassing animals. The magistrate approved the undertaking and ordered the immediate delivery of the horses by appellant to Egge. Thereupon the appellant secured an order requiring the respondent to certify fully to the district court all proceedings had and to temporarily refrain from executing the order made for delivery of the horses. Upon the hearing of the order the district court found that the statutory authority of the magistrate was confined to the approval or disapproval of the security offered without any right to try an issue as to whether the horses were held for trespass or as estrays and that the applicant (the appellant herein) had his remedy in the courts to fully protect his rights. The order issued was vacated and a writ of certiorari denied. The appellant has appealed therefrom. He contends that the magistrate was without authority to approve the undertaking for the reason that the horses were taken under the estray law (§ 3657 et seq., C. L. 1913); that it was made clear to the magistrate before he acted that the appellant claimed no damages under the provisions of the act concerning trespassing of animals which alone provides for furnishing such undertaking (§ 8500 et seq., C. L. 1913); that the newspaper advertisement provided for estrays served as notice concerning estrays alone.

We are of the opinion that the findings and order of the trial court are proper. Upon the issue involved, it would serve no useful purpose to discuss the relative uses and purposes of the statutes upon estrays and trespassing of animals. In the affidavit of the appellant for a writ of certiorari it is alleged that the appellant found and took upon his premises the horses. Although he published notice as if such horses were estrays only, still he might otherwise contend that such horses were trespassing animals under the provisions of § 8500 et seq., C. L. 1913. The order is affirmed with costs.

ROBINSON, BRONSON, BIRDZELL, and CHRISTIANSON, JJ., concur.

GRACE, C. J., concurs in the result.

REUBEN COHN, Respondent, v. NICK WYNGARDEN, Appellant.

(184 N. W. 575.)

Appeal and error—new trial—prejudicial error not presumed; error disregarded unless affecting substantial rights; misconduct of juror must be objected to at trial.

This is an action for a grave assault and battery. Defendant appeals from a judgment for \$1,500 with interest and costs. While he alleges error in the conduct of a juror and in the charge of the trial court, he does not bring any evidence before the court. The verdict and the judgment is presumed to be in all respects just and righteous. As the code provides, the court must in every stage of an action disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect.

Opinion filed September 26, 1921.

Appeal from an order and judgment of the District Court of Kidder county; *Coffey, J.*

Affirmed.

E. T. Burke, for appellant.

"It appears the best and highest evidence of which the case admits if we ask for stronger proof and adopt the rule of shutting the mouths of jurors we may as well close the doors of all inquiries of the case and leave them to act and decide as they please." *Smith v. Cheetham*, (N.Y.) 3 Caines 57; *Crawford v. State*, 2 Yerg (Tenn.) 60; *Wright v. Telegraph Co.*, 20 Iowa 195; *Wright v. Inm. Telephone Co.*, 20 Iowa 212; *Mattox v. U. S.* 146 U. S. 140; 36 Law ed. line 20.

Knauf & Knauf, for respondent.

"One of the causes assigned by statute for a new trial is, § 2, "Misconduct of the jury." But the affidavits of the jurors can only be used to show such misconduct in cases where the verdict is arrived at by chance." § 7660, Comp. Laws, 1913.

"Where the juror's conduct was known at the time of the trial a motion for a new trial on that ground will not be granted, as it was his duty to call attention of the court to it during the trial." *Ewing v. Lunn*, 115 N. W. 527.

"Where motion for a new trial is made upon the grounds of misconduct of jurors, such misconduct cannot be shown by affidavit of a juror—such statements are inadmissible to show misconduct or to impeach a verdict."

If it appear that the alleged misconduct of a juror was not caused by the prevailing party then a new trial should not be granted. *State v. Robidou*, 128 N. W. 1124; *Ewing v. Murphy*, 1 L. R. A. 820; *Phillips v. R. I. Co.* 31 L. R. A. (N. S.) 930 and cases cited; *Peoples v. Ritchie*, 42 Pac. 209, Utah.

"New York affirms the principle that jurors cannot be heard by affidavit or otherwise to impeach their verdict." *Williams v. Montgomery*, 60 N. Y. 648 and cases cited.

"Affidavits of jurors cannot be used to show how jurors arrived at their verdict." *State v. Forester*, 103 N. W. 625; 14 N. D. 335; *Glaspell v. N. P. R. R. Co.* 43 Fed. 900; *Johnson v. Seel*, 144 N. W. 237; 26 N. D. 299.

"The affidavit of attorney as to statements and of admissions of jurors to such attorney are inadmissible." *Johnson v. Seel* supra 238; *Siemsen v. Oaklan*, 66 Pac. 673 (Cal.); *People v. Ritchie*, 42 Pac. 209, (Utah).

"A party to an action will not be heard to complain of errors which he himself has induced the trial court to commit." 3 Cent. Dig. Col. 1312 § 3591; *Walton v. C. St. P. M. & O. Ry.*, 6 C. C. A. 223; 2 Dec. Dig. § 882; *May v. Cummings*, 130 N. W. 828; 21 N. D. 287; *Knox v. Ry. Co.* 203 S. W. 229, ¶ 1 (N. D.); *Pyke v. Jamestown*, 15 N. D. 161.

"Particular errors complained of should be specified." § 7663 Code 1913; *Henry v. Maher*, 6 N. D. 414; *Baumer v. Freach*, 8 N. D. 319; *State v. School Dist.* 18 N. D. 616; *Chaffee v. Edinger*, 29 N. D. 537; *Frost v. Hallinger*, 21 N. D. 560.

Now, it is well settled, that unless the complaining party had been

prejudiced by the instruction, he cannot complain. *Swallow v. Bank* 35 N. D. 608; 161 N. W. 207.

Unless a defendant requests an instruction, the court's failure to instruct in that regard is not reversible error. *Huber v. Zeizzler* 37 N. D. 556; 164 N. W. 131; *Blackorby v. Guither*, 34 N. D. 248; 158 N. W. 354.

ROBINSON, J. This is an action for a grave assault and battery. Defendant appeals from a judgment for \$1,500, with interest and costs, and from an order denying a motion for a new trial. The motion is based on alleged errors in the charge of the court to the jury and on alleged misconduct of a juror. The charge is that pending the trial defendant and his witness slept in the same bed and in a room occupied by a juror, and that during the night the juror heard defendant talk in whispering tones to his witness concerning the testimony he should give. The juror makes affidavit that he was not influenced by the conversation and did not disclose it to any other juror until they had agreed on the verdict. The juror made affidavit thus:

"I heard Wyngarden talk to witness and tell him to testify that he did not see him kick Cohn, but that he had turned to mind his horses, or words to that effect. I decided the case on the evidence and never told any one of the occurrence till the verdict was signed."

The motion for a new trial was not made on a statement of the case nor on the minutes of the court. There was no evidence submitted, only depositions taken by the plaintiff in regard to his injuries and the time he was unable to work. There is the deposition of his doctor in Chicago showing that for two or three months the doctor treated him for a fractured rib. The doctor's charge was \$250; the hospital charge, \$57. For aught that appears from the record, it may have been clearly proven that defendant committed a brutal assault and battery on the plaintiff and that the damage was much greater than the verdict. The presumptions are all in favor of the judgment. The purpose of the law is to administer justice between man and man and not to pile up a nice technical system of practice. By the code trivial defects of procedure must be disregarded. "The court shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings which do not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Code, § 7485. If the defendant had no defense on the merits, then his rights were not affected by any of the

matters alleged as error. If he had a defense, there was no way of proving it without producing the evidence. The presumption is that if produced the evidence would be adverse to him. Code, § 7936. Allowing full force and effect of the alleged errors, there is no showing that the judgment is not in all respects just and righteous beyond a question or a peradventure. If it be true, which it is not, that one of the jurors was prejudiced by accidentally overhearing defendant drilling his witness, it was no fault of the plaintiff; and defendant knew of the occurrence long before the close of the trial and he did not object to the juror. One who consents to an act is not wronged by it. Code, § 7249. Acquiescence in an error takes away the right of objecting to it. Code, § 7250. No one can take advantage of his own wrong. Code, § 7251. No one should suffer by the act of another. Code, § 7254.

Judgment affirmed.

GRACE, C. J., and BIRDZELL, J., concur.

CHRISTIANSON, J. (concurring specially). I concur in an affirmance of the judgment and of the order denying a new trial.

Appellant contends that the judgment and order should be reversed, and a new trial awarded him on account of: (1) Misconduct of the jury; and (2) erroneous instructions.

The only basis for the first ground are affidavits made by jurors and an affidavit of defendant's counsel as to statements alleged to have been made to him by a juror. There is no contention that one or more of the jurors were induced to assent to the verdict by a resort to the determination of chance, and under our statute it is only in such case that the verdict of a juror may be impeached by the affidavit of jurors. See subdivision 2, § 7660, C. L. 1913. Not only does that seem to be the plain meaning of our statute, but that was the interpretation placed thereon by this court in *Johnson v. Seel* 26 N. D. 299, 144 N. W. 237.

In this case defendant made a motion for a new trial. In such motion no complaint was made of the court's instruction to the jury. In other words, error in the instructions was not assigned as a ground for a new trial. This being so, the error, if any will be deemed waived, and cannot be asserted in this court. *State v. Glass*, 29 N. D. 620, 151 N. W. 229.

While I believe that the two decisions cited above are determinative of the questions raised on this appeal, I deem it proper to say that, upon

the record before us, it could in no event be said that the defendant was denied a fair trial.

BRONSON, J., concurs.

THE STATE OF NORTH DAKOTA, Appellant, v. ONE BUICK AUTOMOBILE TOURING CAR K-49, Factory No. 676857, Motor No. 664158, and all persons interested therein, or having claim thereon, Respondents.

(185 N. W. 305.)

Appeal and error — denial to state of order to restrain execution sale of automobile held not prejudicial error where providing for sale subject to state's rights.

1. The plaintiff, the State of North Dakota, made application for an order to restrain the sheriff from selling a certain automobile at an execution sale on the ground that an action had been brought and was then pending for the forfeiture of said automobile, under the State Prohibition Laws, (chap. 97 Laws 1921), and that all claims relating to said automobile were properly triable in such forfeiture action. The trial court denied the application for a restraining order, but in its order provided that the execution sale should be subject to all the rights and equities of the State; that such rights and equities were to be determined in the forfeiture action; that any purchaser at the execution sale should take such automobile subject to the rights of the State as they might finally be determined in such forfeiture action; that said automobile should remain in the possession of the said sheriff to abide the final determination of the rights of the State in said action; and that at the time of, and before making, such execution sale, the sheriff should read such order of the court and announce that said sale was being made subject to the provisions thereof. *Held*, that the plaintiff was in no event prejudiced by such order.

Appeal and error — an appeal from an order refusing to restrain an execution sale, which has been made, will be dismissed.

2. When on appeal from an order denying an injunction to restrain an execution sale, it appears that the proceedings were not stayed pending appeal, and that before the appeal was submitted the execution sale has been held in accordance with the directions of the execution and the

provisions of the order appealed from, the question as to whether the sale should or should not have been restrained becomes a moot one, and the appeal is subject to dismissal.

Opinion filed Sept. 26, 1921.

Appeal from the District Court of Ramsey County, *Buttz*, J., plaintiff appeals from an order denying an application for an order restraining an execution sale.

Affirmed.

S. W. Thompson, State's Attorney, *J. C. Adamson*, of counsel, for appellant.

The automobile was in the hands of the sheriff of Ramsey county awaiting the judgment in the forfeiture proceeding before the judgment was rendered on which the execution was issued. The doctrine is well settled that property in the hands of sheriffs, clerks of court, receivers, executors, etc. is regarded as being in custodia legis and cannot be reached by execution. *McCullough v. Large*, 20 Fed. 309; *Harris v. Dennie* 3 Pet (U. S.) 292; 7 Law ed. 638; *Fischer v. Daudistal*, 9 Fed. 145; 17 Cyc. 980 and cases cited.

Flynn, Traynor & Traynor, for respondents.

The mere fact that by such unlawful search and seizure it may be found that the parties were transporting liquor unlawfully, does not make the unlawful search and seizure thereby lawful, and the evidence obtained thereby cannot be used against such persons. *Silverthorne Lumber Co. v. U. S.* 251 U. S. 385; *Adams v. N. Y.* 192 U. S. 525; *Flagg v. U. S.* 233 Fed. 481; 483.

CHRISTIANSON, J. This is an action instituted by the state's attorney of Ramsey county, under the provisions of chap. 97, Laws 1921, to condemn and forfeit one certain Buick automobile. The complaint alleges that on the 25th day of March, 1921, a criminal information was filed in the district court of Ramsey county against Leslie Anderson and C. E. Story, charging them with the crime of willfully and unlawfully transporting intoxicating liquors, to wit, whisky, within said county by means of an automobile described as one Buick Six, seven-passenger automobile, 1920

model K—49, engine No. 664158, car No. 676857; that said defendants entered a plea of guilty to said information, and that sentence and judgment of conviction was thereupon pronounced by the court whereby the said two defendants were then and there each sentenced to serve a term of 90 days in the county jail of Ramsey county and to pay a fine of \$200 and the costs of prosecution taxed at \$6.75; that said alleged crime was committed on the 22d day of March, 1921, during a jury term of such said district court, and that said automobile was on the same day taken from the possession of the said defendants in said criminal action by the sheriff of said county, and has ever since been, and is now, in his possession; that said possession has been so retained "under and pursuant to the instructions of the state's attorney of said Ramsey county to enforce the right of the state for the forfeiture and sale thereof, pursuant to the provisions and authority of that certain act of the Legislature at the regular 1921 session thereof." The plaintiff prays judgment for a forfeiture and sale of said automobile, pursuant to the statute, and for such other and further relief as may seem proper in the premises.

This action was instituted on the 8th day of April, 1921. It appears that on April 2, 1921, Flynn, Traynor & Traynor instituted an action in a justice court in Ramsey county against Grace Benson, C. E. Story, and Leslie Anderson, as defendants, to recover the sum of \$75. On the same day an affidavit for attachment, accompanied by a proper undertaking, was filed, and the justice of the peace before whom the action was pending issued a writ of attachment. The papers in said action in justice court were delivered to the sheriff of said county for service, and the sheriff served the papers upon the three defendants named therein and also levied upon the Buick car, which is involved in this controversy. Such proceedings were had in the justice court that on the 16th day of April, 1921, a judgment was rendered in favor of the plaintiff in said action and against the three defendants in the total sum of \$94.80. On the 27th day of April, 1921, an execution was issued upon said judgment and delivered to the sheriff of said county for service. The sheriff, pursuant to the directions of said execution, caused notice of sale to be given wherein he advertised that he would sell said automobile, on the 7th day of May, 1921, at the place provided by law, to satisfy the judgment. The state's attorney of Ramsey county thereupon, on May 4, 1921, moved the court for an order enjoining and restraining the said execution sale set for May 7, 1921. The motion was based upon an affidavit of said state's at-

torney wherein he recited the proceedings had in the criminal action, the rendition of judgment in the justice court, the issuance of execution thereon, and the proposed sale thereunder; and it was asked by the said states attorney:

"That said execution sale be enjoined and restrained by order of this court, and that the said judgment creditor be brought in as a party defendant in the above-entitled action, so that the right of the state in and to said automobile in said forfeiture proceedings be adjudicated as against the levy and threatened sale of said judgment creditor, and, further, that the rights of all claimants therein may be adjudicated as provided by statute."

At the hearing the records and files in the criminal action and in this action were submitted, and it appears by recital in the order appealed from that the trial court also considered all the records and files in the case in which the execution was issued. The trial court denied the application for an injunction. In its order the court, however, provided:

"That when the sale is made under and by virtue of the execution issued out of justice court in the action wherein said Flynn, Traynor & Traynor are plaintiffs and the said Grace E. Benson is the defendant and judgment debtor, that such sale be made without prejudice to the rights of the state of North Dakota in and to said automobile and subject to all of the rights and equities of the state of North Dakota in and to said automobile, which rights and equities are to be determined in this action, and that upon such sale the purchaser at such sale shall take the said automobile subject to the rights of the state of North Dakota as may be finally determined in this action, and said automobile shall remain in the possession of the sheriff of Ramsey county, N. D., to abide the final determination of the rights of the state of North Dakota in this action." And "that at the time of such sale and before the sale is made that the sheriff, after reading the notice of sheriff's execution sale, shall read this order and announce that said sale is being made subject to the provisions hereof."

The states attorney has appealed from that order .

On this appeal many questions have been raised relating to the construction of chap. 97, Laws 1921. In our opinion the case neither requires nor justifies consideration of any of these questions. It will be noted that the order of the trial court carefully preserved all the rights of the state, and left all questions involving these rights, as well as the rights of

the judgment creditors, to be determined when this action is tried on the merits. Hence it seems clear that the state was in no manner prejudiced by the order appealed from. Whether any other party was prejudiced thereby is not before us.

There is another reason why we may not consider the various questions urged for determination here. No restraining order was ever issued by the trial court, and no order was made staying proceedings pending the appeal. And in the record which the appellant has caused to be certified to this court on this appeal, there is contained the return which the sheriff made on the execution issued upon the justice's judgment; and from that return it appears that the sheriff, on May 7, 1921, held the execution sale in accordance with the directions of the execution and the provisions of the order appealed from here. In other words, the record presented by the appellant shows affirmatively that before the appeal was taken the very acts which it was sought to have restrained had been performed. Hence the appeal presents merely questions which have become moot, and is subject to dismissal. *Thompson v. Vold*, 38 N. D. 569, 165 N. W. 1076; *Holter v. Wagoner*, 32 S. D. 137, 142 N. W. 175; *Barber Asphalt Co. v. Hamilton*, 80 Wash. 51, 141 Pac. 199; *Carr v. Montesano*, 76 Wash. 380, 136 Pac. 363; *Wiebke v. Ft. Wayne*, 64 Ind. App. 38, 115 N. E. 355; *Crise v. Slagle*, 129 Md. 453, 99 Atl. 669; 4 C. J. 584. See, also, *State v. Albertson*, 25 N. D. 206, 141 N. W. 478; *In re Kaeppler*, 7 N. D. 307, 75 N. W. 253; *Richardson v. McChesney*, 218 U. S. 487, 31 Sup. Ct. 43, 54 L. ed. 1121; *Mills v. Green*, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. ed. 293.

It follows from what has been said that we cannot interfere with the order entered by the trial court, and it is affirmed.

GRACE, C. J., and ROBINSON, BIRDZELL, and BRONSON, JJ., concur.

AMERICAN STATE BANK, a corporation, formerly German-American State Bank of Burlington, N. D., Appellant, v. A. C. DAYTON and J. A. CARROLL, co-partners under the firm name and style of Dayton & Carroll, Respondents.

(184 N. W. 665.)

Chattel mortgages — evidence in conversion action held to warrant directing verdict for defendant purchasers from mortgagor.

In an action for the conversion of grain, upon which the plaintiff claimed a mortgage lien, the trial court directed a verdict for the defendants. The evidence is examined and it is *held* that no error was committed in directing the verdict.

Opinion filed Sept. 26, 1921.

Appeal from the District Court of Ward County; *Leighton, J.*

Affirmed.

Greenleaf & Woledge, for appellant.

B. H. Bradford, for respondents.

BIRDZELL, J. This is an appeal from a judgment of dismissal and from an order denying a new trial. The action was brought to recover the value of certain wheat purchased by the defendants, upon which the plaintiff claimed a lien through a chattel mortgage given on Gobernatz, the defendants' vendor. At the conclusion of the evidence the trial court directed the jury to return a verdict for the defendants. The facts are as follows:

In November, 1917, one Chris Gobernatz gave the plaintiff and appellant a chattel mortgage covering a large amount of personal property used by the mortgagor in operating a certain farm and the crop to be raised in 1918 upon the west half of sec. 5, township 157, range 83 to secure an indebtedness of \$2,781.32. In December, 1917, he gave another mortgage to the plaintiff, covering substantially the same property. During the following season the mortgagor farmed the land described in the chattel mortgages, and also the northwest quarter of sec. 6 of the same

township and range. The owner of the land described in the mortgage was J. Olson, who was also the president of the plaintiff and appellant bank. Gobernatz was his tenant. During the fall of 1918 Gobernatz delivered certain grain to the Olson-Warner Grain Company at Burlington, for which payment was made to Olson, the landlord. He also turned over to the appellant, the personal property on the farm without seizure under foreclosure proceedings. Some of this was disposed of by the appellant and the remainder was still in its hands at the time of the trial. During the fall of 1918 Gobernatz sold and delivered to the defendants herein, at Glenburn, 559 bushels and 30 pounds of wheat, for which the latter paid the market price. It is this wheat that is the subject of the present controversy.

The respondents justify the judgment of the trial court dismissing the action upon several grounds. It is contended: (1) That the evidence is insufficient to identify the grain purchased by the defendants as grain raised upon the west half of sec. 5, township 157, range 83, covered by the appellant's mortgages; (2) that the mortgages were not entitled to be filed under chap. 108, Session Laws of 1917, on account of their form; and (3) that the evidence fails to show the receipt by the mortgagor of copies of the mortgages at the time they were executed. After a careful examination of the record we find it unnecessary to consider any question other than the first, viz. that the evidence does not identify the wheat Gobernatz sold to the defendants as the wheat covered by the appellant's mortgages.

The nearest approach to evidence of the identity of the grain sold to the defendants is that of one Warner, an officer of the plaintiff bank. He testified that during the season of 1918 he was out to Gobernatz's place a number of times; that he was familiar with his farming operations, and knew what land he put into crops; and that he seeded and raised oats on the northeast quarter of sec. 6, which, he stated, was the only land he farmed, aside from the half section covered by the crop mortgages in question. He stated that he did not know, of his own knowledge, where the wheat, aside from that delivered to the Burlington elevator, was hauled to, or where any of the grain hauled by Gobernatz came from. We are of the opinion that this evidence is not sufficient to sustain the plaintiff's burden of proving that the defendants purchased the grain covered by the plaintiff's mortgages.

The sale of the mortgaged grain to the defendants would have involved

a criminal act on the part of Gobernatz, and it cannot be assumed that such an offense was committed by him, where the evidence going to negative other sources of the grain sold is not stronger and more direct than that in the instant case. The source of wheat sold is not ordinarily a fact so difficult of proof as to require its establishment by evidence which is so remote and circumstantial as that in the instant case. The facts in this case are scarcely distinguishable from the facts in the case of *State Bank v. Bismarck Elevator & Investment Co.*, 31 N. D. 102, 153 N. W. 459, in which it was held that the evidence did not do more than give rise to a suspicion. It was there held that a verdict founded on surmise, conjecture, or guess alone was not sufficiently supported by evidence.

For the foregoing reasons, we are of the opinion that no error was committed in entering a judgment of dismissal, and it is affirmed.

GRACE, C. J., and ROBINSON, CHRISTIANSON, and BRONSON, JJ., concur.

THEODORE MEYER, as Receiver of Farmers' Co-operative Creamery Company, a corporation, Appellant, v. Charles Hernet, Respondent.

(184 N. W. 619.)

Corporations — in action by receiver against treasurer for accounting, evidence held to sustain judgment of dismissal.

1. In an action for accounting, the evidence is examined, and held to sustain a judgment in favor of the defendant for a dismissal of the action.

Opinion filed Oct. 5, 1921.

From a judgment of the District Court of Logan County, *Graham, J.*, plaintiff appeals.

Affirmed.

S. E. Ellsworth, for appellant.

"It is a prevailing doctrine of the American Courts, repeatedly asserted in the broadest terms, that the capital stock of a corporation is a trust fund to be used only in its interests and for corporate purposes, and more particularly that it is a trust fund for the security of creditors of the corporation, who presumably deal with it on the credit of its capital stock, so that it cannot be withdrawn or diverted to their prejudice." 14 Corpus Juris 383, § 505; In re L. M. Alleman Hardware Co. 172 Fed. 611; Thompson's Liability of Officers and Agents of Corporations, pp. 397-8.

"The capital stock of a corporation, both that which has actually been paid and that which remains unpaid, is regarded in the law as a trust fund pledged for the payment of the debts of the corporation." Adler v. Milwaukee Patent Brick Co. 13 Wis. 62; Gratz v. Redd, 4 B. Mon. (Ky.) 178, 196; Wood v. Drummer, 3 Mason 313; Compiled Laws 1913, §§ 7996 and 7997, Compiled Laws 1913.

"A creditor whose claim has not been reduced to judgment may maintain an action against an insolvent corporation on behalf of himself, and all other creditors to enforce stockholders' liabilities. Marshall-Well's Hardware Co. v. New Era Coal Co. 13 N. D. 396; 100 N. W. 1084.

Cameron & Wattam, for respondent.

The Receiver stands in the same position as the corporation of which he is Receiver would have stood as to all rights of action against debtors or alleged debtors except as to cases of fraudulent conveyance which are not involved in this case. Our Supreme Court has so held. Peoples National Bank of Dakota v. Francis, 8 N. D. 369.

A Receiver succeeds only to such title, right, and interest in the property as the person for whom he is appointed receiver had at the time of the appointment and which appointment does not affect pre-existing liens. Albien v. Smith (S. D.) 123 N. W. 675.

"The decided weight of authority sustains the rule in respect to the powers of receivers, where there is no enlargement of their powers by legislative enactment, that they have such rights of action only as were possessed by the persons or corporations upon whose estates they administer." 23 R. C. L. 116.

Directors of a corporation are liable to creditors only in case of fraud or deceit. 7 R. C. L. 501.

CHRISTIANSON, J. This is an action for an accounting. The complaint alleges:

"That at all times since September 8, 1911, the Farmers' Co-operative Creamery Company was a corporation organized and existing under and by virtue of the general laws of the state of North Dakota relating to corporations, having its principal place of business at Burnstad, Logan county, N. D., where it was engaged in the operation of a creamery belonging to it, and in the purchase of cream and the manufacture and sale of butter.

"That on or about the date of the organization of said corporation, the defendant, Charles Hernet, was appointed treasurer by its board of directors, and from that date until about October, 1915, continued to act as treasurer for said corporation, to collect, receive, and hold all funds and moneys belonging to said corporation, including subscriptions to the capital stock of the same and the income resulting from the operation of said creamery and the sale of its products."

The complaint further alleges:

"That on or about March 9, 1918, an action was commenced by the Attorney General for the dissolution of the said Farmers' Co-operative Company, on the ground, among others, that it was insolvent; that in said action an order was made on May 14, 1918, appointing the above-named plaintiff as receiver of said corporation; that he qualified and entered upon the discharge of his duties as such receiver, and now is acting as such.

"That during the period from his appointment as treasurer of said Farmers' Co-operative Creamery Company about the 8th day of September, A. D. 1911, as aforesaid, until and after October, 1915, said defendant, Charles Hernet, in his capacity as treasurer of said corporation, received into his hands all moneys and funds belonging to said organization, in sums aggregating \$10,000 or more; that during said period said defendant paid out upon the operating expenses of said creamery, and upon other accounts of indebtedness against said corporation, sums of money, the exact amount of which has not been disclosed to and is not known to this plaintiff; that said defendant has not at any time rendered to the board of directors of said corporation a true and correct account of the sums of money so received from him, or the sums disbursed by him; that from the best information procurable by plaintiff, from the accounts, papers, letters, and files of said corporation, there has been received by said defendant, as treasurer of funds and moneys belonging to said corporation, over and above all expenditure, a sum aggregating

more than \$3,500, which balance has not been by said defendant paid over to said corporation or to this plaintiff as receiver of the same, and of which defendant upon demand of this plaintiff has failed and refused to render an account."

The plaintiff prays judgment as follows:

"(1) That said defendant, Charles Hernet, be required to account to this plaintiff for all sums received by him as treasurer of said corporation, the items of disbursement, of any sums regularly paid out by him as such treasurer, and the balance now remaining in his hands; (2) that upon said accounting judgment for the amount of any balance in the hands of said defendant of funds and moneys belonging to said corporation be entered in favor of this plaintiff as the receiver thereof; (3) and such other and further relief as to the court may seem just and proper in the premises, and for plaintiff's costs and disbursements herein."

The answer of the defendant admits that the Farmers' Co-operative Creamery Company is a corporation as alleged; that an action was brought for its dissolution, and that the plaintiff was appointed receiver of said corporation, and now is such receiver. The answer admits:

"That on or about the date of organization of said corporation defendant was appointed treasurer of said corporation and continued to act as treasurer for said corporation except for a certain period in which C. P. Hoirup was appointed and acted as treasurer of said corporation."

The answer denies that the defendant has ever refused to render a correct and true account of the moneys received and disbursed by him as treasurer of said corporation, and avers that all moneys and funds received into his hands have been fully accounted for, and a report of the same rendered to the plaintiff, as receiver of said corporation. The answer further denies that the defendant has any moneys or funds belonging to said corporation in his possession, or that there is any balance whatsoever in his hands as treasurer of said corporation. The answer, also, avers:

"That during the time that the defendant acted as treasurer of said corporation, D. L. Anderson and H. A. Shepard each served as manager of said creamery, and in their capacity as manager paid salaries and other expenses, sold the product, and handled the receipts thereof, and the

defendant, acting as mere custodian of funds, had no check on the actual business transactions of said creamery."

The case was tried upon the issues framed by these pleadings. The trial court made findings and conclusions in favor of the defendant. Judgment was entered accordingly, and the plaintiff has appealed from the judgment and demanded a trial anew in this court.

The evidence shows that on or about July 3, 1911, a certain written contract was entered into between the Hastings Industrial Company of Chicago, Ill., as party of the first part and certain persons, some 46 in number, denominated as the subscribers, as parties of the second part, wherein the said Hastings Industrial Company agreed with the subscribers to construct and equip a gathered cream power butter factory at or near the town of Burnstad, in Logan county, in this state, for the sum of \$4,000. Among others, the contract contained the following provisions:

"The contract is not binding unless the amount of \$4,000 or more shall be subscribed, and it is understood that no subscriber is liable for a greater interest in said butter factory when same is completed than is represented by the amount of his or her individual subscription. Each subscriber agrees to pay the amount subscribed by him or her, to first party and no more.

"Payment as follows: 15 per cent. of the contract price when the foundation of the building is ready, and the material for building on ground; the balance 85 per cent. of the contract price, when the plant is completed.

"Subscriptions to this contract may be procured to any amount, and for this purpose one or more forms of this agreement may be circulated, and at any time after the subscriptions on all forms so circulated shall equal or exceed the said purchase price of said butter factory, it may be closed by the first party's special agent signing the same, and such forms shall be attached and taken together, and shall constitute the sole contract between the parties.

"First party shall have the right first to collect from said subscriptions or notes, as the entire amount due under this contract, but all money, notes, or subscriptions remaining after first party has been fully paid is the property of second parties.

"Second parties agree to appoint an executive committee of three when this contract is closed with full power and authority in a majority

to represent them in all of their interests herein, and from time to time inspect the work of first party while it is building said butter factory and placing said machinery."

"For the purpose to form a corporation to own and operate said butter factory and fully carry out the intention of subscribers, it is hereby agreed that when this contract is closed, second parties are to incorporate in a limited corporation organized under the laws of the state, fixing the aggregate amount of capital at not less than the contract price, divided into shares of one hundred dollars each, according to the laws of the state. Each subscriber hereto shall receive a full paid certificate of the stock of such corporation to the amount of the par value of his subscription hereon, when paid in full and not until then, and the subscribers hereto shall not be liable for any further assessments or payments whatsoever."

It seems that the Hastings Industrial Company had serious doubts as to the financial responsibility of some of the signers, and, as a result of certain negotiations, six of the subscribers (of whom defendant was one) executed and delivered to the Hastings Industrial Company their three promissory notes, dated July 3, 1911, aggregating in all \$4,000, to wit, one note for \$1,500, payable October 1, 1912; one note for \$1,250, payable November 1, 1913; and one note for \$1,250, payable November 1, 1914. Thereafter the following assignment was executed and delivered to the six persons who signed the said three promissory notes, to wit:

"Chicago, Ill., Sept. 15, 1911.

"The Hastings Industrial Company of Chicago, Illinois, first party to a gathered cream power butter factory, to be erected at Burnstad, Logan county, North Dakota, hereby assign to Chas. Hernett, H. A. Shepard, Theodore Meyer, J. S. Reich, C. P. Burnstad, and D. L. Anderson all of their interests in said contract with full authority to make collections from all subscribers and use said collections as per contract.

"The Hastings Industrial Company,

"MFM.

By John L. Peterson, Secy."

The evidence shows that when the creamery had been constructed and was put into operation, the company had no working capital. A small sum was borrowed from the bank for this purpose. It appears that the treasurer deposited all funds received, both from the sale of

butter and from the payments received from any of the subscribers to the contract with the Hastings Industrial Company, to the account of the creamery company in the bank. Only one account or fund was kept, and as checks were drawn by the secretary or manager for operating expenses, such as the purchase of cream, salaries, or matters of that kind, he (the treasurer) paid them out of such fund. The evidence shows that prior to December 21, 1915, he received payments upon subscriptions aggregating \$1,557, which he so deposited. It also appears that of said sum only \$431.26 was utilized in paying the Hastings Industrial Company (for which that company allowed credit upon one of the said three notes), and that \$1,122.74 of said \$1,557 was disbursed in the payment of the operating expenses of the creamery. It also appears from the evidence that after the creamery ceased to operate, to wit, after December 21, 1915, various subscribers paid to Hernetts sums aggregating \$1,739.36, as payment upon their subscriptions under the said contract with the Hastings Industrial Company. The undisputed evidence also shows that the six persons who signed the notes in favor of the Hastings Industrial Company were afterwards compelled to pay them, so that the Hastings Industrial Company has been paid in full.

After the defendant had interposed his answer, the plaintiff served a demand that defendant furnish an itemized statement or account of receipts and disbursements. The defendant furnished such account, showing the amount of moneys collected and expended by him up to and including December 21, 1915; that is, for the entire period that the creamery was being operated. As already stated, it appears, however, that after that date he collected or received from various subscribers to the contract with the Hastings Industrial Company sums aggregating in all \$1,739.36. The evidence adduced by the defendant shows that this latter sum was all applied in payment of the indebtedness due the Hastings Industrial Company, and credit given therefor upon the notes given to that company by said six persons.

The contentions of the plaintiff are:

(1) That in so far as concerns the \$1,557 received by the defendant from subscribers, prior to December 21, 1915, he had no right to mingle such moneys with moneys received from other sources, such as the sale of butter; that "the stockholders and creditors of the corporation had a right to expect that the capital stock should be held as a trust fund, or applied in payment of the initial indebtedness or in improvements upon

the creamery plant;" and that "the treasurer having dissipated, misused, and misapplied this fund without the consent of the stockholders or creditors, is now liable upon an accounting to the receiver who represents both." (2) That in so far as concerns the \$1,739.36 received by the defendant from subscribers after December 21, 1915, the defendant was precluded from giving evidence as to the disbursements thereof made by him, for the reason that no mention was made of the collection and disbursements of such moneys in the itemized account rendered by the defendant to the plaintiff herein.

In our opinion neither of these contentions are tenable. It will be noted that by the terms of the contract between the Hastings Industrial Company and the subscribers it was expressly agreed that the industrial company was to be paid in all \$4,000, and that each one of the signers agreed to pay to the Hastings Industrial Company the amount subscribed, and no more. Each of the different subscribers subscribed \$100. By the express terms of the contract the Hastings Industrial Company had "the right to first collect from said subscriptions or notes the entire amount due under" the contract, namely, \$4,000; and it was only "money, notes or subscriptions remaining after" the Hastings Industrial Company had "been fully paid" that constituted "the property" of the subscribers.

The evidence shows that all moneys received by Hernett from so-called subscriptions, prior to December 21, 1915, amounted to \$1,557, and that subsequent to that date he received similar payments amounting to \$1,739.36, making an aggregate of \$3,296.36 collected on such subscriptions. The undisputed evidence, however, shows that the six persons who signed the notes in favor of the Hastings Industrial Company have paid such notes in full with interest. Manifestly, if the arrangement had not been made between the Hastings Industrial Company and the six persons who signed the three notes and later paid them, all the moneys paid on the so-called subscriptions would have belonged to the Hastings Industrial Company, and not to the Farmers' Co-operative Company. The Hastings Industrial Company, however, has been paid in full, and has assigned its rights and interests under the contract to the six persons who executed and delivered their notes to it in full for its claim, and later paid such notes. These persons stand in the shoes of the industrial company, *Raich et al. v. Lindebak*, 36 N. D. 133, 140, 141, 161 N. W. 1026. In other words, the moneys collected upon the so-called subscriptions belonged to the assignees of the Hastings Industrial Company, and not to

the Farmers' Co-operative Company. If any one has any complaint of the way in which these moneys have been disbursed, it is these men, and not the Farmers' Co-operative Company, which corporation confessedly received the benefit of some \$1,122.74, belonging to these men. There is no contention that the defendant did not account fully for other moneys received and disbursed by him. And, in our opinion, the trial court was entirely correct in finding that the defendant had fully accounted for all moneys received and disbursed as treasurer of the Farmers' Co-operative Company.

The plaintiff contends that the defendant is estopped from claiming that the moneys received by him on subscriptions belonged to the six persons who signed and paid the notes to the Hastings Industrial Company, for the reason that these persons have presented claims to the receiver, which claims, it is asserted, in part, are for moneys paid by such persons to the Hastings Industrial Company. In our opinion this contention is without merit. There is no contention that the claims presented are for anything except what these persons were required to pay to the Hastings Industrial Company in excess of what was received from the subscribers. There is nothing to indicate that any action has been taken thereon by the receiver whatsoever, and manifestly he has in no manner been prejudiced by the presentation of the claims. It appears from the evidence that the very moneys involved in this controversy had all been received by the defendant and disbursed long before the claims were presented to the receiver. And the claims were prepared on the theory that the moneys received by the defendant from the subscribers had all been received and disbursed by him, as the evidence in this case shows them to have been received and disbursed. As already indicated, it does not appear whether the claims have been allowed or disallowed. The presumption, of course, is that such action, and such action only, has been, or will be, taken, with respect thereto, as the law and facts warrant. The judgment appealed from is affirmed.

ROBINSON, BIRDZELL and BRONSON, JJ., concur.

GRACE, C. J., concurs in the result.

FARMERS' SECURITY BANK OF CONWAY, Appellant, v. H. B. SPRINGEN and NORTHWESTERN TRUST COMPANY, Respondents.

(184 N. W. 664.)

Venue — change to residence county of private and corporate defendants, on joint demand of both, was proper.

Where a complaint alleges a distinct cause of action against a private defendant and another, also, against a domestic corporation, and where the action is not brought in the county of the residence of either defendant, it is *held*, construing Subds. 6 chap. 3 Laws 1919 and § 7417 C. L. 1913, that a change of the place of trial to the county of the residence of the private party and of the corporation may be permitted upon the joint demand of both defendants.

Opinion filed Oct. 5, 1921.

Appeal from an order of District Court, Walsh County, *Burr, J.*, granting a change of venue to Grand Forks county.

Affirmed.

H. C. DePuy, for appellant.

H. A. Libby and Bangs, Hamilton & Bangs, for respondents.

BRONSON, J. The plaintiff instituted an action against the defendants in Walsh county. The complaint alleges that the defendant Springen was in its employ as cashier and that the defendant Trust Company by its guaranty contract covenanted with the plaintiff to reimburse it for pecuniary loss that it might suffer through acts of fraud and dishonesty on the part of Springen as cashier; that in 1920, Springen, as cashier, misappropriated some \$1,300 belonging to the plaintiff. The defendant Trust Company, in its answer, sets forth a general denial, alleged its office and principal place of business to be in Grand Forks county, and admitted the execution of the guaranty contract. The defendant Springen, in an amended answer, alleged, in addition to a general denial, an indebtedness of some \$774 owing to the plaintiff by him, as determined

upon a final settlement, and the tender, the deposit, and the refusal of such amount.

The defendants, in proper time, made a demand for a change of the place of trial from Walsh county to Grand Forks county. Accompanying such demand, a showing by affidavits was made that the defendant Springen was and had been a resident of Grand Forks county for more than three years, and that the defendant Trust Company during the last ten years had had its office and principal place of business in Grand Forks county. The plaintiff submitted a counter affidavit that the Trust Company transacted business in Walsh county. Upon hearing the trial court ordered the place of trial changed to Grand Forks county. The plaintiff has appealed from such order.

The plaintiff maintains that the provisions of chap. 3, Laws 1919, apply. The material portions thereof read, viz.:

"Actions for the following causes must be tried in the county in which the subject of the action or some part thereof is situated, subject to the power of the court to change the place of trial in the cases provided by statute; * * *

"6. All actions against any domestic corporation shall be tried in any county or judicial subdivision designated in the complaint and in which the defendant corporation transacts business."

The plaintiff further contends that, the venue being properly laid in Walsh county against the Trust Company, the defendant Springen is not entitled to a change, since he is properly joined as a party defendant.

These contentions may be answered by a consideration of plaintiff's cause of action. It will be noted that, as against Springen, it is for a misappropriation of moneys, a cause sounding in tort. As against the Trust Company, it is an action on a contract of guaranty. It is not alleged that Springen is a party to this contract of guaranty. The issues upon the pleadings determinative of the liability of Springen and the Trust Company are not necessarily the same. Further, it is plain that the liability of Springen must first appear before the contract of guaranty is operative. It may be admitted that the cause of action against the Trust Company alone, upon the showing made, would properly be triable in Walsh county. There exists, however, in addition, a cause of action against Springen. The statute does not provide, in terms, that all actions against any domestic corporation, whether joined with other actions or

against other defendants, shall be tried in the county designated in the complaint. § 7417, C. L. 1913, provides that—

“In all other cases, subject to the power of the court to change the place of trial as provided by statute, the action shall be tried in the county in which the defendant or some of the defendants reside at the time of the commencement of the action.”

No repealing clause of any kind was attached to chap. 3, Laws 1910. The act should not be extended by construction to deprive a private defendant of his statutory right to the trial of the cause of action against him in the county of his residence, where the domestic corporation consents thereto. It readily follows that the trial court did not err in transferring the entire cause of action, thus framed, to Grand Forks county. The order is affirmed.

GRACE, C. J., and ROBINSON, BIRDZELL, CHRISTIANSON, JJ., concur.

STATE OF NORTH DAKOTA, Respondent, v. HENRY LAYER,
Appellant.

(184 N. W. 666.)

Criminal law — defendant convicted of murder on his plea of guilty.

1. The defendant was arrested and duly charged by a written information filed in the District Court of McLean county, North Dakota, with the commission of the crime of murder in the first degree. After his arrest, and before the filing of the information, he made a written confession of guilt, admitting therein that he killed Jacob Wolff, with whose murder he was charged by the information, and further admitting that he also killed Jacob Wolff's five children and Jacob Hofer, the hired chore boy. He states that Mrs. Wolff was killed by the discharge of a certain shot gun when he was endeavoring to take the same away from Jacob Wolff. After the entry of his plea of guilty, the Court made and entered a judgment of conviction, and thereafter sentenced defendant to the state penitentiary at Bismarck, North Dakota, for the term of his natural life.

Criminal law — defendant convicted of murder on plea of guilty moved for new trial.

2. Thereafter defendant made a motion for a new trial and appealed from the judgment of conviction. The basis of the motion was that the

written confession was procured from him by duress, coercion, intimidation, and fear, and that his plea of guilty was likewise procured, and that neither was voluntary.

Criminal law — evidence held to show no duress or coercion in procuring confession or plea of guilty.

3. An examination of the record discloses that no duress, coercion, or intimidation was exercised in procuring the confession, nor was such used towards him to procure his plea of guilty to the crime charged in the information and for these and other reasons stated in the opinion, it is held that the Court did not err in denying defendant's motion for a new trial.

Opinion filed October 6, 1921.

Appeal from an order of District Court, McLean county, denying a new trial and from a judgment of conviction. *Nuessle, J.*

Affirmed.

Edward P. Kelly and James Morris, for appellant.

Where the accused in a criminal prosecution in the trial court is forced through well grounded fears of mob violence, to plead guilty and to be sentenced to imprisonment for a term of years, he has a right to relief from such sentence and plea by proper proceedings in the same Court. *State v. Calhoun*, 50 Kans. 532; 18 L. R. A. (N. S.) 838; 34 Am. St. Rep. 141.

The plea should be entirely voluntary by one competent to know the consequences and should not be induced by fraud, fear, persuasion, promises, inadvertance or ignorance. *Pope v. State* 56 Fla. 81; 47 So. 487.

When the Commonwealth introduces in evidence a plea of guilty entered in the Justice Court, the defendant may show that such plea was obtained by duress. *Holtman v. Commonwealth*, 129 Kans. 710; 112 S. W. 851; *Little v. Commonwealth*, (Ky.) 34 L. R. A. (N. S.) 257.

A defendant has a right of relief from a judgment entered upon his plea of guilty, where such plea was forced from his reluctant counsel by threats of an angry and excited mob, and interposed because they believed that to proceed with the trial upon the plea of not guilty would result in the handling of their client by lawless men and was entered at a time when the defendant was lost and bewildered. *Sanders v. State* 85

Ind. 318; 44 Am. Rep. 29; 34 L. R. A. 257; *Salina v. Cooper*, 45 Kan. 12; 25 Pac. 233.

Wm. Lemke, Atty. General, *M. Tollefson*, and *John E. Williams*, for respondent.

GRACE, C. J. This is an appeal from a judgment of conviction and from an order of the district court wherein it denied the motion of the defendant to withdraw his plea of guilty, entered by him to the charge of murder in the first degree, contained in the information duly filed in the district court of McLean county. Subsequent to the time defendant entered his plea, the judgment of conviction was entered, and thereafter he was sentenced to imprisonment in the State Penitentiary at Bismarck for life.

Thereafter he made a motion before the same district judge, asking that the judgment of conviction be set aside, that his plea of guilty therefore entered be withdrawn, and in lieu thereof he be permitted to enter a plea of not guilty, and to have a trial upon the merits. The motion was heard before the court in the city of Bismarck, N. D., on November 27, A. D. 1920, and on the 28th day of January, 1921, court made an order denying in all things the motion. This order was filed in the office of the clerk of court of McLean county, N. D. From this order and the judgment, defendant appeals.

A statement of the material facts is substantially as follows:

On or about the 22d day of April, A. D. 1920, at the farm of Jacob Wolff, four or five miles from the village of Turtle Lake, in the county of McLean, state of North Dakota, one Jacob Wolff, his wife, their five children, and hired chore boy, Jacob Hofer, were murdered. The instrument used in committing the murder was a shot gun. On April 24, 1920, about noon of that day, one Jacob Kraft called at the home of Jacob Wolff, knocked at the door, and, receiving no response, opened it and found a room in disorder, with the floor covered with blood. The dead bodies of Mrs. Wolff, Jacob Hofer, and three of the Wolff children were found in the cellar in one heap, at the bottom of the steps leading thereto. About 30 feet in front of the barn there was considerable blood, and a trail of blood led thence into a shed attached to the barn, and there the dead bodies of Jacob Wolff, and two of his small children were found covered with hay. The bodies of the dead persons were left where found until Sunday, when an inquest was held. Photographs of

the bodies were taken about 2 o'clock Sunday morning, and before the bodies had been disturbed. Thereafter the bodies were removed, a post mortem examination held, and they were prepared for burial.

Upon the discovery of the crimes above mentioned, O. H. Stefferud, the sheriff of McLean county, N. D., and his deputy, Emil Haas, certain detectives, and Chris Martineson, chief of police of Bismarck, began a systematic and searching investigation with the view of discovering and apprehending the person or persons who committed the crimes. They interviewed the neighbors in the vicinity of the crime, taking from them affidavits as to their whereabouts on the day of the crime, and as to any knowledge or information they possessed which might assist in the discovery of the criminals. This investigation continued until about May 11, 1920. About this time the defendant, who was a farmer living about two and three-fourths miles north and east of the Wolff farm, was taken into custody and confined in the county jail at Washburn, McLean county. About 8:30 o'clock p. m. on the 12th day of May the defendant was taken to the sheriff's office, and there was questioned by two detectives, George D. McDowell, E. F. Hezner, Chris Martineson, chief of police of the city of Bismarck, and Sheriff Stefferud, of McLean county, and Haas, his deputy, with reference to the murder. At about 11:30, the deputy sheriff and Hezner, one of the detectives, retired. Those remaining continued to question Layer, and confronted him with conflicting statements, claimed by them to have been made by him in response to their inquiries. He was there shown photographs of the dead bodies, and finally acknowledged his guilt. He related in detail the manner in which he committed the crime; in other words, he made a written confession of his guilt, of which the following is a copy:

•
"Washburn, North Dakota, May 13, 1920

"I, Henry Layer, being first duly sworn, depose and say, that I make this statement out of my own free will, without any promise whatsoever; that on Thursday, April 22d, I left my own house at about 11:00 o'clock a. m. and walked about one mile south, following the section line, and then walked from the north into Wolff's farmyard, arriving there at about 11:30 a. m. I then walked into the house and there found Mr. Jacob Wolff, Mrs. Wolff, the five children, and the hired hand, Jacob Hofer. I began talking to Jacob Wolff, demanding damages for the injury done to my cow by Wolff's dog. I told Wolff to come and look at the cow and see for himself how much damage the dog had done to

my cow. Wolff then told me to leave his yard and go away. This conversation took place while I and Wolff were standing in the doorway leading from the storm shed into the house proper. I then told him not to get mad, and he (Wolff) got the gun, a doublebarreled shotgun, out of his front room. I then tried to take this gun away from him, and in the fight between Wolff and myself for the gun one shot went off, and then another in quick succession; one of the shots killed Mrs. Wolff. I did not see her fall, but saw her lay there. I then got the gun away from Wolff and then got more shells out of the bureau drawer in the front room, where I saw Wolff take two shells at the time he (Wolff) got the gun and then I reloaded the gun and began shooting. I do not remember at whom I shot first but I believe I shot at Jacob Wolff, who by this time had run out of the house across the yard towards the cow shed, and hit him, and I saw Jacob Wolff fall. I then went out of the house where Jacob Wolff lay, and fired another shot into Wolff's body. I then went into the cow shed, saw there Wolff's two girls, and shot them where they stood, in the northwest corner of the shed. I then returned to the house and there shot and killed the rest of Wolff's family. I then returned to the yard, carrying Wolff's coat, dragged Wolff's body into the shed, first covered the bodies of the two girls with hay, which I took out of the manger, threw Wolff's body on top of the pile, and the coat over Wolff's body, and then also covered his (Wolff's) body with hay; then returned to the house, opened the trap door leading from the kitchen into the basement, and threw the bodies of the dead laying about the kitchen, one after another into the basement, then put down the trap door. The reason I did not kill the baby was, I believe, because I did not go into the room in which the baby lay. I then pulled loose the telephone wires from the instrument. I then left the Wolff house, carrying the gun, closing the doors behind me as I walked out.

"Before leaving the house, I picked up all the empty shells, carrying them with me also. I then broke the gun, carrying the same, walked south through Wolff's yard towards the slough which I knew was there. When I got to the slough I threw the broken gun and shells I had in my pocket into the slough, and then turned east on the north side of Brekken lake until I came to the draw leading north, and following this draw to the hills, and then crossed the hill and cut over towards the road north of Wolff's farm, and then followed this road to my

house, a distance of about two miles. I don't know what time it was when I got home, but I believe it was about 2:30 o'clock p. m. I will also add that, after I finished the shooting in the cow shed, I threw about three or four empty shells from the cow shed into the hay loft. through an opened door. This is the whole truth.

(Signed) Henry Layer.

"Witness: George D. McDowell.

"Sworn and subscribed to before me this 13th day of May, 1920."

After having made and signed the above confession, the defendant signed the following written request, a copy of which is as follows:

"Washburn, North Dakota, May 13th, 1920.

"State of, North Dakota, County of McLean—ss.:

"I, Henry Layer, having confessed to the killing of the Jacob Wolff family and Jacob Hofer, do hereby request that I may be taken before the district court at the earliest possible date in order that I may enter my plea of guilty before the court and receive my sentence.

"(Signed) Henry Layer."

Thereafter, on the 13th day of May, 1920, he was taken before W. L. Nuessle, judge of the Fourth judicial district, in the courthouse in the city of Washburn, McLean county. There was also present John E. Williams, state's attorney for McLean county, who appeared in behalf of the state, who, with consent of the court, then and there filed the written confession of guilt, and thereafter the information in writing, which charged the defendant with the crime of murder in the first degree, by effecting the death of Jacob Wolff in the manner and by the means set forth in the information. No question is raised as to the form and sufficiency of the information. The defendant in open court pleaded guilty to the charge contained in the information, as follows:

"State of North Dakota, County of McLean. State of North Dakota, Plaintiff, v. Henry Layer, Defendant. In the District Court, Fourth Judicial District. Written Admission of Guilt.

"I, Henry Layer, the defendant in the above-entitled action, having heard read the information in the above-entitled action, and knowing the contents thereof, do hereby admit that I am guilty of the crime of murder in the first degree as herein set forth. I further state that this

admission of guilt is made by me after mature deliberation, and without any promise of clemency or favor of any sort.

"Dated this 13th day of May, 1920.

"(Signed) Henry Layer.

"Witnesses:

"O. H. Stefferud.

"E. F. Hezner."

After the filing of the information, and prior to the time of the entry by the defendant of his plea, he was examined at great length by the trial court with reference to his legal rights where charged with such a serious crime. The court called his attention to the gravity of the crime with which he was charged, and that it was punishable by a very severe penalty. It informed him further of his right to the services of a lawyer who would appear for him. The defendant admitted he knew that the crime of murder in the first degree was a very serious one, and punishable by a severe penalty. He answered in the negative when asked if he wanted a lawyer, and stated several times in answer to questions that he did not want a lawyer. He was then arraigned, and entered his plea of guilty. Thereafter, and prior to the passing of sentence, the court entered into an extended examination of the defendant, making many inquiries with reference to the defendant's connection with the commission of the crime. The defendant at that time was also informed by the court that it was not necessary for him to answer questions about to be asked unless he desired to do so. His answers to these questions in substance affirm the truth of the matters stated in his written confession.

On this appeal, the defendant assigns four errors, all of which have been carefully considered. Two of them only need discussion. The first relates to the refusal of the court to grant a new trial on the grounds of newly discovered evidence. It impresses us as having no great weight.

John Hofer, in his affidavit, states:

"That on or about the 13th day of November, 1920, this affiant was repairing a water tank near the house when his little daughter, Martha Hofer, who was then about four years old came running up to him, holding in her hand a 12-gauge black shotgun shell and a woman's dust cap, upon which there were blood stains, and said to him, 'Look here what I found,' she then led this affiant to the place where

she said she found them; that the place where his daughter led this affiant was to a clump of bushes about 16 steps east of the Wolff house, and there this affiant found a piece of old brown paper and a piece of table oilcloth, which looked as though it had been wrapped around something. Affiant's daughter picked up the oilcloth and shook it as if she was trying to shake out something. Affiant further states that about two days later he saw two sons, ages 6 and 9, respectively, playing with two pieces of cloth; the younger son had one piece of cloth about 6x8 inches over his face using it as a mask to frighten his little sister. This mask had eyes, nose, and a mouth cut in it. This affiant scolded said son and made him take the mask off. The son then put on the other piece of cloth, which was about the same size as the first, but had no holes cut in it. Both masks had strings tied to the corners with which the boy tied them around his head. This affiant asked his said son where he found the masks, and he told this affiant that they were in the same clump of bushes where the said Martha Hofer found the cap and shell above mentioned."

Magdalena, wife of John Hofer, also made an affidavit which in some respects corroborates that of her husband.

John Hofer, Jr., son of John and Martha Hofer, made an affidavit to the effect that he found one of the masks about five or six days before his father saw the two smaller boys playing with them; that the mask he found was the blacker one of the two, and had no holes cut in it. He also states that he found it in the pasture east of the Wolff farm buildings about 12 steps from the fence. He states he picked it up and carried it to the house.

The affidavit of Mathias Kiemele, who has resided in McLean county for the past 18 years, and who owns a farm near Turtle Lake, which he had leased during the season of 1920, in substance shows that on the second day after the discovery of the dead bodies of the Jacob Wolff family, and during the month of April, he went to work on the Wolff farm; that he and his wife cleaned up the house and the premises, and that he finished seeding the land on the farm that was not seeded at the time that Jacob Wolff's family were murdered; that he took care of the stock on the said Wolff farm until the day of the sale; that from the day he commenced to work on the farm until the work was completed, a period of about two weeks, he was on the place every day; that he went over every part of the yard and over a large part of the farm, and that he

knows where the alleged and so-called masks were supposed to have been discovered by the Hofer children; that he had been over that particular place many times during the time he worked on the Wolff farm; that on the Sunday after the murder was discovered there were hundreds of people in the Wolff premises and in the yard, and that practically every foot of the land was gone over by the people, who were looking about for any evidence they might find which would help to throw light upon the question of who committed the murder; that after he finished the work on the Wolff farm he kept his stock in the Wolff pasture, and watered them at the Wolff farm well located on the Wolff farm, and went three times a week during the whole summer and fall; that he fixed up the fence which was within a very few feet of the place where the Hofer children are presumed to have discovered the so-called masks; that he seeded a small strip of ground which is within five or six feet from this fence; that the so-called masks are supposed to have been found in this strip of grass between the said fence and the ground seeded; that he did not see anything of the so-called masks at any time while on the Jacob Wolff farm; that he has seen the so-called masks which are in the possession of the sheriff, and which were this day shown him by Sheriff O. H. Stefferud, and that he never saw the same upon the Jacob Wolff farm at any time; that he also was shown the woman's dusting cap claimed to have been found on the Jacob Wolff farm by the Hofer children, and that he never saw the same on the Jacob Wolff farm.

The statements in Kiemele's affidavit are in several respects corroborated by the affidavits of Emanuel Hofer and Sheriff Stefferud.

After careful consideration of all the affidavits on behalf of the defendant relative to newly discovered evidence, and considering the length of time since the commission of the crime until the new evidence is alleged to have been discovered, and considering further the proximity of the place where the new evidence was discovered to the house of Jacob Wolff, and that immediately after the crime all of the premises was carefully searched by the officers and masses of people for the purpose of discovering evidence which would lead to the detection of the perpetrator, it is unbelievable that the masks and other alleged new evidence could have been theretofore undiscovered. We are therefore certain that the trial court did not err in refusing to grant a new trial on the grounds of newly discovered evidence.

The second error assigned, and the last to be discussed, is to the ef-

fect that the appearance of defendant, his waiver of preliminary hearing upon the criminal complaint, and his trial under the criminal information were procured, and his plea of guilty to the information made by him while under duress, intimidation, coercion, and fear. The defendant submitted several affidavits in support of the motion. To a large degree they detail what he maintains were his movements, and where he was all of the time on Wednesday, April 21st, the day before the crime, and on April 22d, the day of the crime, and on Friday and Saturday immediately thereafter. In his affidavit he states,

"That on Wednesday, April 21, the day before the murder was alleged to have been committed, I got up at the usual hour of about 5:30, did my chores, got breakfast, and spent the forenoon in cleaning my plow, and getting it ready for the field work of that day. I had an early dinner, hitched up my team, and started to plow about 12 o'clock. I plowed continuously until about 7:30 in the evening, unhitched my team, came home, did my chores, ate supper, and went to bed. I was not away from my farm or off the premises during that day. On Thursday morning, the day the murder is alleged to have been committed, I got up at the usual hour of 5:30 o'clock, went to the barn, did my chores, harnessed six horses, had breakfast at about 7 o'clock, and immediately after breakfast hitched up my team and started to plow. I plowed continuously in the field near the house until about 12 o'clock, at which time I unhitched. I went to the house for dinner, put up my horses, gave them some hay, and went into the house to eat my own dinner. After I had finished eating, I went back to the barn and cleaned it, gave the horses some more hay before I went down to the well, a short distance north of the house, and pumped the tank full of water. I then returned to the house, stayed there until 2 or 3 o'clock; then hitched up my team and went to plowing again, and plowed continuously until about 7, when I unhitched and went home. I then did my chores, ate supper, and stayed home the rest of the evening. I never left my farm or premises at any time during the day of April 22d."

The affidavits attempt to show that defendant was occupied on Thursday in the manner above stated, so that the inference would follow, that, if he were so engaged, he could not have been on Wolff's farm on that day, and committed the crime with which he is charged and for which he has been convicted. It is here proper to notice that the time on Thursday between 12 and 3, when Layer states in his affidavit that he ate his dinner and stayed on his place during all of that time, is about the exact

time when the Wolff family and Hofer were murdered, for Layer in his confession states that he arrived at Wolff's about 11:30 a. m., and returned to his home at about 2:30 p. m.

Layer in one of his affidavits makes statements to the effect that the confession which he signed was procured by reason of threats of and abuse by certain officers of the law, and was procured by them by fear instilled into him by them and by their representations to him. In his affidavits he states:

"After supper on May 12th, I was taken to the sheriff's office and questioned and shown pictures of the murder scene. They kept up the questioning until about 2:30 a. m., at which time the sheriff, Martineson, and the gray-haired heavy-set man, whom I believed to be a railroad detective, took turns at questioning me. They repeatedly told me that there was a mob outside, and that my only chance of saving my life from being strung up on a telephone pole was to make a confession, and for them to get me out of Washburn. They cursed me, took my chair away from me, and made me stand until I was dizzy and faint. All this time I maintained that I was innocent, and that I knew nothing of the murder; finally, the man that I thought was a railroad detective beat me along the side of my head, and took me by the hair and pulled, after which he sat down across the table from me and related to me just how the murder happened, and told me what I would have to say, and then he got up and shook a billy club in my face and told me if I would not say what he wanted, he would beat my brains out. I then gave up, started to cry, and said I would do and say what they wanted. Martineson and the sheriff called in a large tall man, who wrote down the story that I was compelled to tell. Whenever what I said did not suit this man, who I thought was the detective, he would stop me and tell me what to say. They next called in Williams, state's attorney, and made me tell the same story to him as nearly as I could remember. The detective still kept correcting me and forcing me to say what he wanted.

"After this, I asked to send for my wife or Will Brokofsky, but they would not let me. The next morning I was taken before a magistrate, but was told before they took me out of jail that I must stick to the story that they told me the night before, and that my only chance to save my life and get away from Washburn was to stick to that story, and not ask any one for an attorney or for a trial. After leaving the magistrate's office I was taken back to jail for a few minutes, and then again taken out and rushed

down throughout the basement of the courthouse and up to where Judge Nuessle was; on the way over, the sheriff told me to run in going between the jail and the courthouse, in order that no one would see me, for there was a mob in town who would get me if they could. When I was taken before Judge Nuessle, I again told the same story that I had been told the night before, believing that if I did not it would cause me to be kept in Washburn, where I was afraid of being hung by a mob, or being killed in the jail by the man who beat me the night before.

"I further state that I never owned a double-barreled shotgun, and that I never saw the gun that was found in the slough near Wolff's home until after I was placed in jail."

He further states in his affidavits that he was in no way implicated in the murder, and that he is innocent of the crime for which he has been committed to the state penitentiary.

George D. McDowell was present all of the time on the night of May 12th during the examination of Layer in the sheriff's office. E. F. Hezner, another detective, was not present all of the time. He was the person who wrote the confession made by Layer. It was written about 2 a. m. on the morning of the 13th of May.

One Myrle Cook, who was acting as a barber in the penitentiary, made the following affidavit:

"Myrle Cook, being first duly sworn, deposes and says that he was acting as a barber in the State Penitentiary at Bismarck, N. D., at the time Henry Layer was brought to the institution, and that, after the day the said Henry Layer arrived at the penitentiary, this affiant shaved said Henry Layer and gave him a haircut; that when this affiant went to work on him, he noticed that said Henry Layer was badly beaten up, and that both sides of his face and the top of his head were swollen, and it looked as if some one had beat him. The skin was not broken, but was bruised and swollen. As he got into the barber chair, this affiant noticed that he had been beaten, and asked him what had done it. Layer replied that he had been hit over the head by the man who had charge of him before he was brought to the penitentiary, and he broke down and commenced crying, saying that he was innocent, and cried: 'Oh, my children, my children!'"

The affidavit of Dr. C. E. Stackhouse is as follows:

"Dr. C. E. Stackhouse, under oath, deposes and swears that he examined Henry Layer in the North Dakota State Penitentiary May 15,

1920, and found him in normal physical condition. There were two areas of ecchymosis on his face, one over each cheek bone, about the size of a silver dollar. There was no swelling."

The affidavits of Cook and Dr. Stackhouse were wholly contradicted by the affidavits of Chas. McDonald, then warden of the penitentiary, Felix Smith, an employee there, and Richard J. Wilde, another employee, who was then captain of the cellhouse, except that McDonald in his affidavit states that there was a red mark on his face.

The affidavit of one W. L. Brokofsky is to the effect that after Layer was confined in the penitentiary he talked with him, and that Layer told him he was innocent of the crime with which he was charged, and of the manner in which he had been compelled to sign that which was supposed to be a confession of the crime, and that his statements at the time were the same as herein set forth in his affidavit.

Lydia Layer, wife of the defendant, made an affidavit to the effect that she was at home the whole day of April 22d, the day of the crime; that she knew the whereabouts of her husband, and knew what he was doing that day; that he was engaged in farm work in the fields upon the farm and about the buildings, and did not leave, nor was he away from the farm any part of that day; that he was at the house at the noon hour, and had his dinner, and worked about the place doing the usual noon chores and odd jobs, and returned in the usual manner and time to his work in the fields.

No more of the contents of the affidavits filed in defendant's behalf need be set forth. All of the statements in them have been carefully considered. On behalf of the state there were filed affidavits by Sheriff Stefferud, Emil Haas, his deputy, C. J. Martineson, chief of police at Bismarck, M. Tellefson, clerk of the court of McLean county, and John E. Williams, then state's attorney of McLean county, which, taken together, are an absolute denial of the statements contained in Layer's affidavit with reference to threats made against him and the exercise of duress and abuse of him, and acts putting him in fear. Their affidavits deny any conversation with him concerning a mob, and state that there was no talk of that character during any of the time they were examining him at the jail. The affidavits are not only a complete denial of the contents of Layer's affidavits, but of all corroborating affidavits made in support thereof.

Each of such officials then held important and responsible positions.

They were unquestionably able, honest, and efficient officers. The fact that they were alert and active in seeking the perpetrator of these atrocious crimes is evidence that each was conscientious in the discharge of his duty. It is unbelievable that men and officials of this character could be guilty of the matters charged against them by Layer. Certainly they did not thus stultify themselves.

It is also to be remembered that, at the time Layer made his affidavits herein, he was an inmate of the penitentiary, and under the judgment and sentence of the court would remain so for the term of his natural life. He knew that, so long as life should continue, he would be prohibited from free association with the world outside; that he had forfeited for the remainder of his lifetime the society of his family, of his friends, and relations. He knew that the sun of his personal liberty had forever set; his future held for him no hope, no ray of light. In these circumstances the binding force and sanctity of an oath might mean little to him. He in fact would be suffering no additional penalty should he make a false affidavit. In these circumstances, he would be quite free and fearless in swearing to the statements contained in his affidavits. In view of the facts stated in the affidavits by the officials above mentioned, his statements and his and corroborating affidavits are entitled to no credit. It is true, as contended by the defendant in his brief, that under the constitution, one charged with crime is entitled to a trial by the jury, that he is presumed innocent until proven guilty, and that the state must prove him guilty beyond a reasonable doubt. It is likewise true that the defendant is the only person who can waive such rights. It is the law, however, in this state that the defendant has the right to waive, and the state to receive such waiver on the defendant's plea of guilty, and that upon such plea he may lawfully be convicted and imprisoned. It is likewise true that such waiver of such privilege must be a voluntary one, and free from all duress, fear, intimidation, and coercion; that is, he must not be induced or compelled to make his plea of guilty by reason of threats, or in any way forced to do so. In other words, his plea must be free and voluntary.

The appellant has cited a long list of authority which sustains this principle. Among others is *Sanders v. State*, 85 Ind. 318, 44 Am. Rep. 29; *Little v. Commonwealth*, 142 Ky. 92, 133 S. W. 1149, 34 L. R. A. (N. S.) 257, Ann. Cas. 1912D, 241; *State v. Calhoun*, 50 Kan. 523, 32 Pac. 38, 18 L. R. A. 838, 34 Am. St. Rep. 141. There is no doubt of the correctness of the legal principle stated in the above authorities, and other

authorities to like effect cited by the defendant. The rule there stated is the well-settled and general rule. It does not, however, apply to the case at bar. In those cases it was either admitted or established by competent proof that the plea of guilty was entered while the accused was under duress, or that it was procured by intimidation or coercion; in other words, it was not a voluntary one. Here, however, that condition does not exist. The proof entirely fails to show that the defendant was under duress, or that he was intimidated, coerced, threatened, or abused and maltreated, and thus induced to enter his plea of guilty. On the contrary the proof is quite conclusive that his plea was a voluntary one. If it could be established by competent proof that the defendant had by any means been coerced into entering his plea, or if any means were used to put him in fear, or if by fraud he was deceived, or if for any legal cause his plea was not free and voluntary when entered, all the proceedings thereafter occurring including his conviction and sentence would be a nullity. There is, however, no such proof.

While it is proper and lawful in this state for the trial court to receive a voluntary plea of guilty from one charged with crime, nevertheless the writer, speaking for himself only, is of the opinion that the ends of justice would be better subserved, where one is accused of a felony and offers to plead guilty, by rejection of such plea by the court, thus placing the accused upon his trial to the court and jury, providing for him, if necessary, an attorney who will protect and secure for him every right and privilege guaranteed him by the constitution and provided for by the law of the land. This would afford an opportunity to determine if a confession was voluntary in cases where a confession, in part, is relied on by the state to establish the guilt of the accused, and would as well afford the accused an opportunity to show that he did not make the confession, or, if he did, that it was procured by fraud, duress, coercion, etc. It would also afford him an opportunity of cross-examination of those who procured the confession from him, and as well an opportunity to assert every lawful right in aid of his defense.

But, as above stated, defendant waived all these and other privileges by law secured to him, and this, as the record shows, freely and voluntarily. Hence the order and judgment from which this appeal has been taken should be affirmed, and they are affirmed.

ROBINSON, CHRISTIANSON, BIRDZELL, and BRONSON, JJ., concur.

STATE OF NORTH DAKOTA, ex rel Laureas J. Wehe a commissioner of the North Dakota Workmen's Compensation Bureau, Respondent, v. LYNN J. FRAZIER, as Governor of the State of North Dakota, Appellant.

(184 N. W. 874.)

Appeal and error — trial court must enter judgment as directed by Supreme Court.

It is the duty of the lower court, on the remand of a case, to comply with the mandate of the appellate court and obey the directions therein. Hence, where the Supreme Court directs that a judgment be modified in certain particulars, and, as thus modified, affirmed, it is the duty of the court below to modify the original judgment as, and only as, directed; and it has no power to make other modifications or changes in such judgment. It is *held* that in the instant case the trial court correctly interpreted and carried out the mandate of the appellate court.

Opinion filed Oct. 12, 1921.

Appeal from the District Court of Burleigh County, *Nuessle, J.*

Defendant appeals from an order denying motions for an amendment and modification of a judgment.

Affirmed.

Per Curiam Opinion.

William Lemke, Atty. General; *George K. Foster*, Asst. Atty. General; *Philip Elliott* and *C. A. Marr*, for appellant.

There can be no doubt that at its inception the suspension was valid. The power to suspend an officer is incidental to the power to remove for cause. 29 Cyc. (Officers) 1405; *State v. Megaarden*, 85 Minn. 41, 88 N. W. 412; 89 Am. St. Rep. 334; *State v. Peterson*, 50 Minn. 244; 52 N. W. 655; *Chase v. Providence*, 36 R. I. 331, 89 Atlantic 1066; Am. Cas. 1916 C. 1257; *Griner v. Thomas*, 101 Tex., 36; 104 S. W. 1058, 69, 16 Ann. Cas. 944; *State v. Linge*, 26 Mo. 496; *State v. Police Commissioners*, 16 Mo. App. 48; *Shannon v. Portsmouth*, 54 N. H. 183.

One who does not perform the duties of an officer because of unfitness should not receive the salary for that office, and such is established law. 29 Cyc. (Officers) 1424, note 35 and cases cited.

L. J. Wehe, and Theodore Koffel, for respondent.

The Governor has no power unless specifically given to him by statute to suspend an officer during the pendency of the removal proceedings. (Unless the officer should be a treasurer or custodian of public funds, and then an exception is made in some of the cases cited.) Throop on Pub. Off. Sec. 404, p. 394; *Metsker v. Neally*, 41 Kans. 122; Mech. Pub. Off. Sec. 453, p. 286; *Gregory v. Mayor*, 113 N. Y. 416, aff'g. 11 N. Y. St. Rep. 506; *Emmet v. Mayor*, 38 N. Y. St. Rep. 607, following *State v. Jersey City*, 25 N. J. L. 435-8; 29 Cyc. 1405, § 3.

A judgment cannot be amended so as to vary the rights of the parties as fixed by the original decision. 23 Cyc. 868; *Tyler v. Shea*, 4 N. D. 377; 61 N. W. 468; *Barnes v. Hullet*, 29 N. D. 136, 50 N. W. 562.

"But after an order entered, as dictated by the Judge, has been construed and affirmed by the Supreme Court an amendment cannot be allowed on the ground that the construction placed on it was not what the judge intended." 29 Cyc. 867, 867.

PER CURIAM. This is a sequel to *State ex rel. Wehe v. Frazier*, 182 N. W. 545, wherein this court modified and affirmed a judgment of the district court of Burleigh county. After the remittitur was sent down, the district court made an order for judgment, pursuant to which judgment was entered in that court. Subsequently, the attorneys appearing for the Governor moved that the order for judgment and the judgment be amended and modified in certain particulars, which will hereinafter be noted. These motions were denied, and the Governor has appealed from the orders denying such motions.

This litigation arose out of proceedings before, and orders made by, the Governor purporting to suspend and remove the relator, Wehe, from the office of workmen's compensation commissioner in this state.

On April 19, 1920, the Governor wrote a letter to the relator, Wehe, stating that on account of certain reasons specified therein the Governor had suspended the said Wehe "from the office of workmen's compensation commissioner, such suspension to continue until the final determination of this matter." This was followed by a letter dated April 20, 1920, directing Wehe to show cause before the Governor on April 23, 1920,

why his suspension should not be made permanent. In response to this latter letter the relator appeared before the Governor, and, after certain proceedings there had, the Governor made an order removing Wehe from the office of workmen's compensation commissioner; such order being entered on April 23, 1920. Subsequently Wehe instituted a mandamus proceeding to compel the Workmen's Compensation Bureau to issue to him his salary warrant for the month of April, 1920. In the answer in that proceeding it was asserted as a defense that said Wehe had been suspended by the Governor on April 19, and removed on April 23. It was further alleged, as a defense in that action, "that a voucher for plaintiff's salary for the period of April 1 to 23, 1920, had been allowed in the sum of \$159.85." See *State ex rel. Wehe v. North Dakota Compensation Bureau et al.*, 180 N. W. 49, 50.

In November, 1920, said Wehe applied to the district court of Burleigh county for a writ of certiorari for the purpose of reviewing the validity of the alleged removal proceedings had before the Governor. The trial court determined such proceedings, and the orders of suspension and removal entered therein by the Governor, to be irregular, illegal, and void, and entered judgment as follows:

"It is hereby ordered and determined that the proceedings of the defendant, Lynn J. Frazier, as Governor of the state of North Dakota, had and taken in connection with the removal of the plaintiff, Laureas J. Wehe, were irregular, illegal, and void, that no evidence was given nor trial had before said defendant to justify such removal, and the same is here in all things reversed, annulled, and set aside, and that the order and determination of the suspension and removal of said plaintiff by said defendant from the office of workmen's compensation commissioner of the state of North Dakota be, and the same is hereby, annulled, vacated, and set aside.

"And it is further ordered and adjudged and determined that the plaintiff, Laureas J. Wehe, be, and he hereby is, reinstated in his said position of workmen's compensation commissioner of the state of North Dakota, with all the rights, privileges, and emoluments, with interest thereto pertaining, as of the 23d day of April, 1920, the date of his illegal suspension and removal, as fully as if said order of removal had never been made."

The Governor appealed from that decision to this court. This court held that the relator had not been accorded a hearing as provided by law,

and that the proceedings had in the removal proceeding before the Governor were irregular, and that the order of removal was null and void. In the opinion in that case this court said:

"In the legislative act under consideration, the Legislature has granted to the Governor the power of appointment and of removal, but it has expressly provided that the removal must be for cause. § 4, c. 162, Laws 1919; chap. 73, Spec. Sess. Laws 1919. An express legislative limitation was placed upon this executive power of removal. This limitation prescribed the exercise of a legal discretion in addition to an executive discretion. This limitation, as has been stated, the Legislature had the right to prescribe. A removal for cause means for a legal cause. *State v. Common Council*, 53 Minn. 238, 55 N. W. 118, 39 Am. St. Rep. 595; *Townsend v. Tobey*, 71 Minn. 379, 74 N. W. 150; *State v. Donovan*, 89 Me. 451, 36 Atl. 985; *Andrews v. Board*, 94 Me. 76, 46 Atl. 804; *State v. Walbridge*, 119 Mo. 383, 24 S. W. 457, 41 Am. St. Rep. 663; *Hayden v. Memphis*, 100 Tenn. 582, 47 S. W. 182. When the Legislature deemed it proper to prescribe a legal cause as the basic ground for the removal of the office involved, necessarily there then applied those fundamentals in Anglo-Saxon jurisprudence, essential and recognized in any free and democratic government, namely, the right of the accused to a hearing, to be confronted with his accusers, and to the right of defense. See *People v. Therrien*, 80 Mich. 187, 195, 45 N. W. 78. * * *

"This court, therefore, has already adopted, without dissent, the principle that a legal cause in such case must exist and must be established at a hearing. It is merely trite to state that a legal cause is a judicial cause. It follows, accordingly, that the Governor, in exercising his power in such removal proceeding, necessarily acts in a quasi judicial manner, that his orders, quasi judicial in character are subject to judicial jurisdictional review, and that such review does not serve to interfere with any purely executive prerogative. * * *

"It is evident from this record that the Governor did not appreciate the extent of this legislative prescription. It is quite apparent that he doubted whether it was necessary that charges be preferred or a hearing be given; that he considered to a considerable extent that he might exercise this right of removal as a pure act of executive discretion based upon facts that might have been brought to his attention ex parte as the chief executive. By reason of such construction of his powers, it is further evident from this record that the Governor overlooked and ignored, in order

to exercise his power of removal for cause, the necessity of granting a hearing to the relator where the relator might learn the nature of the charges against him, and might have an opportunity to answer the same, cross-examine witnesses, and adduce testimony to disprove such charges. Manifestly such hearing was not accorded the relator. It was jurisdictional for the exercise of the power of removal. No legal cause for removal was established at the hearing. The affidavits upon which the order for removal was based were neither produced nor presented. Accordingly, it follows that the order of removal must be determined illegal and void, unless the act of the relator in refusing to be sworn as a witness has conferred a jurisdiction to order a removal, as if upon default.

“(3) *Refusal of relator to be sworn*: It may be granted that the Governor had the right to examine the relator as a witness. *State v. Borstad*, 27 N. D. 533, 147 N. W. 380, Ann. Cas. 1916B, 1014. The exercise of this right, however, involves the concession that a hearing was necessary with the rights that flow to the relator at such hearing. Plainly, therefore, this right could not be exercised without according to the relator his rights. The record fairly shows that the relator was willing to be sworn, if to the relator a hearing would be accorded. The record fails to show any offer to accord such hearing as was required.

“The trial court, in the writ of certiorari, ordered that the relator be reinstated in his position of commissioner, with all the rights, privileges, and emoluments, with interest thereto pertaining, as of the 23d day of April, 1920, the date of his illegal suspension and removal, as fully as if said order of removal had never been made. This portion of the judgment perhaps may, by construction, receive an interpretation beyond the issues in this certiorari proceeding. It appears from the record herein that the Governor has appointed another person in place of the relator as commissioner, and that such person has qualified as commissioner. The only issues involved in this proceeding are the jurisdictional questions concerning the order of removal. The questions of law involved between the relator, as a de jure commissioner, and Mr. Spencer, as the de facto commissioner, are collateral to the present inquiry. 29 Cyc. 1393. The judgment of the trial court should not be construed to extend further than the restitution of the relator as commissioner de jure, the same as if no order of removal had ever been made. Thus construed and modified, the judgment of the trial court should be, and is, in all things affirmed.”

Upon the filing of the remittitur in the district court, that court entered

an order for judgment, and judgment was entered thereon, as follows:

"Now, therefore, on motion of L. J. Wehe and Theodore Koffel, of Bismarck, N. D., attorneys for the plaintiff, Laureas J. Wehe, as commissioner of the North Dakota Workmen's Compensation Bureau, it is hereby adjudged and determined that all the proceedings of the defendant, Lynn J. Frazier, as Governor of the state of North Dakota, had and taken in connection with the removal of the plaintiff, Laureas J. Wehe, were and are irregular, illegal, and void, and that no evidence was given nor trial had before said defendant to justify such suspension and removal, and that the same be and hereby is in all things reversed, annulled, and set aside, and that the order of suspension and the order of the removal and the determination of the suspension and removal of said plaintiff by said defendant from the office of commissioner of the Workmen's Compensation Bureau of the state of North Dakota, be, and the same is hereby, in all things annulled, vacated, and set aside, the same as if no proceedings for the suspension and removal of the plaintiff had ever been commenced.

"And it is further adjudged, determined, and decreed that the plaintiff, Laureas J. Wehe, be, and he hereby is, reinstated in his said position as commissioner of the North Dakota Workmen's Compensation Bureau, with all the rights, privileges, and emoluments, with interest thereto pertaining, as of the 23d day of April, 1920, the date his illegal suspension was made permanent and absolute, and the date the illegal order of removal was made therein, as fully as if no order of suspension and order of removal had ever been made therein, save and except as to any questions of law involved between the plaintiff, Laureas J. Wehe, as de jure commissioner, and one C. A. M. Spencer, as the de facto commissioner, which are collateral to the present inquiry; and that this judgment extends only to the restitution of the plaintiff herein, as commissioner de jure, that is, the legal and lawful commissioner, with the right and title in him to said office, the same as if no order of suspension and order of removal had ever been made; and the judgment heretofore entered, excepting said modifications, be, and the same hereby is, in all things adjudged, reinstated, affirmed, and determined."

The defendant moved to have this judgment amended by striking therefrom all references to the order of suspension; the contention being that the former decision of this court merely adjudged the order of removal to be invalid, and did not in any manner adjudicate with respect

to the order of suspension. The trial court refused to amend the judgment, holding that the judgment which had been entered was in accord with, and carried out, the mandate of this court.

We have above set out the judgment originally entered by the trial court. It will be noted that therein the court specifically adjudged.

"That the order and determination of the suspension and removal of said plaintiff (Wehe) by said defendant (the Governor) from the office of workmen's compensation commissioner of the state of North Dakota be, and the same is hereby, annulled, vacated, and set aside.

"And it is further ordered and adjudged and determined that the plaintiff, Laureas J. Wehe, be, and he hereby is, reinstated in his said position of workmen's compensation commissioner of the state of North Dakota, with all the rights, privileges, and emoluments, with interest thereto pertaining, as of the 23d day of April, 1920, the date of his illegal suspension and removal, as fully as if said order of removal had never been made."

It was the manifest object of this judgment to set aside all the proceedings had before the Governor in said removal proceedings including both the order of suspension and the order of removal, and to reinvest the relator with all of his rights as an incumbent of the office from which the Governor purported to have removed him.

This was the judgment brought before this court for review, and considered by us in the former opinion. It will be noted that the judgment contained two distinct provisions: The first specifically adjudged that the determination of the suspension and removal of said Wehe be annulled, vacated, and set aside; the second provision directed that he be reinstated in his position with all the rights, privileges, and emoluments as of the 23d day of April, 1920.

The decision of this court became the law of the case. It was binding upon the trial court. That court had no discretion, but was required to render such judgment as this court had directed to be entered. 4 C. J. 1233. And in our opinion the trial court correctly interpreted and carried out the mandate of this court.

While we deem the matter here under consideration determined and the law of the case settled by the former opinion, we do not see how any other conclusion could well have been reached, in view of the principles announced and the conclusion reached in the former opinion. As pointed out in that opinion, this court had already (on the first appeal in this

controversy) adopted, without dissent, the principle that the relator could not be removed from his office except for legal cause, established at a hearing. And by application of that principle this court ruled that the determination of the Governor purporting to deprive the relator of his office was a nullity. Manifestly, if the Governor had no power to remove an officer except for legal cause and after hearing, he could not indefinitely suspend such officer except for similar cause and after hearing. It would be an absurdity to say that an officer may not be removed except for legal cause and after hearing, and in the same breath say that such officer may be indefinitely suspended from his office without any hearing whatever. See *United States v. Wickersham*, 201 U. S. 390, 26 Sup. Ct. 469, 50 L. Ed. 798. A suspension is merely a temporary stop of a right. To suspend an officer is merely to forbid him from exercising the functions of his office for a more or less definite interval of time. See *Black's Law Dictionary*, p. 1129. In case of suspension it is contemplated that the suspended officer may be restored to his office and hold the same by virtue of his original title. *State v. Heinmiller*, 38 Ohio St. 101, 108. The order made by the Governor on April 19, 1920, recognized these facts. It will be noted that the order of suspension merely purported to be effective until the Governor made a further order disposing of the matter. On April 23, 1920, the Governor made such other order, and manifestly the order he then made was intended to wholly supersede the alleged order of suspension made on April 19, 1920. That, as has already been indicated, was also the construction placed upon this latter order by the officers of the state, as they caused a salary warrant to be drawn in favor of the relator, Wehe, for his salary as workmen's compensation commissioner up to April 23, the date that the alleged removal order was entered. In our opinion the judgment originally entered by the trial court upon the return of the remittitur from this court was correct and carried out the mandate of this court, and the trial court was correct in refusing to grant the motions for amendment or modification of that judgment.

We express no opinion upon the question pressed by the appellant on this appeal that the power to remove a workmen's compensation commissioner which the statute confers upon the Governor includes the power to suspend such officer temporarily from office. That question is not involved or properly determinable on this appeal.

Orders affirmed.

CHRISTIANSON, BRONSON, and BIRDZELL, JJ., concur.

GRACE, C. J. (dissenting). I most earnestly and vigorously dissent, and this for the same reasons set forth in my dissenting opinion in the previous case of *State v. Frazier*, 182 N. W. 551.

ROBINSON, J. (dissenting). This is a political case. Twice it has come before this court and twice dissenting opinions have been filed. 180 N. W. 49; 182 N. W. 545, 550, 551, 562. For certain causes, which this court held sufficient, the Governor made an order suspending Mr. Wehe from office and then an order inviting him to appear and show cause why he should not be permanently removed from office. Then, for cause shown to the satisfaction of the Governor, he made what he considered an order of removal. The order of removal was held by three judges of this court, with two dissenting, to be void. Now if the removal order was void and of no effect, of course it left in full force the order of suspension. The first case which came before the court was on a demurrer to the complaint or charges made against Wehe, and it was held to state a cause for removal. One judge dissented. The second case was a certiorari proceeding to test the validity of the order of removal made by the Governor. The judges held thus:

"The only issues involved in this proceeding are the jurisdictional questions concerning the order of removal."

The decision said not a word concerning the order of suspension. It was based on the ground that the Governor had denied Wehe a hearing or trial on the charges against him, but, as the record shows, at the time and place set for a hearing the Governor and his counsel were present. Wehe and his counsel were present. The Governor demanded that Wehe be sworn as a witness. Of course the purpose was to examine him on oath concerning the charges against him. The answer of Wehe was: "I absolutely refuse to be sworn." Now the Governor had no power to compel Wehe to be sworn. But the Governor and his counsel supposed, and had a right to suppose, that calling Wehe as a witness was the commencement of the hearing on the charges against him. Wehe was given ample opportunity to testify and to present his case, but it seems he did not desire to be the first witness. Hence the Governor made an order of removal without calling any other witness, and that he had a right to do. The Governor is the head of the executive department. He had a right to adopt his own mode of procedure, and neither this court nor the district court had any right to dictate to him. Wehe was given ample opportunity for a trial, but he refused to accept it. He played to the galleries and the

newspapers and set the Governor at defiance. There is no claim that Wehe had ever applied for a hearing or that he had been denied a fair hearing and a prompt hearing on the charges against him. This court has no right to control or usurp the functions of the Governor, or to hold that his order of suspension does not remain in full force pending a legal decision on the charges made against Wehe. Certain it is an unseemly thing for this court, by a majority of one judge, to hold void the official action of the Governor. And, as the result shows, it leads to an unseemly contest between the executive and the judicial departments, and to endless, vexatious, and expensive litigation.

A. W. EYNON, Respondent, v. BESSIE THOMPSON, J. H. THOMPSON and E. T. SWANSON, Defendants. T. L. BEISEKER, Intervener and Appellant.

(184 N. W. 878.)

Mortgages — prior recording of mortgages held not to establish precedence.

Where a mortgage is given by one in possession of realty under an agreement with a guardian of an estate to sell and to deliver title through a judicial sale, and, where, thereafter, pursuant to the agreement, a guardian's sale is held, and a guardian's deed is issued to one who is entitled to retain title as trustee of the mortgagor for advances made prior to the execution of the mortgage, it is *held* that the prior recording of the mortgage did not establish precedence, under the recording statutes, to the title and lien of the trustee.

Opinion filed October 10, 1921.

Action to foreclose a mortgage in District Court, Wells County, Coffey, J. The intervener has appealed from a judgment of foreclosure.

Judgment modified.

John A. Layne and *Arthur L. Netcher*, for appellant.

"A mortgagee of realty is regarded a purchaser thereof; and if his

mortgage is supported by actual present consideration, and is given and taken in good faith and without fraud, he is treated as a bona fide purchaser for value, and as such is protected from adverse claims of which he had no notice, actual or constructive, including not only prior deeds or other conveyances of the premises, but also all other liens upon it or claims of interest in it." 27 Cyc. 1183.

"The doctrine of bona fide purchasers does not apply to an encumbrancer of a merely equitable title or estate." *Shoufe v. Griffiths* 31 Pac. 93.

A person who takes a mortgage in good faith and for a valuable consideration, the record showing a clear title in the mortgagor, will be protected against any equitable titles to the premises, or equitable claims upon the title, in favor of third persons of which he had no notice actual or constructive. 27 Cyc. 1184. 39 Cyc. 1688.

B. F. Whippel and John O. Hanchett, for respondent.

A party taking a mortgage for valuable consideration from a party in possession of real estate under an unrecorded contract of purchase is protected as a bona fide purchaser under our recording statutes. *Simonson v. Wenzel* 27 N. D. 638; 147 N. W. 804; *Toledo etc. R. C. Co. v. Hamilton*, 134 U. S. 296; 33 Law ed. 905.

Thompson would be regarded as the equitable owner, notwithstanding the provisions of the statute of frauds and all other laws requiring contracts for sale and conveyances of real property to be in writing." *Mitchell v. Knudtson Land Co.* 19 N. D. 736; 134 N. W. 325; *Torgeson v. Hauge*, 34 N. D. 646; 159 N. W. 6.

An agreement to assume and pay a mortgage by a party receiving a conveyance of real estate may be wholly in parole, and is not considered as being within the statute of frauds. 27 Cyc. 1344; 1345; *Moore v. Booker*, 5 N. D. 543; 62 N. W. 607; *Bossingham v. Syck*, 91 N. W. 1047, (Iowa).

BRONSON, J. *Statement*.—This is an action to foreclose a mortgage. The intervener has appealed from a judgment in favor of the plaintiff, and demands a trial de novo. The facts disclosed by the evidence are as follows: One Norton, an incompetent under guardianship, was the owner of three vacant lots in the town of Chaseley. The guardian testified that he first had a talk with defendant Thompson, one Sheppard and one Knoble about purchasing these three lots. They wanted to build upon the lots. He

made a price of \$250 for the lots. They told him the money would be deposited at the bank of the defendant Swanson. He told them that he would guarantee a deed, so they proceeded to build. Thompson built a hotel and garage upon the west 25 feet of the lots in 1916. The plaintiff, Eynon, testified that the bank, of which he was formerly president, loaned to the defendants, Mrs. Thompson and Mr. Thompson, her husband, \$300 on October 3, 1916, upon a note and mortgage covering the entire three lots executed by Bessie Thompson and J. H. Thompson, her husband, defendants. Then they were occupying the hotel building and in possession of the property. They represented that the lots were paid, and there was nothing against the property; that it was in the hands of an estate, and they would not get a deed until that fall or later. He further testified: That, during the following week, he talked with the defendant Swanson about this property and the mortgage. That Swanson stated that he had a plain note against Thompson, and wanted Eynon to protect it. Later, when the guardian's sale of this property was being advertised, he saw Swanson. Swanson said he intended to bid in the property. That he agreed that if Eynon would not appear at the sale, he would take up the mortgage. Further, he testified that he knew before the loan was made that Sheppard was in possession of a portion of these lots and had buildings thereon. Also Knoble was in possession with a building thereon. That he never had any intention of bidding in Knoble's and Sheppard's portions of the lots. That he became owner of the note and mortgage, and Swanson subsequently refused to pay the same.

On February 25, 1916, the guardian made a written agreement with Swanson to deliver a warranty deed covering the lots for a consideration of \$250. He further testified: He had no talk with Thompson concerning how much of the lot he should have. That the talk between him and Swanson was that Swanson should bid in the lots himself for the parties to whom he had sold them. That the buildings on the lots were completed before the sale proceedings were finished. That before the deed was issued Swanson stated he would pay the Eynon mortgage. Swanson testified that he had been cashier of the Chaseley State Bank. That prior to the execution of the written agreement with the guardian he had a talk with Sheppard. He then determined to purchase these three lots. The talk was had with Thompson after the time of the written agreement. Previously, he had agreed to deed a portion of the lots of Sheppard, and another to Knoble, and to reserve the west 25 feet for himself. Then he talked with

Thompson. He wanted him to build a hotel on the west 25 feet. Thompson did not have enough money. The agreement was made that Thompson should pay enough money to invest in the lot, and the bank would finance him, holding the lot and hotel as security. That these deals concerning the lots were made to help build up the town. That Thompson paid for his portion of the lot \$75.00. Sheppard and Knoble around \$80.00. That Thompson proceeded to build the hotel. The bank financed him, furnishing \$975 in various items, between March 18 and July 24, 1916, evidenced by notes maturing October 1, 1916. This portion of the lot after construction of the hotel buildings was worth about \$1,500 or \$1,600. On October 3, 1916, Thompson renewed these notes by a new note for \$975, and upon the next day left town. That he made these advances, being assured through the written agreement of the guardian. That he first learned concerning plaintiff's mortgage, through the weekly commercial report of mortgages on record. That he made the arrangements with the guardian about the sale. That he had no talk with Eynon about his not bidding upon the lots. That he did not agree to pay the mortgage. That he did tell him that they would take no action on their claim without first taking it up with him so that he would have a chance to protect himself. The bank's claim for \$975 is now held by the intervener, who together with Swanson in an answer and counterclaim, asserts the validity of Swanson's legal title for purposes of the claim concerned over plaintiff's mortgage. Plaintiff's mortgage was recorded October 4, 1916. The guardian's deed is dated March 9, 1917, and was recorded May 8, 1917. It recites therein the making of an order authorizing private sale dated October 24, 1916, the holding of the sale on November 27, 1916, and the offering of the property in separate parcels and the order confirming the sale, dated January 8 (1916?). The deed covers, in addition to the lots concerned herein, an additional lot in another block. The Thompsons, defendants, were served by publication, and are in default. The trial court found that, when plaintiff's mortgage was made, Thompson was then the full equitable and beneficial owner of west 25 feet involved, subject only to the payment of \$75 for such lot then on deposit with the bank for that purpose; that plaintiff's mortgage was a conveyance of the premises involved in good faith and for value within the meaning of the recording statutes, and that the equitable liens and rights of Swanson and his bank were void in respect thereto. Judgment of foreclosure was ordered accordingly. In its findings of fact

the trial court found in plaintiff's favor upon the disputed questions of fact.

Decision.—The respondent does not question the legality of the guardian's sale and deed. On the contrary, he relies upon its validity in order to sustain the lien of the mortgage. It is not necessary to give serious consideration, nor does the respondent, to the testimony concerning nonbidding or the assumption of the mortgage by Swanson. Eynon had no intention to bid on the three lots, and certainly not upon the extra lot mentioned in the guardian's deed. The property was sold as it was agreed that it should be sold. There is no contention made that the property, or any part of it, was sold at an improper low price, or that a greater price could have been secured therefor. 24 Cyc. 28. The evidence is insufficient to establish that Swanson agreed to take up the mortgage prior to the payment of Swanson's advances to Thompson, and the trial court does not so find. The respondent relies for protection upon the recording act. §§ 5594—5598, C. L. 1913. That his mortgage, taken bona fide for a valuable consideration without notice of any claim or lien, is, under these statutes, prior, although taken from one in possession of the realty under an unrecorded contract of purchase, citing *Simonson v. Wenzel*, 27 N. D. 638, 147 N. W. 804, L. R. A. 1918C, 780. He contends that Thompson was the full equitable owner of the premises when the mortgage was made, and that, accordingly, the conclusions of the trial court should be sustained.

The purpose of the recording statutes is to give notice of, and to protect, rights as against subsequent purchasers or incumbrancers, not to create rights not possessed, either of record or in fact. This purpose is apparent even though the recording act protects concerning subsequently acquired title through the doctrine of inurement. See § 5529, C. L. 1913. The recording statutes apply as notice only to subsequent purchasers and incumbrancers. *Sarles v. McGee*, 1 N. D. 365, 48 N. W. 231, 26 Am. St. Rep. 633. In this case, the title involved is dependent upon a judicial sale, a sale in guardianship proceedings. Both parties, in order to maintain any right at all, must rely upon the validity and regularity of this judicial sale. This sale is not questioned in this proceeding. May it be said that, prior to this judicial sale, either Thompson or Swanson had any title in the premises? May a guardian part with a right or an interest in the estate, and thus abrogate the statutory authority of the court both before and after the sale? It is plainly apparent that, prior to the judicial sale, Thompson possessed no equitable title such as existed in the vendee of a contract

for a deed in *Simonson v. Wenzel*, *supra*, upon which reliance is placed by the respondent. The giving and the recording of the mortgage did not create any greater right than Thompson then had. It neither enlarged the estate nor the lien. Upon any conclusion that may be drawn from the evidence, it appears that Swanson received the title as it was agreed that he should receive it, Thompson has no title except as it is conferred through the title to Swanson. The mortgage has no force except such as it secures through the title to Swanson. If it be contended that, under favorable construction of the evidence for the plaintiff, Swanson was only the agent of Thompson, the fact remains that he was in any event an agent coupled with an interest, and pursuant to the agreement was to receive this title first, not from Thompson, but from the estate, and afterwards was to convey the same to Thompson. Swanson was not a subsequent purchaser or incumbrancer from Thompson. No title could be received by Thompson until first it had been vested in Swanson. Upon this record, the priority of rights between the contending parties, already established in fact by the agreement of Swanson and Thompson, is not to be disturbed, or even determined, by a foot race to the recorder's office. In fact, the advances made by Swanson were prior in point of time to those made by the plaintiff. In law, the title to secure these advances was prior to the vesting of plaintiff's lien. If the plaintiff seeks equity to compel the performance of Swanson's trust, he must do equity by recognizing the priority in fact of Swanson's advances. It is unnecessary to consider the question whether the plaintiff is a bona fide purchaser. The conclusions and judgment of the trial court must be modified so as to provide for foreclosure of plaintiff's mortgage, inferior and subsequent to the priority of intervener's note. It is so ordered. The appellant will recover costs.

ROBINSON, BIRDZELL, and CHRISTIANSON, JJ., concur.

GRACE, C. J. (specially concurring). I concur in the opinion of Mr. Justice Bronson on the ground that the alleged contract for sale of the lots in question between the guardian and Thompson, Sheppard, and Knoble was wholly invalid and was of no legal force or effect.

To be of any validity it would necessarily have to be made in pursuance of the laws governing the sale of this kind of property by guardians. It was not; hence plaintiff's mortgage never attached.

W. J. DYER & BRO., a Corporation, Appellant, v. ARTHUR BAUER,
Respondent.

(184 N. W. 809.)

Sales — in an action on note for price, evidence held to sustain verdict for defendant for breach of warranty.

The plaintiffs sue to recover the balance due on a \$3,000 promissory note, given for a secondhand fotoplayer. The defense is a warranty of quality and fitness, express and implied, and a breach of the same. The jury found a verdict for defendant for \$1.00. *Held*, that the plaintiffs have had a fair trial and that the verdict is well sustained by the evidence.

Opinion filed Oct. 11, 1921.

Appeal from a judgment of the District Court of Burleigh County;
Coffey, J.

Affirmed.

F. E. McCurdy, for appellant.

Laws of 1917 chap. 202, § 15 is a re-enactment of subsection 1 of § 15 of the uniform sales act, and was not intended to apply to an executed sale of a definite, ascertained and existing article but only to executory sale. This is also the common law. *Mechem on Sales*, § 1346.

This same section does not apply to a second hand article. *Mechem on Sales*, § 1348.

Newton, Dullam & Young, for respondent.

Questions similar to the one involved in this case have been considered in the following cases: *Little v. G. E. Van Slych*, (Mich.) 73 N. W. 554; *Buckbinder Bros. v. Valke*, (N.D.) 173 N. W. 947; *Ward v. Valke*, 176 N. W. 129.

ROBINSON, J. In November, 1918, the plaintiffs, dealers in musical instruments in St. Paul, sold defendant a secondhand fotoplayer, to be used as an orchestra in his moving picture theatre at Bismarck. For the player defendant gave a note for \$3,000. To secure the note he gave a chattel

mortgage on the player. The purpose of this action is to recover the balance due on the note and to foreclose the mortgage. The defense is a breach of warranty. The jury found in favor of defendant and against the plaintiffs and assessed defendant's damages at \$1.00.

The evidence was conflicting. The jury heard it all and found, in effect, that defendant had paid for the old player all it was worth, and more too. The payments and freight amounted to about two-thirds of the purchase price. The answer avers that at the time of contracting to purchase the player defendant was the proprietor and manager of a picture theatre at Bismarck, as the plaintiffs well knew; that to induce defendant to purchase the instrument plaintiffs represented and warranted that it would play several musical instruments and furnish good orchestral music for the theatre; that it was in all respects suitable for use in the theatre and that its use would make the theatre a success. The defendant knew nothing of such instruments and he bought the same relying on the representations and warranty; that the player was not suitable for theatrical purposes; it easily got out of order, did not give satisfaction and was not worth over \$500. Now it appears that defendant had never seen a fotoplayer and knew nothing of such an instrument and that he relied on the warranty of quality and fitness, express and implied. He bought the player for a particular purpose, known to the plaintiffs, and he bought it relying on their representations and judgment. The deal is covered by the Sales Act (Laws 1917, c. 202, § 15):

"* * * Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies upon the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for that purpose."

The testimony showing the defects and the failure of the player is oral, and is quite extensive. The player represents a variety of musical instruments. It is a complicated machine. The testimony is that after it was installed by the expert it ran well enough for a while, and in about two or three weeks it started to get out of order. The expert from St. Paul was called. He overhauled it and for a time it ran along, and then got out of order, so the expert had to be called again and again to overhaul the player, and it kept going from bad to worse. The result was a continual discord. "It was awful," says Mr. Bauer. "We could not use the instrument, and we played the piano by hand without the at-

tachments." The machine was installed in January, 1919, and in about a year and a half defendant ceased attempting to use it. Mr. Bauer testifies that during the first year it was used about four or five months, and the rest of the time was out of order. He says the machine is of no value only the piano part, which is worth about \$500. The testimony of Mr. Bauer is well corroborated by his wife and by Mr. Hoffman, a piano tuner who worked on the player trying to put it in order.

Mr. Roth, the expert who installed the player, and who overhauled it four times, testifies that on each occasion he left it in good working order and mechanically perfect. He attributes the failure of the player to defects in its operation, and doubtless there were defects in the operation as well as in the complicated machine. Defendant and his help were fairly able to operate the machine till it got badly out of order, and then he had to send for the expert to overhaul it. So it is with a farmer of ordinary skill; when he buys a new machine it commonly runs well and he finds it easy to operate, but as it commences to get badly out of repair the operation becomes more and more difficult. The machine in question was second-hand. It is probable that because of some failure in operation the plaintiffs had taken it back from the first purchaser. But, to induce the defendant to buy it, they assured him that they were going to build in their own shops important missing parts of the player, and promised him the same guaranty as with an entirely new instrument. The player was sold with both an express and an implied warranty of fitness for use in a theatre.

Here is a copy of two letters written to induce the defendant to purchase the player:

St. Paul, Nov. 6, 1918.

Mr. A. J. Bauer, care Orpheum Theatre, Bismarck, No. Dak.—Dear Sir: We are very much surprised to learn through our Mr. Hough that you have entirely given up the idea of purchasing a fotoplayer because of your desire to dispose of your theatre.

We honestly believe, Mr. Bauer, if you were to install one of the genuine fotoplayers in the Orpheum Theatre, it would prove a sensation that would be the talk of the country for miles around and would, undoubtedly, result in increasing your business and your profits. We trust that you will reconsider this matter and let us get together on a proposition. We have known of cases where business was so poor that the owner of

the theatre could not meet his current bills. After the installation of a fotoplayer business improved to such an extent that the increased patronage took care of the payments on the fotoplayer and left a nice profit besides. We are sure that if you put the thing over right, you will have the same results. Cannot we get together at this time?

We are inclosing a stamped and addressed envelope, and awaiting your favor, we are

Yours very truly,

ALB*HR

W. J. Dyer & Bro.

St. Paul, Dec. 17, 1918.

Mr. A. J. Bauer, care Orpheum Theatre, Bismarck, N. D.—Dear Sir: We are sorry to report to you that we are still unable to make shipment of your fotoplayer. Upon receipt of the new parts from the factory, we discovered that one of the most important parts was missing and as it would take at least two weeks to get this by express from the factory, we concluded to go ahead and build it in our own shops. This has delayed matters longer than we had anticipated, but we have promised you the same guaranty with this instrument as we would with an entirely new one, and for this reason, the writer has insisted that the foreman of our repair department should have this instrument in just as good condition mechanically as a new one before it is boxed for shipment.

Of course, this means that the instrument will not be set up until after Christmas and while it may be a disappointment to you not to have the instrument sooner, you really are way ahead of the game for it means a saving of several hundred dollars to you on the instrument.

Regretting exceedingly that we have not been able to make shipment up to this writing, and with compliments of the season, we are

Yours truly, -

ALB:AS

W. J. Dyer & Bro.

P. S.—Inclosed please find copy of your order which has been accepted by us.

I:INC.

On the whole it appears that the plaintiffs have had a fair trial. They have received good value for their player. The verdict does them no injustice. It is well sustained by the weight of the testimony.

Judgment affirmed.

BIRDZELL, J., concurs.

GRACE, J., concurs in the result.

CHRISTIANSON, J. (concurring). All the errors assigned and argued on this appeal relate to the defense interposed by the defendant. It is contended:

(1) That there is no evidence justifying the application of subdivision 1, § 15, c. 202, Laws 1917, which provides:

"Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies upon the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for that purpose."

(2) That the evidence in this case does not show a breach of such warranty (if one exists) for the reason that it does not appear that the musical instrument was not reasonably fit for the purpose for which it was purchased, but on the contrary that the evidence shows that it was fit for such purpose.

(3) That the contract of sale was for a specified article, under its patent or trade name, and, hence, that (under subd. 4, § 15, c. 202, Laws 1917) there was no implied warranty as to its fitness for any particular purpose.

(4) That there is no evidence from which the jury could compute the amount of damages to which the defendant is entitled, in event a warranty and breach thereof were shown.

1 and 2. So far as the first two contentions are concerned. I am of the opinion that the evidence, considered as a whole, justified the submission to the jury both as to whether an implied warranty existed, and also whether there was a breach of such warranty. In other words, the evidence was such that it could not be said, as a matter of law, either that there was or was not an implied warranty; neither could it be said, as a matter of law, that the warranty (if one existed) had not been broken. Inasmuch as the findings of the jury upon these two questions have substantial support in the evidence, they are, of course, not subject to interference by this court.

3. The contention that the contract involved in this case was for the sale of a specified article, under its patent or trade name, has in my opinion no real basis in the evidence. The evidence shows that the defendant was solicited by the plaintiff to purchase an instrument of the character involved in this controversy. When the defendant called upon

the plaintiffs with respect to the matter, he was not at all interested in the purchase of an instrument of any particular make. He did not come to the plaintiff saying that he desired to purchase a fotoplayer manufactured by some particular firm. What he wanted and finally agreed to buy was an instrument which could be utilized for a particular purpose; and he relied upon plaintiff's representations and superior skill or judgment as to what that instrument should be. In any event, the record discloses that the contention that the contract of sale was for a specified article under its patent or trade name was not advanced in the trial court, and it cannot be urged for the first time on appeal.

4. I am also of the opinion that the contention that the evidence furnished no proper basis for a computation of damages may not be raised at this time. It is true that the questions propounded to the witnesses as to the value of the instrument were couched in the present tense; that is, the witnesses were not asked as to the value of the instrument at the time of the purchase, but were asked as to the then value. The defendant testified that the instrument could be used as a piano, but that the attachments were of no value, and that, used as a piano, it was worth \$500. Another witness for the defendant testified that the instrument in its then condition was valueless. These witnesses were both present at the time of the installation of the instrument, and had more or less to do with its operation and repair during the entire period it was in the hands of the defendant. Their testimony was not objected to on the ground now urged. The only objection urged to the testimony of either witness in the trial court was that the witness had not been shown to be qualified to testify as to value. No objection was made on the ground that the evidence related to the value of the instrument at the time of the trial, and that it should relate to the value of the instrument at the time of the purchase. The objection now made could readily have been obviated, if it had been presented at the time of the trial, and manifestly the plaintiff cannot at this time object to the evidence on grounds different from those raised in the trial court. It would also seem that no particular harm could result from the questions as propounded. Whether a particular article is fit for a specified purpose can generally be determined only after trial or an attempt to apply it to the intended use. While the questions propounded to the witnesses as to the value of the instrument in controversy were in the present tense, and the answers related to the then value of the instrument, it would seem that this testimony, if true, also

tended to prove that the instrument, at the time of its installation, was fit only for the same purpose which the testimony showed it to be fit for at the time of the trial.

Upon the record as a whole, I find no reason for disturbing the verdict or the judgment entered thereon. Hence I agree that the judgment appealed from should be affirmed.

BRONSON, J., concurs.

MANDAN NEWS, a corporation, Appellant, v. H. L. HENKE, as President of the Board of City Commissioners, and W. H. SEITZ, as City Auditor of the City of Mandan, North Dakota, Respondents.

(184 N. W. 991.)

Mandamus — city officers may not be compelled to issue warrants on general fund, after having offered to issue warrants on special fund for same debt.

1. Plaintiff brought an action of mandamus to compel defendants to issue to it certain warrants drawn on the general funds of the city of Mandan, they having theretofore declined to issue such warrants, but offered to issue warrants drawn on the special street lighting fund, claiming that the proper one against which the warrants should be drawn.

The Court declined to issue the Writ of Mandamus and for reasons stated in the opinion, it is *held*, its refusal to do so was not error.

Refusal to grant mandamus against defendant held not error.

2. The Court did not err in granting judgment in favor of defendants.

Opinion filed Oct. 13, 1921.

Appeal from a judgment of the District Court of Morton county, Berry, J.

Judgment affirmed.

Charles L. Crum, and T. J. Krause, for appellants.

Mandamus is the proper remedy to enforce the payment by a municipal corporation of an official salary, the amount of which is fixed." *Speed v. Common Council of City of Detroit et al*, 100 Mich. 92; 58 N. W. 638; *McBride v. Grand Rapids*, 47 Mich. 236; 10 N. W. 353 followed.

L. H. Connolly, for respondents.

The cost of special improvement must be raised through special assessment of the property abutting upon and benefitted by the improvement and without cost to the general taxpayer. *Pine Tree Lumber Co. v. City of Fargo*, 12 N. D. 360.

GRACE, C. J. This action is one where the plaintiff sought to procure the district court of Morton county to issue a peremptory writ of mandamus against the president of the board of city commissioners and the city auditor of the city of Mandan, to compel them to issue warrants for the amounts hereinafter mentioned against the general funds of the city.

The case was tried by the court. It refused to issue the writ, and dismissed the action.

The material facts are as follows: During the year 1919 and 1920 the city of Mandan installed a special system of street lighting, under § 3745 of the Compiled Laws of North Dakota of 1913, as amended by chap. 69 of the Session Laws of 1915. A special street lighting district and a special assessment fund for said district were created. The plaintiff published the resolutions in connection therewith, and certain notices for bids. At the time of these publications, no special fund had been provided, the special street lighting system not having been at this time fully established. At the time these publications were made, no question was raised about the method of paying the printer for the publication of them. Subsequently the street lighting system was established in accordance with the laws above mentioned, and the city made contracts for the installation of the lighting system. The commission levied special assessments upon the property within the improvement district, subject to levy for the cost of the lighting system, and afterward plaintiff published the special assessment list, giving two publications thereof. It presented two bills to the city: One for \$280.72, which was allowed November 8, 1920; the other for \$292.16, which was allowed December

6, 1920. At the time they were allowed, the city had made provision for a fund, designated street lighting district No. 1 fund of the city of Mandan, N. D.

After the bill for \$280.72 had been allowed by the city commissioners, the defendants issued a warrant for that sum drawn on the special street lighting fund. This was handed to Mr. Roth, vice president of the board of directors of the plaintiff corporation. At the time he received it he did not examine it, but soon afterward did, and, on finding that it was drawn on the special street lighting fund, returned it to the city auditor and informed him that the plaintiff refused to accept it, because it was not drawn on the general fund. The auditor offered plaintiff warrants drawn on the special street lighting fund, which offer was refused, and warrants on the general fund demanded.

Chap. 69 of the Laws of 1915, *supra*, provide in part as follows:

"If the owners of the majority of the property abutting street or streets where said lighting system is to be installed, shall not within ten days after the last publication of said notice protest against said lighting system or improvement, then the majority of such owners shall be deemed to have consented thereto, and such city may proceed to provide for the construction of such improvement and to assess the costs thereof against the abutting property in the same manner and with the same notice and according to the same forms and procedure as now provided by statute for the construction and assessment of street paving; and upon such proceedings being taken and completed, the cost of such construction or such part thereof as the counsel or commission shall deem proper, be assessed against the abutting property in the same manner and according to the same form as now provided by law for the assessment of the cost of street paving."

§ 3726, Compiled Laws of 1913, provides how special assessments shall be made in case of the construction of sewers, paving, etc., to pay the costs thereof, or such part thereof as is to be paid by special assessment, including all expense in making such assessment, publishing necessary notices with reference thereto, etc. As the cost of the special lighting system is to be assessed against the abutting property in the same manner, and with the same notice, and according to the same forms and procedure as now provided by statute for the construction and assessment of street paving, and as § 3726, with reference to street paving, designates publication of notices as part of the expense and costs of con-

struction of the pavement, it would seem that the cost of publication of notices in connection with the establishment of a special street lighting system, or of special assessments therein to be levied, should be considered a part of the cost of construction thereof. With what above has been stated in mind, we may proceed to a disposition of the questions here presented.

This action, as above stated, being one to procure the issuance of a peremptory writ of mandamus for the purpose above mentioned, it is incumbent upon the plaintiff to show that it is the plain legal duty of the defendants to perform the act which it seeks to compel by the writ, and to further show, otherwise than by a mandamus proceeding, that the plaintiff had no plain, speedy, or adequate remedy. From what has above been said, it is clear that no such plain legal duty rested on the defendants. Hence the court, in the circumstances of this case, was fully justified in refusing the issuance of the writ.

The only errors assigned on this appeal are that the court erred in granting the judgment from which appeal had been taken, and further erred in dismissing the action. It is clear that the court erred in neither respect.

The judgment appealed from is affirmed. The respondents are entitled to their costs and disbursements on appeal.

BIRDZELL and ROBINSON, JJ., concur.

BRONSON, J., concurs in the result.

CHRISTIANSON, J. (concurring). The publication of the necessary notices relating to an improvement, to be paid for by special assessments against the property benefited, under article 20, c. 44, Political Code, Comp. Laws 1913, is a proper item of the cost of the improvement. § 3726, C. L. 1913.

A city has power, subject to the debt limit provisions of the constitution, to provide that not exceeding one-fifth of the cost of certain local improvements be paid by general taxation. § 3723, C. L. 1913. But it is averred in the return of the defendants in this case that special assessments were levied to pay all the costs of the improvement, including all expenses incident thereto. Hence, under the facts shown to exist in this case, the plaintiff's claim was properly allowable against, and payable by warrant drawn upon, the special assessment fund; and plaintiff was not entitled to a warrant drawn upon the general fund of the city.

EDGELEY CO-OPERATIVE GRAIN COMPANY, a corporation
Respondent, v. H. SPITZER, Appellant.

(184 N. W. 880.)

Gaming — in action on note defended as having been given in gambling, evidence held to show loss was in "hedging" transaction.

1. In an action brought to recover on a promissory note in the sum of \$4,000.00, the defense of no consideration was pleaded and relied upon. In that connection it was claimed the note was given for losses sustained in a gambling transaction to wit: the buying and selling of grain options. The evidence shows that the loss was occasioned by what is termed a "hedging" transaction, conducted by The Pomona Valley Farmers' Elevator Company, (of which the plaintiff is the successor and now the owner of the note) for the defendant and at his request.

Gaming — where evidence showed note was not for grain gambling, directing verdict for plaintiff held not error.

2. At the close of the testimony the court directed a verdict in plaintiff's favor and it is held for reasons stated in the opinion that in this there was no error.

Appeal and error — where plaintiff consents to modification of judgment correcting error, it will be so modified.

3. Defendant claims there is conflicting testimony with reference to the proper application of a certain sum of money, in amount \$1,710.00, which he claims he ordered to be applied on the note. The judgment has been directed to be modified, plaintiff having consented, so that any benefit he would have received if the money had been applied on the note, instead of otherwise, viz: on an account, is secured to him and a new trial is therefore unnecessary. For reasons stated in the opinion, nothing would be gained by a new trial.

Opinion filed Oct. 17, 1921.

Appeal from the District Court of LaMoure County, *Graham, J.*

Judgment modified and affirmed.

John W. Carr, for appellant.

"The essence of a gambling transaction is that the particular trans-

action shall contemplate no delivery, without reference to the making of any other deal." *John Miller Co. v. Klonstad*, 105 N. W. 164.

It is also well settled that where the principal cannot recover because of the gambling nature of the transaction, neither can the agent recover. *Dows v. Glaspell* 60 N. W. 60.

"Transactions for the sale and delivery of grain or other commodities to be delivered at a future day are not per se unlawful, where the parties in good faith intend to perform them according to their terms. But contracts in form for future delivery, not intended to represent actual transaction, but merely to pay and receive the difference between the agreed price and the market price at a future day, are in the nature of wagers on the future price of the commodity and void." *Mohr et al v. Miesen* (Minn.) 49 N. W. 862.

The fact that a note had been given by the defendant to cover the loss or a portion of the loss on the gambling transactions does not change the rule so as to preclude him from setting up as a defense the fact that the consideration for the note was represented by losses on the various gambling transactions." *Embrey v. Jemison*, 131 U. S. 338; 9 Sup. Ct. Rep. 776; *Dows v. Glaspell*, 60 N. W. 60 (N. D.).

The question of whether the creditor applied a payment otherwise than as directed by the debtor is one for the jury. *Root v. Kelly*, 39 Misc. (N. Y.) 530; 80 N. Y. Supp. 482.

"Generally the question of application of payments by the parties as determined by their intention is one of fact for the jury." 30 Cyc. 1296.

Hutchinson & Lynch, for respondent.

The court is justified in directing a verdict where the evidence is undisputed or of such conclusive character or so preponderates in favor of the plaintiff that the court in the exercise of sound judicial discretion would be compelled to set aside a verdict in opposition to it. 38 Cyc. 1567 to 1571.

The court did not err in directing a verdict for the plaintiff on all the issues of the case. *Buchanan Elevator Co. v. Lees*, 37 N. D. 27; *The John Miller Co. v. Klovstad*, 14 N. D. 435; 105 N. W. 164; *Bibb v. Allen* 149 U. S. 481; 13 Sup. Ct. 950; 37 L. ed. 819; *Clews v. Jamieson*, 182 U. S. 461; 21 Sup. Ct. 845; 45 L. ed. 1183; *Chicago Board of Trade v. Christie G. & S. Co.*, 198 U. S. 236; 49 L. ed. 1031; *Van Duzen Harrington Co. v. Jungeblut*, (Minn.) 77 N. W. 970; *Wall v. Schneider*

(Wis.) 18 N. W. 443; *Hill v. Levy*, (D. C.) 98 Fed. 94; *Parker v. Moore*, (C. C. A.) 125 Fed. 807; *Ponder v. Jerome Hill Cotton Co.* 100 Fed. 373; 40 C. C. A. 416.

The contracts were in accordance with the customs and usage of the Minneapolis Chamber of Commerce and there was no evidence that delivery could not be legally exacted in any of the transactions involved. *Barnes v. Smith*, 159 Mass. 344; 34 N. E. 403; *Board of Trade v. Kinney*, et al 130 Fed. 507; 64 C. C. A. 669; *The John Miller Co. v. Klovstad*, supra; *Board of Trade v. Christie*, supra.

The rules and regulations of the Minneapolis Chamber of Commerce are not in conflict with the Minnesota statute with reference to bucket shop. *John Miller Co. v. Klovstad*, supra; *Sampson v. Camperdown Cotton Mills* 82 Fed. 833.

The functions of the Minneapolis Chamber of Commerce and all other such exchanges are necessary and they are created by law and sanctioned by the courts of the land. *John Miller Co. v. Klovstad*, supra; *Bibb v. Allen*, supra; *State v. Duluth Board of Trade*, et al (Minn.) 23 L. R. A. (N. S.) 1260; *Clews v. Jamieson*, supra; *Chicago Board of Trade v. Christie G. & S. Co.* supra.

Contracts for the future delivery of merchandise of tangible property are not void whether such property is in existence in the hands of the seller or to be subsequently acquired. *John Miller Co. v. Klovstad*, supra; *Bibb v. Allen*, supra.

It is well settled that the burden of proof is upon the defendant to prove that the contracts were illegal. The law presumes that they are legitimate transactions. *John Miller Co. v. Klovstad*, supra; *Chicago Board of Trade v. Christie, G. & S. Co.* supra; *Clews v. Jamieson*, supra; *Bibb v. Allen*, supra.

GRACE, C. J. This is an action to recover on a promissory note in the sum of \$4,000, with interest thereon from the 20th day of April, 1917, to date of maturity, at the rate of 7 per cent. per annum until due, and 10 per cent. per annum thereafter. The issues of fact were presented to a jury.

At the close of the testimony the court directed a verdict in plaintiff's favor for the amount of the note and interest. Judgment was entered on the verdict, and this appeal is from the judgment.

The complaint states a cause of action in the ordinary form on a promissory note. The answer admits the execution and delivery of the

note to the payee. It denies that it was executed or delivered for value received or any legal consideration, and further denies any indebtedness to the plaintiff in any sum whatsoever. In the answer it is further alleged that the sole and only consideration for the execution and delivery of said note by defendant was in substance as follows: That during the months of March and April, 1917, and subsequently thereto, this defendant, acting through the said Pomona Valley Farmers' Elevator Company, as his agent, engaged in the purchase and sale of grain options and in gambling and speculating upon the prices of grain upon various boards of trade, selected by said Pomona Valley Farmers' Elevator Company, and during said periods this defendant, acting through said Pomona Valley Farmers' Elevator Company, as his agent, bought and sold grain options, solely as gambling and speculative operations, it being at all times fully understood by the said Pomona Valley Farmers' Elevator Company, by this defendant, and by all others connected with said transactions, that said transactions were purely and solely gambling and speculative operations; and it was never understood by said Pomona Valley Farmers' Elevator Company, or by this defendant, or by any one else connected therewith, that any actual grain was to be bought or sold, received or delivered by defendant. And defendant alleges that neither this defendant nor Pomona Valley Farmers' Elevator Company, nor any other party connected with the transaction mentioned above, actually intended that there should be any actual transfer, delivery, or receipt of the commodities covered by said options.

The answer is of too great length to be set out in full. The principal defense set forth in the answer is that the entire transaction with reference to the sale and purchase of 10,000 bushels of rye, the facts in reference to which will hereafter be set forth, was one of speculation and gambling. The defendant pleads a counterclaim in the sum of \$1,800, the alleged value of the number of bushels of rye delivered by him to the Pomona Valley Farmers' Elevator Company in the fall of 1917, and further claims that it agreed to give credit on the note for that amount which it failed to do. A reply was interposed to the answer averring payment to defendant of the amount of the actual rye delivered in the fall of 1917.

The material facts in the case are substantially as follows: The price of rye in March, 1917, was about \$1.49 per bushel. At that time Ernest Steel was the agent of the Pomona Valley Farmers' Elevator Company

at Edgeley, N. D. During the month of March, and until April 20, 1917, the Pomona Valley Farmers' Elevator Company sold in the manner hereinafter described for defendant 10,000 bushels of rye at the market price of about \$1.49 per bushel. Between the time when defendant had through the said Elevator Company sold the rye and the 20th day of April, 1917, rye on the market had advanced in price to such an extent that a loss of about \$4,000 had occurred on the transaction, and at that time for this amount the note in suit was taken. After the giving of the note, rye still continued to advance. The defendant in the month of July, 1917, through the Elevator Company, purchased 10,000 bushels of rye at \$2.05 per bushel. The loss on the entire transaction up to the time of the purchase last mentioned was approximately \$5,505.

The defendant owns and operates a farm of about 1,000 acres in the vicinity of Edgeley. He also owns about 1,000 acres of land in Canada. Formerly he was engaged in the real estate business and had also seven years experience as a grain buyer. He was a stockholder in the Pomona Valley Farmers' Elevator Company which was later re-organized into the Edgeley Co-operative Grain Company, now the owner and holder of the note in suit.

In the fall of 1916, he sowed 800 acres of winter rye on his La Moure county, North Dakota, farm. In the spring of 1917 he endeavored to contract with the Pomona Valley Farmers' Elevator Company his prospective rye crop, which he estimated at about 12,000 bushels. Steel, the agent of the said Elevator Company, stated that he could not at that time contract to buy the rye, but that it might be handled as a "hedge."

The defendant desired to sell September rye. There was then no dealings in September rye, and the commission firm informed said Elevator Company to this effect. Steel again took the matter up with the commission firm and they finally suggested that what is termed a trial sale for July might be undertaken, and, if that went through, the sale could be later transferred to September when defendant could make actual delivery of the rye. Steel informed the defendant of this and such a sale was made at \$1.49 per bushel. At this time he authorized the sale of 1,000 bushels, later of 4,000, and later still of 5,000 bushels, and sales thus authorized were made.

In the fall of 1917, the defendant delivered to the Pomona Valley Farmers' Elevator Company approximately 2,513 bushels of rye. On the 20th day of October, 1917, this was sold at \$1.67 per bushel, amount-

ing to a total of \$4,196.85. Prior to the time the defendant delivered to the Elevator Company the above-mentioned number of bushels of actual rye, he agreed with it that it should pay him \$1 per bushel for each bushel of rye hauled to the elevator, as he claimed it was necessary for him to have this amount to pay the threshing expense, etc., the balance of the selling price of the rye so delivered to be applied on the loss to which reference has heretofore been made. The Elevator Company did make certain advances to the defendant, which with interest, together with a note to the Nortonville Bank of \$150, aggregated \$2,486.85. This amount, deducted from the \$4,196.85, the selling price of the actual rye, left remaining \$1,710, \$1,505 of which was indorsed by the Elevator Company on the loss account which had occurred from the time of the execution and delivery of the note of \$4,000 until the transaction was finally closed in July by the purchasing on the market of the 10,000 bushels. The remaining \$205 was indorsed by the Elevator Company on the note.

The defendant's testimony in substance is that he directed the \$1,710 to be applied upon the \$4,000 note, while Steel testified in substance that it was to be applied first upon the loss account due to the rye transaction, and the balance on the note. The defendant testified in substance that he gave the plaintiff no direction to apply any of the money on the loss account, and that he knew of no charge or account against him except that represented by the note.

Defendant attempts to show that the loss at the date of execution and delivery of the note was \$3,000, while the testimony of Steel is that the losses equaled the amount of the note. The testimony of each shows that the total loss was \$5,505, \$25 of which was commission charged by the Tenney Company.

The testimony of the defendant is to the effect that the whole rye transaction except where the actual rye was delivered was a speculation. It will serve no useful purpose to set forth any of the evidence in detail. There is only one assignment of error, which may be divided into two important contentions:

(1) That the court erred in granting plaintiff's motion for a directed verdict made at the close of the trial, and in not submitting the issues to the jury.

(2) That there was a direct conflict in the evidence on a number of material issues, and for this reason it is claimed that the facts of the case

should have been submitted to the jury for determination. It is the defendant's contention that the entire transaction with reference to the 10,000 bushels of rye was purely a gambling transaction, and that for this reason there was no consideration for the note. His contention in this regard is entirely without merit. The testimony clearly shows that he expected that, if his rye crop was normal, he would have about 12,000 bushels. At the time of the transaction rye was about \$1.49 per bushel. The defendant expected rye to be a lesser price in the fall, when the rye crop would be ready for sale; hence he desired to contract the sale of it. About the time the transaction took place, the Elevator Company declined to contract for purchase of the prospective crop of rye.

The Elevator Company would, however, undertake to handle the transaction as a "hedge." The term "hedge" is well understood in connection with transactions on the grain market, and that term needs no further elucidation. If the transaction could be handled as a hedge, it would result in procuring for the defendant a price for his prospective crop of rye, at the time of marketing thereof, of not less than the amount for which the 10,000 bushels were sold on the market by the Elevator Company for defendant. In other words, the 10,000 bushels would represent a sale of defendant's prospective crop of rye which was then in existence, but which had yet not matured. When consummated, the transaction would be what is denominated a "hedge."

The Elevator Company was at all times acting for the defendant in the hedging transactions. Defendant had the prospective crop of rye which, if normal, would exceed the number of bushels sold on the market for him by the Elevator Company, and which we think the record clearly shows was intended to be delivered to fulfill the contract of the sale of the 10,000 bushels above referred to. If this be true, and we think it is, the transaction was not a gambling one, but purely a hedging transaction, which is not unlawful, and does not partake of the nature of gambling. It is not difficult to perceive that defendant authorized the sale of the 10,000 bushels so that he would be assured of a good price for his crop of rye when it was ready to market, and that he expected to have more than that amount of actual rye at the maturity of his crop. He evidently expected that rye would be a great deal lower in price at marketing time than it was in March, the time of the transaction, and by selling the 10,000 bushels, and by being able to transfer the same on the market from July to September, the time would then have arrived when he could

deliver an amount of rye equal to that which he had sold, and if at the time of the delivery the market price of rye was only \$.75 per bushel, it is not difficult to see that he would have gained about \$.75 per bushel by the transaction. But, unfortunately for defendant, and contrary to his expectations, rye was not a lower price at the time he expected to market same, but continued to advance over the price for which he had sold the 10,000 bushels until it reached \$2.05 per bushel, when defendant desired, no doubt, to terminate the loss, and procured the Elevator Company to purchase 10,000 bushels on the market, at which time his loss had reached \$5,505. His prospective crop of rye did not materialize as he expected, and hence he could not deliver a sufficient number of bushels to cover the sale of the 10,000 bushels which he had made, and hence the only thing he could do to stop his loss was to buy rye in amount equivalent to the number of bushels which he sold. This he did.

It must also be noticed that the Elevator Company never received any benefit or profit from the transaction, and as the transaction was handled, there was no way in which it could make a profit on it. Certainly it is unbelievable that it would entail a great loss on itself without expectation or any possibility of profit to it. It is clear that it was handling the matter for the defendant as a "hedge," and not otherwise.

Other transactions of the defendant on the grain market which occurred prior to the one in question, and which are claimed to have been speculation, need no consideration here, as they have no bearing on the issues here involved.

As to defendant's second contention that there was a conflict of evidence on material issues which should have been submitted to a jury, it is only necessary to say that such conflict, if any, related only to the alleged direction of defendant to the Elevator Company relative to the application of a portion of the money received for the rye actually delivered to the Elevator Company. A certain amount of this money the Elevator Company applied upon defendant's account with it, and the balance upon the note as above stated. The defendant's contention is that he directed such money to be applied upon the note, and because the issues in this regard were not submitted to the jury, he contends there should be a new trial. Assuming, however, that the defendant is correct in his contention, and assuming further that this is the only relief a new trial would give defendant, and we think this assumption is true, we are clearly of the opinion that in the circumstances of this case, that would

not be sufficient reason for granting a new trial. Instead thereof, this court could, with consent of plaintiff, order the judgment modified so that the defendant would obtain benefit equal to that which he claims he would have received had the money been indorsed on the note instead of applied to the payment of the account.

The note bore 7 per cent. interest before and 10 per cent. after maturity. The account drew the legal rate of 6 per cent. per annum. And assuming, but not deciding, that defendant directed the \$1,710, the balance of the price of rye sold to the Elevator Company, after deducting the amount it advanced him for expenses to which reference heretofore has been made, to be applied on the note, it is clear that he would be entitled only to a credit of the difference between the interest at the rate the note bore, and interest at the legal rate on the amount paid since the date of payment, and if the judgment is so modified there would be no issue remaining for a new trial. The plaintiff on oral argument consented that this modification might be made. Plainly, under the evidence the defendant is entitled to no other relief. The judgment is therefore directed to be modified as above indicated, and so modified it is affirmed. Respondent is entitled to his costs and disbursements on appeal.

BRONSON, BIRDZELL, and ROBINSON, JJ., concur.

CHRISTIANSON, J. (concurring). I agree with Mr. Chief Justice GRACE that the only question for the jury in this case was whether the defendant directed the plaintiff to apply the \$1,710 upon the note. Upon all other issues of fact there was no conflict in the evidence, and no room for different conclusions to be drawn by reasonable men. Furthermore the evidence was such that it is manifest that there could be no different result upon another trial. In other words the disposition made of the case in the opinion prepared by the Chief Justice is the most favorable to the defendant that could possibly be made upon another trial. And upon the oral argument plaintiff's counsel stated that in event this court should hold that the question as to the proper application of the \$1,710 was one for, and should not have been withdrawn from, the jury, that then the plaintiff, in order to terminate the litigation, would and did consent that the issue might be determined against it, and the judgment modified accordingly by this court. Hence I concur in the disposition made of this cause in the opinion written by the Chief Justice.

AASE ELLEFSON, Appellant, v. Nels Ellefson, Respondent.

(184 N. W. 990.)

Divorce — in granting divorce for incurable insanity, held proper to divide the property between plaintiff wife and the insane husband.

Plaintiff was granted a decree of absolute divorce from defendant on the ground of his incurable insanity. The court in its decree made a division of defendant's property between them, giving to plaintiff all of it except property valued at about Twelve Thousand (\$12,000.00) Dollars, which it permitted to remain in defendant's name, and as his portion of the property.

From the decree plaintiff appeals and assigns error in that the court did not decree her all of the property. It is *held* for reasons stated in the opinion that the decree was proper and without error.

Opinion filed October 19, 1921.

An appeal from the District Court of Sargent county, *Nuessle, J.*

Decree affirmed.

John A. Jorgenson, for appellant.

John W. Carr, for respondent.

GRACE, C. J. This was an action brought by the plaintiff against the defendant to obtain a divorce on the ground of his incurable insanity.

The material facts are as follows: Plaintiff and defendant intermarried in Norway in 1886, and they afterward removed to the United States and located in Sargent county, N. D. To the marriage were born seven children, all of whom are living with the exception of two, and all are of legal age except one.

In 1888 the defendant purchased the tree-claim rights of a third party to the southwest quarter of section 14, township 132 north of range 55, in Sargent county, N. D., and filed on the same as a homestead. In 1892 defendant purchased on crop payment the northwest quarter of the same section and later made full payment of the purchase price and received title thereto. In 1901 defendant was committed from Sargent county to the hospital for the insane at Jamestown. He escaped from there and

returned home, remaining there until January, 1903, when he was again committed to the said hospital, where he has ever since remained. It is claimed that his insanity is incurable.

Defendant was the owner of considerable personal property worth between \$2,000 and \$3,000, and \$2,000 in cash at the time of the trial. The homestead of about 160 acres at this time was worth about \$16,000, and the 160 acres which was purchased on contract was worth about \$12,000. Plaintiff at this time also appeared to have between \$2,000 and \$3,000 in cash and Liberty Bonds in her name.

The trial court granted the plaintiff a divorce and decreed to her all of defendant's property with the exception of the 160 acres which had been purchased on contract and which had been fully paid for by the defendant. In short, the trial court awarded her approximately \$20,000 and left in the name of the defendant the land above mentioned of the value of about \$12,000.

The only error assigned on this appeal is the refusal of the trial court to transfer the whole of the property to plaintiff instead of leaving in his name the northwest quarter of section 14, township 132, range 55. In this we are clear there is no error. The same rule we think would be applicable here as on division of property in a divorce proceeding based upon other statutory grounds for divorce than that of insanity. The trial court made what it thought was a fair division of the property in all of the circumstances of the case.

It would seem that it has exercised a wise discretion in the matter at one which should not be disturbed unless for more forceful reasons than have been presented to us. It is claimed, however, by the plaintiff, that all of her children signed a request that all of the property be transferred to their mother, the plaintiff. But notwithstanding this, the trial court thought it wise and just that a certain portion of the property should remain in the defendant's name, and we are unable to discover any good reason why its decree in this respect is not equitable and just. Certainly the amount left defendant will not be squandered, as it appears he will in all probability spend the remainder of his days in the hospital for the insane. There will also continue to be a guardian over his estate whether it be his wife, who has now procured a divorce, or some other competent person.

There is another very good reason why a portion of the property should be left in the name of the defendant. His estate, in the conditions

mentioned in the statutes, § 2579 of the C. L. 1913 as amended by chap. 103 of the Laws of 1915, chap. 144 of Laws of 1919, and other amendatory laws, if any, may be charged with the expense incurred by any county in the state for his treatment and maintenance in the hospital for the insane.

Hence the wisdom of the decree of the trial court requiring that a portion of the estate remain in defendant's name, so that in the event such estate is properly and legally charged with any of such expense there will be property out of which it may be paid. The entire record has been examined with care, and we find no error committed by the trial court.

The judgment is affirmed. Respondent is entitled to his costs and disbursements on appeal.

CHRISTIANSON, ROBINSON, BRONSON, and BIRDZELL, JJ., concur.

NORTHERN PACIFIC RAILWAY COMPANY, Respondent, v. W.
R. TUCKER, County Auditor of Cass County, Appellant.

(184 N. W. 983.)

Counties — act construed as limiting total taxes to one-third of combined levies for years 1918-1920.

Chap. 122, Session Laws of 1921, construed, concerning particular language, and, *held* to mean that the total amount of taxes levied for all purposes shall not exceed an amount equal to one-third of the total combined levies which were made for the years 1918, 1919, and 1920.

Opinion filed October 19, 1921.

Action in District Court, Cass County, *Cole*, J.

Defendant has appealed from an order and judgment of injunction.

Reversed.

George E. Wallace, for appellant.

Young, Conmy & Young, for respondent.

BRONSON, J. This is an action to enjoin the levy of certain taxes. The defendant has appealed from an order and judgment of injunction. The facts are stipulated. The material portions of chap. 122, Session Laws of 1921, read as follows:

"The total amount of taxes levied for any purpose, * * * shall not exceed an amount equal to one-third of the total combined levies which were made for the years 1918, 1919, and 1920."

One-third of the total county levy for Cass county, or the average during such years, is \$423,230. The total levy in Cass county for 1921 is \$392,289. One-third the bridge levy for Cass county, or the average during such years, is \$57,600. For 1921, the commissioners of Cass county have made a bridge levy of \$80,000. This alleged excess levy the plaintiff seeks to restrain. In effect, it contends that the quoted section means that the total amount of any tax levied for any purpose shall not exceed an amount equal to one-third of the total combined levies for such purpose in the years 1918, 1919, and 1920. In effect, the defendant contends that the section means that the total amount of taxes levied for all purposes shall not exceed an amount equal to one-third of the total of all levies made for the years 1918, 1919, and 1920. The plaintiff maintains that the language of the statute refers to specific statutory levies. The defendant claims that the statute deals with the total amount of the budget, and not with the individual items composing the budget. Upon processes of definitional analysis, the meaning of the statute does not appear clear. We are of the opinion, however, that the legislative intent may be fairly gleaned from the language used when considered in connection with cognate legislation. Reversing the language of the statute, it may be thus stated:

"One-third of the total combined levies for the years 1918, 1919, and 1920, shall be the limit of the total of taxes levied for any purpose."

If the words, "for any purpose," were eliminated, the meaning of the statute would appear clearer. If these words must be applied to a particular levy, such as a bridge tax, road tax, gopher tax, etc., or to a particular levy authorized by statute, then the statute is more restrictive than if otherwise applied to the total combined levies for all purposes. For instance, the total combined levies for Cass county for all purposes is within the limits prescribed by the statute. The particular bridge levy for Cass county is in excess of the limit. Again, if the statute be applied to a particular levy—even those limited or authorized by statute—it may be more

restrictive than if otherwise construed. For it might happen that, during the years 1918, 1919, and 1920, no levy for a particular purpose had been made at all, although authorized and limited by statute. Accordingly, the effect of the statute might be to abrogate the right to make any levy by reason of the failure during such years to make any levy. A legislative restriction upon a power or authority theretofore granted by legislation should not be imposed nor increased unless the legislative language and intent is clear so to do. Tax legislation enacted in 1919 changed methods of determining assessed value. Chap. 220, Laws 1919. These methods greatly enhanced assessed values. They operated to remove or far extend limitations (in amounts of moneys) upon levies as theretofore made by political subdivisions of the state. Accordingly, in a restrictive way, in 1919, a statute was also enacted (chap. 214, Laws 1919) which provides that the total amount of the taxes levied for any purpose for the years 1919 and 1920, etc., shall not exceed by more than 10 per cent. the amount that would be produced by the levy of the maximum rate upon the assessed valuation of 1918. Thereafter, the special session of the Legislative Assembly in 1919, re-enacted said chap. 214, and imposed, in addition, a penalty for its violation, and further enacted another statute reducing the levy and amount of state taxes 25 per cent. These acts serve to throw some light, though scant, upon legislative intent, concerning the levy and amount of taxes. The language of the statute speaks in terms of totals: "The total amount of taxes;" "the total combined levies." If a comma should be inserted after the word "taxes," the statute would read: "The total amount of taxes, levied for any purpose." Thus, the phrase, "levied for any purpose," considered in connection with the other language of the statute, might equally as well refer to an inclusive purpose or purposes, as to a particular purpose. We are of the opinion that no legislative intent can be deduced, either from the language used or, upon principles of construction, to abrogate the right to make a particular levy otherwise authorized by statute, as might occur under plaintiff's construction.

Accordingly, we are of the opinion that the language of the statute, considered in its entirety, and in connection with existing cognate legislation, was intended to apply to the total amount of the budget. In other words, the statute intends to mean as if it read: "The total amount of taxes, levied for all purposes of the political subdivision shall not exceed an amount equal to one third of the total combined levies," etc. No

constitutional questions have been presented or decided in this action. The action accordingly should have been dismissed.

It is so ordered, without costs.

CHRISTIANSON, ROBINSON, and BIRDZELL, JJ., concur.

GRACE, C. J., concurs in the result.

CHRIST MOEN and STEPHEN FAUST, Respondents, v. KILZER LUMBER COMPANY, Appellant.

(184 N. W. 989.)

Chattel mortgages — creditor attaching engine prior to filing of purchase-money mortgage held not subsequent creditor in good faith.

For the conversion of a Case engine plaintiffs bring this action and recover a judgment for \$400. and costs. The plaintiffs claim under a chattel mortgage. Defendant claims under an attachment which was levied prior to the filing of the mortgage. The attachment was for a debt which existed prior to the execution of the mortgage. Hence the lumber company is not a subsequent creditor in good faith and its claim does not take precedence over the mortgage. Judgment affirmed.

Opinion filed October 19, 1921.

Appeal from the District Court of Dunn county, *Berry, J.*

Affirmed.

T. F. Murtha and *H. L. Malloy*, for appellants.

It is plain that the mortgage should not have been received for record by the Register of Deeds of Dunn county. The recording of said mortgage did not constitute constructive notice of defendants. *Pease v. Magill*, 17 N. D. 166. (cit. 167).

"Defendant's chattel mortgage was not properly witnessed or acknowledged so as to entitle it to be filed; and hence the filing of the same did

not operate to give constructive notice thereof." *Banbury v. Sherin*, (S. D.) 55 N. W. 723; 23 C. J. 765.

"Under chap. 5594, Comp. Laws 1913, an unrecorded deed is void as against a judgment lawfully obtained against the person in whose name the title to real property appears of record. And the certificate of sale issued to a purchaser upon a sale legally held under an execution issued upon such judgment is valid as against an unrecorded deed, of which the judgment creditor and purchaser had no notice." *McCoy et al. v. Davis et al.*, 38 N. D. 328.

Thorstein Hyland, for respondents.

As the appellant did not move for a new trial in the court below, the same is not subject to review by the Supreme Court. *Morris v. Mpls. & St. Paul Railway Co.* (N. D.) 155 N. W. 861.

Defendant did not renew his motion for a directed verdict at the close of the case, which is necessary in order to raise the questions in the Supreme Court. *Kennedy v. State Bank* 22 N. D. 69; *Wood v. Campbell* 28 S. D. 197; 132 N. W. 785.

The Statute also provides how you may serve Summons. § 7427 Revised Code.

The return must show clearly the manner in which service was made. 22 Cyc. 503 and the cases cited.

A statement in return that the copy was served is insufficient. *Graves v. Robertson*, 22 Texas 130.

There is sound reason why the mode of serving summons must be distinctly stated. *Weaver v. Springer*, 2 Miles (Pa.) 42; *Harris v. Sargeant* (Oregon) 60 Pac. 608.

There is nothing in the records to show that service was made by a competent person. He may have been a minor and service cannot be made by minors. § 7427 Revised Code.

Even if statute is silent service cannot be made by minors. *Gilson v. Kuenert*, (S. D.) 89 N. W. 472.

ROBINSON, J. This is an appeal from a judgment of \$400 and costs against the defendant for the conversion of a J. I. Case engine. In May, 1919, at Beulah, the plaintiff sold the Case engine to Sam Crosby, and for the purchase price Crosby made to them a promissory note and a mortgage on the engine for \$700. The mortgage was duly executed,

and on December 8, 1919, it was filed in the office of the proper register of deeds. In November, 1919, and before the filing of the mortgage, defendant commenced, or attempted to commence, an action against the mortgagor, obtained an attachment, and levied the same on the engine. Then he obtained a judgment and an execution under which the engine was offered for sale and sold to the defendant. In this action the judgment and the execution was justly held void for the reason that the proof failed to show any service of the summons; but if the judgment and the execution were valid that would be of no avail to the lumber company, because it is not in position to assert any rights as a subsequent bona fide purchaser or a subsequent creditor. Its action against the mortgagor is based on two promissory notes made on December 3, 1918. Hence it cannot be either a subsequent bona fide purchaser or a subsequent creditor, and the filing of the mortgage is of no consequence. This case is ruled and governed by a well-considered decision of this court which is directly in point. *Union National Bank v. Oum*, 3 N. D. 208-211, 54 N. W. 1034, 44 Am. St. Rep. 533. The reason is that a subsequent creditor parts with his property on the apparent responsibility of his debtor by reason of property then owned and possessed by him. When the lumber company trusted Crosby to the amount of \$400, the presumption is they knew of his circumstances and knew he had the means to buy and pay for the Case engine. That was notice sufficient to put them on their guard. They knew that if he bought such an engine or any property of like value it would be subject to a mortgage or a lien for the purchase money. Good faith consists in an honest intention to refrain from taking an unconscionable advantage of another, even through the forms and technicalities of the law.

Judgment affirmed.

GRACE, C. J., and CHRISTIANSON and BIRDZELL, JJ., concur.

BRONSON, J. (specially concurring). I concur in an affirmance upon the ground that upon the record, the lien of the chattel mortgage was prior to that of the attachment proceedings. *Union Nat. Bank v. Oium*, 3 N. D. 193, 54 N. W. 1034, 44 Am. St. Rep. 533; *Petrie v. Wyman*, 35 N. D. 126, 144, 159 N. W. 616.

KASBO CONSTRUCTION COMPANY, a corporation, Appellant, v.
MINTO SCHOOL DISTRICT OF CAVALIER COUNTY,
North Dakota, a corporation, Respondent.

(184 N. W. 1029.)

Schools and school districts — in action against district for balance for building, evidence held to show defective performance.

1. Plaintiff's action is to recover the balance claimed to be due under the terms of a written contract, and for extras alleged to have been furnished for the construction of a building to wit: a school house. The defendant interposed a defense to the effect that the building was not constructed in accordance with the terms of the contract, plans nor specifications; that the workmanship was poor, etc. The evidence abundantly established that the building was not so constructed, and that it was very defective. The jury returned a verdict in defendant's favor for a dismissal of the action, and judgment was entered accordingly.

Denial of motion for new trial held not error.

2. Thereafter, plaintiff made a motion for a new trial which was denied and an order to that effect entered, and in this it is *held* there was no error.

Opinion filed October 20, 1921.

Appeal from an order denying a motion for a new trial, *Burr, J.*

Order affirmed.

G. Grimson, for respondent.

"Where an instrument has been executed by only a portion of the parties between whom it purports to be made, it is not binding on those who have executed. * * * The reason for holding the instrument void is that it was intended that all parties should execute it and that each executes it on the implied condition that it shall be executed by the others and therefore that until executed by all it is inchoate and incomplete and never takes effect as a valid contract and this is especially true where the agreement expressly provides or it is manifestly intended that it is not to be binding until signed." 13 C. J. 305; *Wilcox v. Saunders*, 4 Neb. 569; and cases cited in notes 85, 13 C. J. 306.

"One party to a contract cannot alter its terms without the assent of the other. The minds of the parties must meet as to the proposed modification." 13 C. J. 591.

"In an action for alleged breach of contract it is error to instruct that if the plaintiff suggested modification and the defendant failed to answer him, he agreed thereto and the contract as modified was the true contract, since one need not answer and cannot be bound in the absence of actual consent." "One of joint parties cannot extend the time for performance without the consent of his co-party." 162 Pac. 845; *Northwestern F. & M. Ins. Co. v. Connecticut F. Ins. Co.* 105 Minn. 117 N. W. 825; *Molostowsky v. Grauer*, 113 N. Y. Supp. 679; Note 7, 13 C. J. 591; *U. S. Central C. v. Good*, 120 Fed. 793; *Ehrman v. Rosenthal*, 49 Pac. 460; *Tutt v. Davis*, 110 Pac. 690; *State Bk. v. Heinse*, 160 N. W. 903; *Blake v. Osmundson*, 159 N. W. 766; *Pardoe v. Jones*, 143 N. W. 405; *White Pine Lmb. Co. v. Mfg. Co.* 158 N. W. 124; note 37, 13 C. J. 601.

"A new trial will not be granted merely because the losing party or his attorney did not exercise prudence or erred in judgment and can probably make a better case or defense on another trial." 29 Cyc. 852; *Fincher v. Malcolmson*, Cal. 38, 30 Pac. 835; *Holderman v. Jones*, 52 Kan. 743; 34 Pac. 352.

"Suprise at the admission of proper evidence is generally not ground for a new trial. * * * Surprise at the exclusion of inadmissible evidence is seldom ground for a new trial and this rule applies to the exclusion of testimony of an incompetent witness and to the rejection of documentary evidence or secondary evidence for the introduction of which no proper foundation has been laid." 29 Cyc. 862, and cases cited in notes 28 and 30.

"The measure of damage occasioned by failure to perform a building contract in the case of substantial performance is the difference between the value of the work done or the building erected and the value of that which was contracted for." 9 C. J. 810.

"The fundamental idea running through all of the case law is that an owner is entitled to the performance of a contract by the contractor and where the contract is breached is entitled to recover damages that will be a just equivalent for the breach." *Waller v. Huggins*, 148 S. W. 148.

"The question ordinarily is how much less is the building fairly worth than it would have been if the contract had been performed." *White v. McLaren*, 151 Mass. 553; *Gibson v. Harlan*, 13 Tenn. 440.

"In an action for a breach of building contract for alleged improper construction the owner's measure of damages is the difference between the value of the building when constructed and what its value would have been if constructed according to the contract and with reasonably sound material and reasonably skillful labor." *Hartford Mill Co. v. Hartford Tobacco Warehouse Co.*, 121 S. W. 477 (Ky.).

"The measure of damages is the difference between the value of the house as finished and the house as it ought to have been finished under the contract, plans and specifications." *Small v. Lee Bros.* 61 S. E. 831 (Ga.); *Norcross Bros. v. Vose*, 81 N. E. 468; *Fleming v. Lunsford*, 163 Ala. 540; 50 So. 921.

Sinness & Duffy, for appellant.

"If a person accepts and adopts a written contract, even though it is not signed by him, he is deemed to have assented to its terms and conditions and to be bound by them." 6 R. C. L. 642.

"Signature is not always essential to the binding force of an agreement. The object of a signature is to show mutuality or assent, but these facts may be shown in other ways; and unless a contract is required by statute or arbitrary rule to be in writing, it need not be signed, provided it is accepted and acted upon. * * * Further it is competent for the parties to adopt it as their contract without signing it, provided their intention to do so is clear." 13 C. J. 303; *Ramsay Realty Co. v. Ramsey* (Iowa) 113 N. W. 468; *Fortham v. Peters* (Ill.) 69 N. E. 97; *Kim v. Walters*, (S. D.) 133 N. W. 277; *Reed v. Coughran* (S. D.) 11 N. W. 550; *Henderson v. Henderson* (Iowa) 114 N. W. 178; *Muscatine Water Works Co. v. Muscatine Lumber Co.* (Ia.) 52 N. W. 108; *Merritt v. Adams Co. Land Co.* 29 N. D. 496; *Griffin v. Bristle* (Minn.) 40 N. W. 523; *Hefferman v. Davis*, (Cal.) 140 Pac. 716; *Bloom v. Hazzard*, (Cal.) 37 Pac. 1037; *Leonard v. Howard*, (Ore.) 135 Pac. 549; *Ullsberger v. Meyer*, (Ill.) 75 N. W. 482; *McPherson v. Fargo*, (S. D.) 74 N. W. 1057.

The Court said, "If it (the school building) cannot be remedied, then the defendant is entitled to a judgment for the amount it paid." That is not the law. *Handy v. Bliss*, 204 Mass. 513; 90 N. E. 864; 134 Am. St. Rep. 673.

GRACE, C. J. This is an action to recover \$3,486.40, the balance of the contract price about \$9,241.40, and \$877.68 for alleged extra work,

labor, and material for the construction of a certain schoolhouse for defendant. The defendant paid about \$7,000 of the contract price.

The defendant admits that plaintiff erected and constructed such building, but denies that it was constructed and finished according to the plans and specifications, and by appropriate pleading sets up two separate counterclaims aggregating \$9,000. The issues were submitted to a jury and resulted in a verdict in favor of defendant for a dismissal of the action. Plaintiff made a motion for a new trial which was denied, and from the order denying new trial plaintiff appeals and assigns 7 errors based upon alleged erroneous instructions by the court and 28 specifications of the insufficiency of the evidence to sustain the verdict.

The material facts necessary to be stated are as follows: The defendants published notices for bids for the construction of a schoolhouse, according to plans and specifications, to be erected in Minto township in Cavalier county. On about April 1, 1918, at a meeting of the school board, it let the contract for the construction of the building to the plaintiff. At that time the terms of the contract were discussed between the parties and a written contract, Exhibit C, was entered into and signed by both parties. It is of too great length to be set out in full and it is needless to do so.

Exhibits D and E, specifications and plans, are part of the contract. There is another alleged contract, Exhibit A, which plaintiff contends is the contract under which the work was performed. It claims that though this contract is unilateral, having been signed by the plaintiff only, nevertheless it was sent to the defendant and retained by it. Plaintiff claims that the defendant agreed that the work should be done under the latter contract. There is positive testimony, however, that Exhibit C was the contract agreed upon and signed by both parties. After its completion, Kasbo took it with him for the purpose of making copies of it and was to return it. At the trial plaintiff attempted to introduce Exhibit A in evidence. It was excluded, and properly so, as it never was accepted nor approved by the school board. It was a contract materially different from Exhibit C. Furthermore, the following stipulation was made in open court between the plaintiff and defendant which was dictated by Mr. Devaney, one of plaintiff's attorneys:

"It is stipulated by and between the plaintiff and defendant that Exhibit C is the original contract entered into by and between plaintiff and defendant on or about April 1, 1918, excepting therefrom the por-

tions which are stricken out with a red pencil and including those portions contained in brackets and green ink which the plaintiff made in the contract after the contract was reduced to writing, and signed therein approved and consented to by the defendants. It is further stipulated that Exhibit F is a true copy of said original agreement and may be used upon the trial of this case for any purpose for which the original may be used. It is further stipulated that Exhibit D is the specifications referred to in said contract, and it should be admitted in evidence as such and as the specifications according to which the schoolhouse was to be built, and that Exhibit E may be admitted in evidence as the original plans of the schoolhouse to be built by the plaintiff under this contract and according to which plans it was to be built."

Certainly and especially in view of the above stipulation, there was no error in excluding Exhibit A. Exhibit C, as it originally existed before the changes inserted into it by Kasbo and which is represented by Exhibit F, is the contract and the only contract between the parties, and the trial was had on that theory, and the plaintiff cannot now change its position. The 28 assignments of error relative to the insufficiency of the evidence to sustain the verdict need no lengthy discussion. If there is competent evidence in the record which will support the verdict, then all errors based upon the insufficiency of the evidence must be considered of no merit. An examination of the evidence not only discloses that there is some competent evidence, to support the verdict, but that there is an abundance of it. It is entirely unnecessary to set it forth in detail. It is sufficient to state that there is an abundance of evidence to show that the foundation of the building was improperly and poorly constructed; that the cement and gravel used therein were not in proper proportion nor in compliance with the specifications, and as a result, according to the testimony of Mr. Shannon, an architect of 25 years' experience, who examined the building, the foundation, and basement walls, it appears that the walls were soft; that they were very irregular and not straight and out of plumb in places; that the concrete was soft. He found a crack in the northeast corner and one in the southwest corner, stating that these were ruptures in the wall. In explaining what he meant by the walls being soft, he stated, in substance, that they are not of the density that concrete usually is; that it would rub off by hand, or pieces could be taken out of it. He stated that the walls were not safe nor durable and that as an architect he would not allow such a wall, but

would condemn it, have it taken out and another put in. He stated further that the rafters, ceiling, and joists had sagged; that they were not properly braced; that the floor had sagged some; that the frame at the plate line was very roughly thrown together and not put in according to plans and as a result seems to let the building spread; that the cornices were open and let the daylight in; that some of the wainscoting was out of plumb; that the outside walls were not in plumb.

There is much more evidence by the same witness largely to the same effect. He further testified as follows:

Q. What difference in money in your opinion would there be between the building as it stands now, as erected by Mr. Kasbo, and the building as it should have been erected under that contract? A. \$4,500.

He testified further to the effect that the building could not be repaired and put in condition as required by the specifications for \$4,500; that there was no way that the wall could be repaired and made to stand up according to the plans and specifications; that it would have to be wrecked and rebuilt; and that in his opinion it would cost, to take out and rebuild a foundation for a new building, about \$3,000. In substance his testimony shows that to make the building, aside from the foundation or basement walls, comply with the plans and specifications, it would have to be wrecked and rebuilt, and that this could not be done for \$4,500.

The evidence of Shannon is substantiated by that of other competent witnesses. The evidence is abundant to sustain the verdict of the jury. If the verdict of the jury had been for a much larger amount, there is abundant evidence in the record to have sustained it.

The several assignments of error predicted upon alleged erroneous instructions have been carefully analyzed and are of no real substance, and are largely without merit. The parts of the instructions from which excerpts are taken are entirely too lengthy to be here set out and none of them merit discussion. It will, however, do no harm to briefly discuss the only one of importance. It is claimed that it does not state the true measure of damages. It is as follows: "It would be your duty to deduct the costs of supplying the defects." This is but an excerpt from the following portion of the instructions:

"To entitle the contractor to recover on a building contract, which has not been fully complied with by him, when he admits there are defects but claims the contract was substantially performed, it must appear and

he must show that not only he endeavored to perform it in good faith, but also that he has done so, except as to unimportant omissions or deviations which are the result of mistake or inadvertence, and were not intentional, and which are susceptible of remedying so that the other party will get substantially the building he contracted for. For example, if the building is substantially erected, but the contractor has failed through mistake or inadvertence or some other reason that is not intentional, to give the required thickness of painting, and it is shown how much it will cost to supply this defect and if the defects were supplied, the building would be substantially correct, then he would be entitled to recover, but it would be your duty to deduct the cost of supplying the defects. I mention painting, not that it is proof of a defect, but merely as an illustration."

Certainly there is no error in giving that instruction. The following is complained of:

"If the building is fairly in compliance with the contract, but has defects which should and can be remedied, then the defendant has the right to deduct the cost of remedying from the contract price and if then it has overpaid the plaintiff, it is entitled to judgment for the difference."

If it cannot be remedied, then the defendant is entitled to judgment for the amount it paid, and if it can be remedied, then deduct from the contract price \$9,241.40, and from the proved extras which ought to be paid for, the amount necessary to remedy it, and if the remainder be less than the amount paid, then the defendant is entitled to judgment for the difference. Even though the foregoing instruction be considered by itself, and not in connection with the instructions as a whole, it is clear that the giving of it was not error, and, if so, the error was harmless, for certainly it states the correct rule of damages.

In 9 C. J. p. 110, the rule is thus stated:

"The measure of damages occasioned by failure strictly to perform the building contract is, in the case of substantial performance, the difference between the value of the work done or the building erected and the value of that which was contracted for."

In *Walter v. Huggins*, 164 Mo. App. 69, 148 S. W. 148, it is stated:

"The fundamental idea running through all of the case law is that an owner is entitled to a performance of the contract by the contractor, and, where the contract is breached, is entitled to recover damages that will be a just equivalent for the breach."

In *White v. McLaren*, 151 Mass. 553, 24 N. E. 911, it is stated that—
“The question ordinarily is, how much less is the building fairly worth than it would have been had the contract been performed?”

In *Gibson v. Carlin*, 13 Lea (Tenn.) 440, it is stated that—
“The measure of damages is ordinarily the difference between the contract price and the value of the work as done for merely inferior work, and for defective work the cost of replacing it so as to make it equal to the work contracted for.”

In *Hartford Mill Co. v. Hartford Tobacco Warehouse Co.* (Ky.) 121 S. W. 477, it is stated that—

“In an action for breach of a building contract for alleged improper construction, the owner's measure of damages is the difference between the value of the building when constructed and what its value would have been if constructed according to contract, and with reasonably sound material and reasonably skillful **workmanship**.”

In *Small v. Lee & Brothers*, 4 Ga. App. 395, 61 S. E. 831, it is stated that—

“The true measure of damages is the difference between the value of the house as finished and the house as it ought to have been finished under the contract, plans, and specifications.”

The language of the instruction complained of stated the rule enunciated in those cases. The language used is different than in those cases, but in reality it states the same rule, for when defects, etc., are supplied, the building would be according to contract.

The instructions were not erroneous and prejudicial for failure to set forth the law relative to settlement or adjustment.

The plaintiff contends that after the completion of the schoolhouse the defendant accepted it by taking possession of it and using it. There is no merit in this contention, as there was no other proper place where a school could be held, and of necessity defendants were compelled to use the building in its defective condition, and in doing so it waived none of its claims or causes of action, if any, against plaintiff.

There is no reversible error in the record, and the order appealed from should be affirmed.

It is affirmed.

Respondent is entitled to its costs and disbursements on appeal.

BIRDZELL, ROBINSON, BRONSON, and CHRISTIANSON, JJ., concur.

JOHN LYNCH, L. M. BYRNE and W. H. BROWN, Petitioners, v.
THE DISTRICT COURT OF WARD COUNY, NORTH DA-
KOTA, the HON. JOHN C. LOWE, Judge thereof, and E. F.
TUEPKER, Respondents.

(185 N. W. 303.)

Prohibition—lies only when inferior court or body has no jurisdiction, or is about to act in excess of jurisdiction

A writ of prohibition is not a process for the correction of errors. Such writ lies only when there is no jurisdiction in the inferior court or body or when the inferior court or body is about to act in excess of jurisdiction.

Opinion filed October 21, 1921.

Original application to the Supreme Court for the issuance of a writ of prohibition.

Writ denied.

Fisk, Murphy & Nash, for petitioners.

Funke & Eide, for respondents.

ROBINSON, J. This is an application for a writ of prohibition to the district judge of Ward county to restrain him from proceeding under a writ of certiorari by him issued to the respondents. The petitioners are the police magistrate and police officers of the city of Minot. On May 16, 1921, a stranger named J. W. Baker made before the magistrate an affidavit:

"That stolen property, to wit, a Buick car, is present upon the following described premises: Lots 17 and 18 of block 21 in Brooklyn addition to the city of Minot—that the keeper of said stolen property is to this affiant unknown."

The affidavit does not state that Baker knows anything of the car, its ownership, its value, or that he has any interest in the matter. However, the magistrate issued a warrant "to search the above-described

premises for said stolen car and to bring it forthwith before me (the magistrate) at my office in the city of Minot." Under that warrant the chief of police made return thus:

"I made search of the premises and took into my custody one Buick roadster and one Buick Six touring car."

Then one Della Marsh proved that she owned the Buick Six and it was released to her. Now it appears the Buick roadster was taken from the possession and the garage of E. F. Tuepker, and on his affidavit the writ of certiorari was issued. The affidavit was made on August 11, 1921, and it shows, among other things, that the police officers took and retained possession of said roadster and used it as their own car, and that they failed to make an inventory of the car and failed to deliver any inventory to said Tuepker, from whose possession he took it; that the magistrate failed to take any testimony in regard to the facts stated in such warrant or to reduce the same to writing, and that in several other respects the magistrate and police officers wholly failed to comply with the law; also that the police officers did remove from the car the license tags and an extra tire, which they used on other automobiles.

The writ of certiorari commands respondents to certify and return to the district court of Ward county all the records and proceedings in regard to the Buick roadster, and in the meantime to desist from using the same. By statute—§ 8445, Comp. Laws 1913 (Laws 1919, c. 76)—the writ of certiorari may be granted by the Supreme Court and any district court when inferior courts, officers, boards, or tribunals have exceeded their jurisdiction and there is no appeal, nor, in the judgment of the court, any other plain, speedy, and adequate remedy, also when it is deemed necessary to prevent a miscarriage of justice. If it appeared to the district judge, as we presume it did, that the search warrant was issued without a proper showing, that no proper return was made to the magistrate or judgment rendered by him, and that the parties taking the roadster were using it as their own, that was cause sufficient for issuing the writ. By the Constitution unreasonable searches and seizures are forbidden. A warrant of seizure may not issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person or thing to be seized. § 18. Respondents object that certiorari is not the proper remedy; and that a replevin suit would be a much better remedy, but to such a suit a valid objection would

be that it is a collateral attack on the official action of the magistrate, while the certiorari affords the only direct, plain, speedy, inexpensive, and adequate remedy.

Hence the petition for the writ of prohibition is denied and dismissed.

GRACE, C. J., concurs in the result.

CHRISTIANSON, J. (concurring). Our statutes provide:

"The writ of prohibition is the counterpart of the writ of mandamus. It arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person." § 8470, C. L. 1913.

"It may be issued by the Supreme or district court to an inferior tribunal, or to a corporation, board or person in all cases, when there is not a plain, speedy and adequate remedy in the ordinary course of law." § 8471, C. L. 1913.

It is patent that, under these provisions, prohibition lies only when there is no jurisdiction in the inferior court or body, or when the inferior court or body is about to act in excess of jurisdiction. The question here is: Do the facts presented by the petition in this case show that the district court has no jurisdiction or has or is about to exceed its jurisdiction? I think not.

"Jurisdiction does not depend upon the correctness of the decision made. * * * 'Jurisdiction of the subject-matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power. It is not confined to cases in which the particular facts constitute a good cause of action, but it includes every issue within the scope of the general power vested in the court, by the law of its organization, to deal with the abstract question. Nor is this jurisdiction limited to making correct decisions. It empowers the court to determine every issue within the scope of its authority, according to its own view of the law and the evidence, whether its decision is right or wrong.' *Foltz v. St. Louis & S. F. Ry. Co.*, 60 Fed. 316, 8 C. C. A. 635." *Christenson v. Grandy*, 180 N. W. 18, 22.

The district court has jurisdiction to issue writs of certiorari to justices of the peace and other inferior courts, officers, boards, or tribunals. Const. N. D. § 103; § 8445 C. L. 1913.

The district court also has jurisdiction over proceedings wherein a

search warrant has been issued by a justice of the peace or other magistrate. Our statutes provide:

"A search warrant must be executed and returned to the magistrate by whom it was issued within ten days." § 11139, C. L. 1913.

"The officer must forthwith return the warrant to the magistrate, and deliver to him a written inventory of the property taken." § 11141, C. L. 1913.

"The magistrate must annex together the depositions, the search warrant and return and the inventory, and return them to the next term of the district court having authority and jurisdiction to inquire into the offense in respect to which the search warrant was issued, at or before its opening on the first day." § 11146, C. L. 1913.

If the papers required to be returned by a magistrate to the district court are not so returned, there can be no question but the district court has power to require the magistrate to forthwith transmit such papers to the district court. When the magistrate makes such return to the district court, of course, jurisdiction is transferred to that court, and it becomes vested with jurisdiction in the matter, and doubtless has power to make proper disposition of the property seized under the search warrant. If it should appear that the return made is incomplete and that the magistrate has not returned all the papers, the district court doubtless has power to require the magistrate to make a more complete return.

From the petition for the writ of prohibition in this case it appears that the search warrant was issued by the justice of the peace on May 16, 1921, and that it was executed by the police officer and returned by him to the justice of the peace on that same day; also that "the search warrant and affidavit" on which it was issued were returned to and filed with the clerk of the district court on August 10, 1921. In these circumstances it seems to me that a writ of prohibition will not lie. Such writ is not a process for the correction of errors. Even the improper decision of a jurisdictional question is not ground for the writ where the inferior court had jurisdiction to determine that question. 23 A. & E. Ency. L. 203. The writ does not lie merely because the inferior court makes or is about to make an erroneous decision relating to the remedy where it has general jurisdiction of the subject-matter and the remedy which is being invoked.

Spelling says:

"The plain import of all the authorities is that, if the inferior tribunal

have jurisdiction to issue the writ, or make the order, a mistaken exercise of the jurisdiction, or a misapplication of this acknowledged jurisdiction, even though the case made by the petition is fatally defective, will not justify a resort to the extraordinary process of prohibition." Spelling, Extr. Relief, § 1728.

In the American & English Encyclopedia of Law (23 A. & E. Ency. L. pp. 200-202) it is said:

"Where the inferior court has jurisdiction of the matter in controversy, prohibition will not lie. The writ does not lie to prevent a subordinate court from deciding erroneously, or from enforcing an erroneous judgment in a case in which it has a right to adjudicate, and it matters not whether the court below has decided correctly or erroneously; its jurisdiction of the matter in controversy being conceded, prohibition will not lie to prevent an erroneous exercise of that jurisdiction. The exercise of power which it is sought to prohibit must be wholly unauthorized by law. Mere errors or irregularities in the proceedings which do not go to the jurisdiction will not be considered upon an application for a writ of prohibition. The sole question is as to the jurisdiction of the inferior court to take the proposed action, and the merits of the action will not be considered."

I express no opinion as to whether certiorari will lie to review the proceedings had before, and the determination made by, a magistrate on a search warrant, and whether it would be error for a district court to make or attempt to make such review.

BIRDZELL and BRONSON, JJ., concur with CHRISTIANSON, J.

BOOKE & OLSON, co-partners, Appellants, v. JOHN BARTON PAYNE, as Agent of the President of the United States, Respondent.

(184 N. W. 803.)

Carriers—when furnishing facilities and utilities for reception of cattle carrier must have same suitable and reasonably safe.

1. It is the duty of a carrier, as an incident to its business of

transporting livestock, when it tenders facilities and utilities for the reception of cattle preparatory to shipment, to furnish the same in a suitable and reasonably safe condition.

Carriers — carrier's breach of duty and contributory negligence as to stock lost in wandering into reservoir before shipment held for the jury.

2. Where a carrier maintains stockyards and also a plot of ground upon which cattle are customarily held preparatory to shipment and, where prospective shippers are directed by the carrier to feed, water and hold their cattle upon such plot of ground preparatory to and while waiting shipment by reason of occupancy of the stockyards, and where, while there, 60 head of cattle wander through unprotected openings in small banks of an artificial reservoir there maintained by the carrier, and off steep banks into an open space of thin ice and deep water, occasioning the loss of 44 head, it is *held* that the carrier's breach of duty and the shippers contributory negligence were questions of fact for the jury.

Opinion filed Oct. 5, 1921. Rehearing denied Oct. 29, 1921.

Action in District Court, Stark County, *Crawford, J.*

From an order granting judgment notwithstanding the verdict, the plaintiffs have appealed.

Reversed and judgment ordered upon the verdict.

Simpson & Mackoff, and *S. Pomerance*, for appellant.

Young, Conmy & Young, for respondent.

Statement

BRONSON, J. This is an action against a common carrier to recover damages for negligence resulting in the loss of some 44 head of live stock. Upon trial, the jury returned a verdict in favor of the plaintiff for \$2,640. Thereafter the trial court, upon motion made, ordered judgment notwithstanding the verdict for the defendant. From the judgment entered accordingly, and from the orders made therefor, the plaintiffs have appealed. The record discloses evidence as follows:

In November, 1919, the plaintiffs, as co-partners, were engaged in the cattle business and were operating a ranch some 25 miles south of Belfield. On November 15, 1919, they made written order for six cars

to the defendant carrier, then under federal control, for the shipment of cattle from Belfield, N. D., to Steele, N. D., to be furnished on November 25, 1919. On that day they called, over the telephone, the agent of the carrier at Belfield. They were advised that the cars were there. They told the agent that they would be there upon the 28th. The agent responded that this would be all right. On November 26, 1919, the plaintiffs, with two assistants, left the ranch with some 260 cattle. During the first two days they approached within $2\frac{1}{2}$ miles of Belfield. On the morning of the third day, between 9 and 10 (November 28th), they arrived at Belfield. The railway facilities at Belfield for receiving and loading cattle consisted of stock pens and chutes along the right of way adjacent to the track. There was one large pen, having a capacity of about 100 head, for mixed cattle, and smaller pens. In the whole stockyards there could be placed and fed therein properly between 150 and 200 head of cattle. In order to drive into the smaller pens, it was necessary to drive through the large pen. Connected with these pens are two loading chutes. On the morning when the plaintiffs arrived there were 56 head of horses in the main pen of this stockyard. They had been placed there by the owner, one Mullaney, about 8 a. m. of that day, and remained there throughout the day, excepting about 10 head, cut out in the afternoon. South of these stockyards and of the right of way the defendant carrier owned a considerable strip of land adjacent to the right of way, extending eastward some 1,000 feet to the townsite. Upon this strip and partly upon the right of way, eastward of these stockyards some 700 feet, it had constructed, and for several years had maintained, a reservoir for purposes of securing water for locomotives, etc. This reservoir was 648 feet long, 130 feet wide, and about 16 feet deep. It extends north and south; the north end being some 100 feet from the main railway track. The dirt excavated was thrown upon the sides about, forming so-termed "spoil banks" 14 to 15 feet high. At the southern end there were two openings between these "spoil banks," one where an inlet of a natural creek exists, and the other at the southwesterly corner. At the north end there are likewise two openings, one for an outlet or overflow into this natural creek, some 20 feet in width, the other a smaller opening on the north side.

These openings at the north end are upon the railway right of way. The "spoil banks" set back so that there are about 5 feet of natural ground between them and the banks of the reservoir. The

banks are constructed upon a 1 to 1 slope. The land about this reservoir is open ground. It was the custom for people who had live stock for shipment, awaiting shipment, to graze and hold them on the particular railway lands southeast of the reservoir. Likewise the agent of the carrier admitted, although otherwise testifying, that it was customary to put cattle brought in for shipment in the stockyards. When the plaintiffs came with their cattle near the stockyards they discovered the horses therein. The day was cold, about 15 degrees below, with a cold breeze from the northwest. It had been cold for several days. There was not room for all of their cattle in the yards. One of the plaintiffs saw the agent. He advised them that the cattle were there, that they wanted to ship out, and that there were horses in the corral. Thus he testified:

"Well he (the agent) says to keep them over there handy and just pointed out. He says to keep them handy; that he thought along about 12 or 1 o'clock there would be an engine along to load us." "I wanted to know where to go. It was a cold day. If I could have got them in the corral there would be some shelter, that shed on the west away from the wind; and he said to keep them over handy, so I took them right on the south just about where he directed me; on the southeast corner of the reservoir, there are some high dirt piles." "Just about where he pointed to keep them handy."

Then he testified that he took the stock over to the place where he was directed; that the agent told him to take the cattle over on the east side of the reservoir where that little creek was and water them; that he could get water there and also there was a little shelter from the dirt piles; that then they proceeded to purchase hay, to dump it on the ground against the reservoir, and to feed it to the cattle; that they found water in this creek against the reservoir. They cut holes in the ice in several places so that the cattle could eat, walk down, and drink also. The ice on this creek was about one foot thick. The water in this creek in some places was two or three feet deep. They saw the openings in the "spoil banks" in the southeast and southwest corners because they went that way and were right near. There were four of them in charge of the stock until about the dinner hour. Then three of them, leaving one La Due, a boy 16 or 17 years old, in charge, proceeded on horseback to town for dinner. The cattle were about four blocks west of Main street, about 30 or 40 rods from the main part of town, as one of the

plaintiffs testified. They were gone about 20 minutes or so. On their way back from dinner they met La Due, proceeding on foot for his dinner. One of them hollered that something was wrong with the cattle; they went to the north end of the reservoir and discovered that some 60 head of cattle had gone through the opening there, and were in the water at the north end from the bank for a distance of 30 feet or so. Two boys, witnesses for the defendant, testified that the cattle went through the opening between the "spoil banks" at the northeast corner, the overflow outlet. Help was summoned, and after some three hours effort the cattle were extricated from the water. Six were then dead; others died during the day. The cattle remaining were shipped to Steele on the following day. More of the inundated cattle perished, although given good care. In all, 44 were lost. These openings at the north end of the reservoir were not protected by any fence or barriers. They were situated upon the railway right of way. Prior to the loss of the cattle the plaintiffs did not know of these openings. Then (November 28, 1919), the reservoir was well covered with thick ice, excepting at this place where the cattle got in the water. There, as one witness testified, he never saw the water frozen over completely. He had lived about 300 feet from the reservoir for three or four years, and had helped pull out these cattle. Another witness who assisted in taking out the cattle testified that the water in the reservoir freezes to the ordinary depth of water in creeks and open watering places in that locality, excepting that the northeast corner does not freeze as hard; that there was a thin scum of ice over that particular portion; that he thinks perhaps they tapped a spring, in constructing the reservoir, that came from the little stream there. He was familiar with the ground before the construction of the reservoir, and he remembers a large spring formerly to the north of the reservoir. The plaintiffs testified that there was not much ice where the cattle fell in the water, and that it was not possible for them to crawl out of such place.

The plaintiffs, in their pleadings and contentions upon the record, have predicated negligence of the carrier through its failure to have proper room and place for receiving and loading the stock, in directing and permitting the stock to be held in the vicinity of the reservoir, and in failing to properly safeguard the reservoir and the place where the cattle were held.

Decision

The evidence in the record favorable to the plaintiffs has been so stated for the reason that the issues of fact involved have been determined by the verdict of the jury adversely to the testimony favorable to the carrier. *First State Bank v. Kelly*, 30 N. D. 84, 98, 152 N. W. 125, Ann. Cas. 1917D, 1044; *Dubs v. Nor. Pac.*, 171 N. W. 888; *Jackson v. Grand Forks*, 24 N. D. 617, 140 N. W. 718, 45 L. R. A. (N. S.) 75.

The general rule undoubtedly is that it is the duty of the carrier, as an incident to the business of transporting cattle, to furnish suitable stockyards for receiving and delivering such cattle both at the point of shipment and of destination. 10 C. J. 79, and cases cited; *Hutchinson on Carriers* (3d ed.) § 510. As Justice Harlan stated in *Covington Stockyard Co. v. Keith*, 139 U. S. 128, 11 Sup. Ct. 461, 35 L. ed. 73:

"When animals are offered to a carrier of live stock to be transported it is its duty to receive them; and that duty cannot be efficiently discharged, at least in a town or city, without the aid of yards in which the stock offered for shipment can be received and handled with safety and without inconvenience to the public while being loaded upon the cars in which they are to be transported." "In other words, the duty to receive, transport and deliver live stock will not be fully discharged, unless the carrier makes such provision, at the place of loading, as will enable it to properly receive and load the stock, and such provision, at the place of unloading, as will enable it to properly deliver the stock to the consignee."

In *Zakrazewski v. G. N. Ry.*, 125 Minn. 125, 145 N. W. 801, 802, it is stated:

"There ought to be no doubt upon the proposition that, at those shipping points of a common carrier where stock pens or yards are reasonably necessary, the duty rests upon the carrier to furnish the same in such condition and with such facilities for handling and caring for stock that the shipper can, with a reasonable degree of safety and convenience, assemble and attend to the wants of the animals so that when loaded they are in a fit condition to stand the hardships of the journey."

See *Id.* 131 Minn. 175, 154 N. W. 966; *St. Louis & San Francisco Ry. v. Beets*, 75 Kan. 295, 89 Pac. 683, 10 L. R. A. (N. S.) 571; *Ft. Worth & G. R. Ry. v. Galton*, 45 Tex. Civ. App. 67, 100 S. W. 166.

This duty attaches although the control and management of the stock remain entirely with the shipper until loading begins. *Zakrzewski v. G. N. Ry.*, *supra*.

Upon this record the questions presented are (1) whether, as a matter of law, the carrier was free from negligence in the performance of this duty stated, and (2) whether, as a matter of law, the plaintiffs were guilty of contributory negligence.

The carrier contends that the carrier did not invite the plaintiffs to turn their cattle loose without a herder or to use the reservoir to water their cattle; that in permitting the cattle to get in the reservoir and using a portion of the carrier's premises where they were not invited the plaintiffs were trespassers or at best mere licensees. It further maintains that there is no proof that the carrier invited or directed the plaintiffs to use this particular spot adjoining the reservoir for holding the stock, and that the failure to fence the reservoir was not negligence.

Does the record sustain the contentions of the carrier, as a matter of law? The answer must be considered in connection with the duty of the carrier in the receiving of cattle for shipment. The carrier has neither considered nor discussed this duty. The negligence of the carrier does not turn upon the question whether the plaintiffs were licensees or invitees, as such, but rather upon the question whether the facilities and utilities tendered to the plaintiffs for the reception of the cattle preparatory to, and while awaiting, shipment, were furnished pursuant to its duty.

It is undisputed that the carrier did recognize the necessity of maintaining facilities and utilities at Belfield for the receiving of cattle prior to and while waiting shipment. It is admitted that the carrier did maintain there stockyards for such purpose. It is further undisputed that cattle were customarily held upon this plot of ground where the reservoir is situated preparatory to, and while waiting, shipment. There is evidence in the record that on November 28, 1919, the stockyards were not available for the use of the plaintiffs. There is further direct evidence that the agent of the carrier directed the plaintiffs to hold, feed, and water their cattle near the reservoir both for purposes of shelter and for water, all preparatory to and while waiting shipment.

The reservoir was an artificial creation. The water therein was deep; the banks were steep, almost precipitous. The "spoil banks," serv-

ing as a protection and barrier, also perhaps were a snare by reason of the unguarded and nonwarning openings through them. The water at a certain place in the north end remained unfrozen, or with a thin coating of ice, in cold weather, and so existed when the cattle were drowned. There is evidence, although disputed, to that effect. If this reservoir were within the confines of the stockyards proper with no further protection than existed upon the adjacent ground of the carrier, it surely might not be said, as a matter of law, that the carrier had fulfilled its entire duty in providing for the receiving of cattle, if they should be drowned or be killed, as they were in this case. The question of the breach of this duty by the carrier must be similarly considered, although such reservoir was situated without the stockyards proper, if the facts warrant consideration by the jury of this duty. If the plaintiffs were directed and permitted by the carrier to take, hold, feed, and water these cattle near the reservoir, where they were by reason of the yards then being occupied and insufficient to contain plaintiffs' proposed shipment, if the reservoir, by reason of its proximity, the unguarded openings, and the open place in its water surface, was a dangerous utility to be so maintained at such place where such cattle were received and held for shipment, then, through loss resulting by reason thereof, a jury might find a breach of this duty of the carrier. Upon this record we are of the opinion that sufficient facts were presented to make this breach of duty a question of fact for the jury, and that the verdict of the jury determining the negligence of the carrier in that regard should not be disturbed. See *L. R. A. 1918C, 540*; *Heckman v. Evenson*, 7 N. D. 173, 182, 73 N. W. 427.

The carrier contends that the record discloses contributory negligence on the part of the plaintiffs; that the cattle were simply permitted to wander wild as they willed. In this connection a close question is presented, as a matter of law. The evidence is far from satisfactory in explaining how the cattle happened to get in the reservoir, whether during the presence of the herder or his temporary absence. There is evidence, however, that the plaintiffs did not know about these open and unguarded openings between the "spoil banks" in the north end; that they knew nothing about the open place in the water where the cattle were drowned. The plaintiffs were directed and permitted to hold, feed, and water their cattle near these openings. The openings, unguarded and not protected, were dangerous for cattle by reason of the open water

place within the reservoir. If the ice upon the reservoir had been uniformly thick, like upon the creek without, a foot in thickness, and if there had been no open nor dangerous water hole within, little danger would have existed if the cattle should wander through such openings and upon the reservoir.

The unguarded openings and the open water space, concerning both of which the plaintiffs neither were informed nor knew, constituted the menace of danger and of injury. Reasonable men might draw different conclusions from the evidence as to whether the plaintiffs would have known or investigated concerning the reservoir or should have more closely attended the cattle. Contributory negligence may not be charged to the plaintiffs because they accepted the facilities offered by the carrier. *Lackland v. Ry. Co.*, 101 Mo. App. 420, 74 S. W. 505. The question of contributory negligence therefore was primarily one for the consideration of the jury, and its findings should not be disturbed. *Jackson v. Grand Forks*, 24 N. D. 601, 617, 140 N. W. 718, 45 L. R. A. (N. S.) 75; *Haugo v. G. N. Ry.*, 27 N. D. 268, 273, 145 N. W. 1053; *Overpeck v. Rapid City*, 14 S. D. 507, 85 N. W. 990, 992.

The order is reversed, and judgment ordered upon the verdict, with costs.

GRACE, C. J., and ROBINSON, CHRISTIANSON, and BIRDZELL, JJ., concur.

JOHN PETERSON, Respondent, v. ISAAC OGLAND and NELS OGLAND, Appellants.

(184 N. W. 981.)

Attachment — should be dissolved where grounds are denied by defendant and not sustained by plaintiff.

Where, on a motion for dissolution of an attachment, the existence of the grounds of the attachment is properly denied by the defendant, the burden is placed upon plaintiff to show the existence of such grounds; and where he fails to sustain such burden, the attachment should be dissolved.

Opinion filed Oct. 31, 1921.

Appeal from the District Court of Williams County, *Moellring, J.*

Defendants appeal from an order denying a motion to dissolve an attachment.

Reversed.

Per Curiam Opinion.

Fisk & Shafer, for appellants.

There is no showing that appellant had sold, assigned, secreted or otherwise disposed of his property with intent to cheat or defraud his creditors, or that he was about to do so. And there is no showing by such alleged statement that he was about to remove his property from this state, or a material part thereof with the intent or to the effect of cheating or defrauding his creditors, and the motion to vacate the attachment should have been granted. *Jones v. Hoefs*, 14 N. D. 232; 103 N. W. 751; *Palo Sav. Bank v. Cameron*, 168 N. W. 769, (Iowa); *Piper v. Wade*, 132 N. W. 786, (S. Dak.).

Burdick & Knox, for respondent.

PER CURIAM. This is an appeal from an order denying a motion to discharge an attachment. The grounds specified in the affidavit for attachment are:

"That the defendant has removed or is about to remove his property, or a material part thereof, from this state, not leaving enough therein for the payment of his debts. Has sold, assigned, transferred, secreted or otherwise disposed of, or is about to sell, assign, transfer, secrete, or otherwise dispose of, his property with intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts; is about to remove his property, or a material part thereof, from the state with the intent or to the effect of cheating or defrauding his creditors or hindering or delaying them in the collection of their debts or judgments."

Under the warrant of attachment issued upon such affidavit, the sheriff levied upon an automobile belonging to the defendant Isaac Ogland. The defendants moved to discharge the attachment on the ground that the charges in the affidavit for attachment were untrue.

They submitted in support of said motion an affidavit of each of the defendants, completely traversing all the statements in the affidavit for attachment, and showing that both of the defendants are residents of the state of North Dakota, own real and personal property therein, and that neither of them had committed, or were about to commit, any of the acts charged in the affidavit for attachment. Upon the hearing of the motion to discharge the attachment, the plaintiff and his wife were sworn and testified orally. Their testimony was to the effect that on the evening of April 12, 1921, the two defendants came to a room where plaintiff was then confined on the second floor of a building known as the Royal Cafe, in the city of Williston; that they wanted to see the plaintiff, but plaintiff's wife refused to admit them, and locked the door. She claimed that both of the defendants were intoxicated. According to her testimony they became quite angry because she would not let them see her husband. The defendants thereupon went down stairs. And plaintiff and his wife testified that when the two defendants were on the sidewalk in front of the Royal Cafe, they (plaintiff and his wife) heard the defendant Isaac Ogland say: "I am going to get my car and get out of this country here and they can all go to hell." At the time this statement was made, the car was in the possession of the chief of police of the city of Williston, who apparently, had taken charge of it in connection with some charges against defendants for violation of the traffic regulations of the city of Williston. This constitutes the sole showing made by the plaintiff in support of the averments in the affidavit for attachment. Both defendants were also sworn and gave oral testimony. It appears from the testimony of the defendant Nels Ogland that he was and is the owner of real property in Williams county, N. D., with improvements thereon consisting of a house, barn, and other buildings, which is worth \$4,000; and the owner of personal property, consisting of horses, cows, pigs, chickens, harnesses, household furniture, etc., worth \$700; that said Nels Ogland was the owner of all of said property at and prior to the time the summons and complaint in this action were served upon him, and is still the owner of all of said property. It further appears that the said Nels Ogland is a widower, with five children to support and care for, and has resided in Williams county for the past 12 years. These facts are not disputed. The defendant Isaac Ogland testified positively—and on this point his testimony is not contradicted—that he is the owner of a house and lot in Crosby, N. D., where he has

been, and is making his home; that he is the owner of personal property, consisting, among other things, of the automobile levied upon in this case, and a set of carpenter tools, which personal property he claims to be worth \$1,000. It appears, further, that Isaac Ogland has been living at his present place of residence at Crosby for many years. Both defendants denied that Isaac Ogland made the statement attributed to him by plaintiff and his wife. Both, also, denied that they had committed, were about to commit, or ever had the slightest intention of committing, any of the several acts charged in the affidavit for attachment.

In passing on a motion to discharge an attachment, the trial court exercises judicial powers. Due weight will be given to its determination. But where that determination relates to the truth or falsity of the charges set forth in the affidavit for attachment, and involves a consideration of evidence bearing upon such question, there must be some basis in the evidence for the conclusion reached by the trial court. This court has ruled:

"In motions for dissolution of an attachment, the facts stated in the original affidavit being denied, the burden is on plaintiff to support the allegations thus made; failing so to do this, the attachment should be dissolved." *Weil et al. v. Quam*, 21 N. D. 344, 131 N. W. 244.

See, also, 6 C. J. 451; 2 R. C. L. 878. In our opinion the plaintiff wholly failed to show the existence of any of the grounds specified in the affidavit for attachment; and the trial court should have ordered the attachment to be dissolved.

The order appealed from is reversed, with costs to the appellants.

GRACE, C. J., and CHRISTIANSON, BIRDZELL, and BRONSON, JJ., concur.

ROBINSON, J. (dissenting). This is an appeal from an order denying a motion to vacate an attachment. The plaintiff sues to recover \$500 damages on the ground that by fast and reckless driving defendants ran an automobile against the plaintiff, doing him severe injury. On the usual statutory affidavit the plaintiff obtained a warrant of attachment and levied on the offending automobile, which was appraised at \$300. On counter affidavits defendants moved to dissolve the attachment, and on the hearing of the motion the plaintiff and his wife were sworn and testified and each testified that defendants called on them, and on leaving defendant Isaac Oglund, the owner of the automobile, said:

"I am going to get my car and get out of the country, and they can all go to hell."

It also appeared that Isaac Ogland had no property of any account, excepting the automobile and some carpenter tools. Defendants were sworn and denied the testimony of the plaintiff and his wife. Now, in such cases, the statute provides thus:

"If on such hearing it appears to the satisfaction of the court or judge that the attachment was irregularly issued or that the affidavit upon which it was issued is untrue, the attachment must be discharged. Code, § 7561.

We may assume for a certainty that the judge would have discharged the attachment if it had appeared to his satisfaction that the affidavit upon which it was issued is untrue. It did not so appear to his satisfaction, nor does it appear to the satisfaction of this court. Furthermore, the fact that defendant has gone to the trouble and expense of a motion to dissolve the attachment and of an appeal to this court may well be considered as some evidence that his purpose was to get the automobile clear, take his carpenter tools and leave the country. When the motion was denied Isaac Ogland gave a counter bond, as provided by statute, for the release of the attachment. That is what he should have done in the first instance.

STEWART WILSON, Respondent, v. THE CITY OF FARGO, a municipal corporation, et al, Appellants.

(186 N. W. 263.)

Courts — statute may not be held unconstitutional unless four Supreme Court judges so decide.

1. This action involves the constitutionality of chap. 122, Laws, 1921. It is *held*:

Inasmuch as two of the judges of the Supreme Court are of the opinion that the act does not violate any provision of the state constitution, it cannot be said that the act is unconstitutional as violative of the state constitution in view of § 89 of the constitution as amended (Article XXV, p. 503, Laws 1919), which provides that in no case shall

any legislative enactment or law of the State of North Dakota be declared unconstitutional unless at least four of the judges of the Supreme Court so decide.

Opinion filed Oct. 31, 1921.

Appeal from the District Court of Cass County; *Cole, J.*

From an order overruling a demurrer to the complaint, defendants appeal.

Reversed.

W. H. Shure and George E. Wallace, (B. F. Spalding and Wm. Lemke, Atty. General of counsel) for appellant.

"It is a sufficient compliance with the constitutional requirement if the subject matter of such amendment is germane to the subject matter of the original act and is within the title of that act." *State v. Fargo Bottling Company*, 19 N. D. 396; *Erickson v. Cass County*, 11 N. D. 496; *Eaton v. Guarantee Company*, 11 N. D. 79.

An act permitting recovery of money paid at an invalid tax sale is germane to the matter of collection of taxes on land by means of sale. *Sherwood v. Barnes County*, 22 N. D. 310; *Paine v. Dickey County*, 8 N. D. 581.

An act permitting the sale of intoxicating liquor for certain purposes and prohibiting it for others under regulations, constitutes but one subject. *State v. Haas*, 2 N. D. 202.

Engerud, Divet, Holt & Frame, for respondent.

"No law shall be passed except by a bill adopted by both houses, and no bill shall be so altered and amended in its passage through either house as to change its original purpose." Constitution, § 58; *Fillimore v. Van Horn*, (Mich.) 88 N. W. 69; *State v. Burlington & Co (Neb.)* 84 N. W. 254; *In re House Bill (Colo.)* 21 Pac. 472.

The title of a bill must be a constant quantity, not subject to amendment, or at least not subject to such an alteration as will effect a substantial change in it. *Irwin v. State*, (Tenn.) 93 S. W. 73; *State v. Baseball Club (Tenn.)* 154 S. W. 1151; *Simpson v. Stockyards*, 102 Fed. 799;

Railroad Co. v. Smith, 103 Fed. 372; Fillimore v. Van Horn, (Mich.) 88 N. W. 69; State v. Burlington &c (Neb.) 84 N. W. 254.

The term "subject" as used in § 58 and § 61 of the Constitution means the matter to which the statute relates, the purpose sought to be effected by the legislation. 36 Cyc. 1022, Statutory Construction; G. N. Ry. Co. v. Duncan, (N. D.) 176 N. W. 992; Sutherland on Statutory Construction § 83; Matter of Mayer, 50 N. Y. 507; Dorsey's Appeal, 72 Pa. St. 192.

The act must be construed in the light of its general purpose and object, and if so construed, its provisions appear to be in furtherance of one general purpose and plan they will be considered to be germane to one another. State v. Peake, 18 N. D. 101; G. N. Ry. Co. v. Duncan (N. D.) 176 N. W. 992; 1 Sutherland Statutory Construction, § 143; G. N. Ry. v. Duncan, (N. D.) 176 N. W. 992; Johnson v. Harrison (Minn.) 50 N. W. 923.

The different matters incorporated in a bill must be so closely related as to constitute but separate parts of a consistent plan which is readily discernible in the act itself. G. N. Ry. Co. v. Duncan (N. D.) 176 N. W. 992; State v. Nomland, 3 N. D. 427; Richards v. Stark Co. 8 N. D. 392; Divet v. Richland Co. 8 N. D. 65; Fitzmaurice v. Wells, 20 N. D. 372; Erickson v. Cass County, 11 N. D. 494, 512.

It is not permissible to enact a law which amends a section by changing only some portion of it, and by publishing only the part or the words which create the change. Copeland v. Price, (Wash.) 67 Pac. 227; In re Buelow, 98 Fed. 86; State v. Guiney, (Kans.) 40 Pac. 926; Douglas Co. v. Hayes, (Neb.) 71 N. W. 1023; Blakemore v. Dolan, 15 Ind. 194; Dodd v. State, 18 Ind. 56; Erickson v. Cass Co. 11 N. D. 494, 512; State v. Fargo Bottling Works, 19 N. D. 396, 410, 411.

GRACE, C. J. This is an appeal from an order of the District Court of Cass County overruling a demurrer to a complaint. The action is said to be a friendly one brought by the plaintiff as a taxpayer on his own behalf and all persons similarly situated, to restrain a proposed special election in the City of Fargo, called pursuant to chap. 122, Session Laws of 1921, which makes certain amendments to an amendatory act relating to the exemption of property from taxation and which also provides for limitation of tax levies, in that, political subdivisions, are authorized to exceed the limitations specified in said Chapter by twenty-five per cent (25%) upon authorization by a majority of the electors voting at a

special election. The plaintiff asserts his right to restrain the holding of an election on the theory that chap. 122 is unconstitutional. Several constitutional objections are advanced but the principal one, and those we shall consider are as follows, viz: that during the passage of the bill the purpose was changed in violation of § 58 of the Constitution, which provided that no bill shall be altered and amended on its passage to (through) either House, as to change its original purpose, and that the bill embraced more than one subject in violation of § 61.

We are impelled to give a thorough consideration to and an extended analysis of the statute, in order to arrive at what we believe is the true status as to the validity of the statute, as such validity is challenged by the two provisions of our constitution above mentioned.

Chap. 223 of the Session Laws of 1919 and chap. 122 of the Session Laws of 1921 are both amendments and have become part of an original act viz: that of Revenue and Taxation. This fact is of importance and must be kept in mind while considering the constitutionality of the act under consideration with reference to the sections of the constitution hereinbefore mentioned. The original revenue and taxation act was approved by the Legislature of the State of North Dakota on March 11th, 1890. It is chap. 132 of the Session Laws of that year. It consists, as thus enacted, of 109 sections, all of which are relative to the subject of Revenue and Taxation. § 5 thereof dealt with exemption from taxation of personal property. § 98 thereof dealt with the limitation of taxes by the corporate authorities of various political subdivisions.

It appears therefore that the tax exemption section and the section relative to the limitation of taxation were a part of the original act of 1890. Without tracing every step in its subsequent history suffice it to say, the original Revenue and Taxation Act is found in the C. L. of 1913, largely in its original form, as chap. 34.

§ 5 of the Original Act became in substance § 2078 of chap. 34 and § 98 of the Original Act became in substance § 2148 of that chapter. § 2078 was amended by chap. 223 of the Session Laws of 1919. That chapter reenacted that Section which then passed out of existence and ceased to exist except as to past transactions, and chap. 223 displaced it as part of the Revenue and Taxation Act.

The first contention is, that the purpose of the act, chap. 122 was changed during its passage in the Legislature. We believe when this contention is closely examined it will be found to contain no great merit. A casual glance at this chapter might give the impression that its purpose

was two fold, in that it refers to exemption from taxation and limitation of taxation. But a careful consideration of the title and of the whole of the act leads to the conclusion that the whole subject or object of the act is taxation. Exemption from taxation and limitation of taxation are not incongruous terms. They relate to the same subject or object to wit: taxation and it is our view that change in the bill during its passage, which related to taxation did not change the purpose of the bill for it seems clear that chap. 122 relates to no other subject or object than taxation.

As to the second contention that the act contravenes 61 of the constitution, it may be observed that chap. 223 relates to the subject of taxation. It is true that the term exemption is there used, but its use relates exclusively to the subject of taxation. If the term exemption appearing there, referred to the homestead exemption as defined by law, or to that part of a debtor's property exempt as against the claims of creditors, then that term would not relate to the subject of taxation and it would not in that case be congruous with the term "Limitation of Taxation." But such is not the fact. All of chap. 223 and all of chap. 122 relate exclusively to the subject of taxation and the terms of both we believe are congruous. Assuming that 223 is an original act,—which it is not, but an amendatory act only—it would seem that the amendment 122, is germane to the subject of that act (taxation) and within the title of it.

There is another view that may be mentioned. 122 is not an amendment of an act but an amendment of an amendment. This fact complicates the situation and we have been able to find no case similar in this respect. Taking chap. 34 as the original act relative to Revenue and Taxation and regarding 223 and 122 as in effect amendments thereof for each has become a part thereof, and are additional and supplementary of it, we think the rule would apply, that if the subject or object matter of the amendment is germane to the subject matter of the original act (chap. 34) and within the title thereof (Revenue and Taxation) it is sufficient. In *State v. Fargo Bottling Works*, 19 N. D. 409, it in substance was held that "If the subject matter chap. 187 (an amendment) is germane to the subject of the law of 1890 (the original act) and is fairly within the title of that act, its title is sufficient, whether or not it would be so standing alone." It would seem quite clear that all of 122 is germane to the subject matter of chap. 34, the original act, and within the title of that act to wit: Revenue and Taxation. That principle is illustrated by other decisions of this court.

In *School District No. 94 v. King*, 20 N. D. 618 the constitutionality of chap. 106 of the Laws of 1907 was challenged on the ground that it contravened § 61 of the constitution. The act of 1907 was one to amend § 949 of the Revised Codes of 1905 which was "An act to Provide for a Uniform System of Free Public Schools Throughout the State and Prescribe Penalties for Violation of the Provisions Thereof." In that case part of the amendatory act did not affect the rights of the plaintiff or any of the inhabitants of the district. This portion of that act conferred authority upon the County Commissioners to attach certain portions of the School district to a school district of another county. But had the rights of plaintiff been affected by that provision, in view of the construction placed on the remainder of the amendment by the court, there would seem to be no doubt that the court would have upheld the constitutionality of the act in this respect for the same reason that it held that the remainder of the amendment was within the original act. The court there said with reference to the amendment "The title of the act of 1890 (the original act) is sufficiently broad and comprehensive to include § 170 of that act which was the same substantially as § 949 until amended in 1907. The general subject of public schools includes the division of school districts. So in this case it can with as much reason be said that the title of the original Revenue and Taxation Act of 1890 above mentioned, now chap. 34, of the Comp. Laws of 1913, is sufficiently broad and comprehensive to include chap. 122, for all that is in the latter relates to taxation and to no other subject. Reasoning of somewhat similar nature is contained in *State v. Fargo Bottling Works*, 19 N. D. 396 and *Erickson v. Cass County*, 11 N. D. 494. In the latter case it was said "The Supreme Court of Missouri in construing a constitutional provision of that state in all respects like § 61 *supra*, in the *City of St. Louis v. Tiefel*, 42 Mo. 578-590 said: While the clause was embodied in the organic law for the protection of the state and the legislature, it was not designed to be unnecessarily restrictive in its operations, nor to embarrass legislation by compelling a needless multiplication of separate bills. It was only the intention to prevent the conjoining in the same act of incongruous matters and of subjects having no legitimate connection or relation to each other. If the title of an original act is sufficient to embrace the provisions contained in an amendatory act, it will be good, and it need not be inquired whether the title of the amendatory act would of itself be sufficient. *Branden v. State* 16 Ind. 197; *State v. Meade* 71 Mo. 267 is to the same effect. The Constitution of Indiana contains provisions almost identical with §§ 61 and 64. The Su-

preme Court of that state in *Branden v. State* 16 Ind. 197 held, that, "If the title of the original act is sufficient to embrace the provision in question, it is unnecessary to inquire whether the title of the amendatory act would of itself be sufficient. See, also, *State v. Bowers* 14 Ind. 195; also *Shoemaker v. Smith* 37 Ind. 122. The last case is important in holding that the different provisions contained in different sections of an act, all having a common subject are not to be regarded as so many different subjects, but as having references to only one general subject. See, also, *Improvement Co. v. Arnold* 46 Wis. 214-225; 45 N. W. 971; *Phillips v. Town of Albany* 28 Wis. 340; *Wheeler v. State* 23 Georgia 9."

There is another principle that applies. It is stated in 36 Cyc. 1044 as follows: "Statutes are generally valid with titles reasonably apt concerning taxes." In support of this principle in note 99 are cited a long list of cases from various states. It is also to be noticed that the sections amended by 122 are set forth at length as well as all that relates to limitation of taxation and that at the head of the chapter are two words, exemption and limitation, all of which show there was no deception, surprise or fraud possible in the passage thereof. "The courts in a long series of cases have enunciated the general principle that the presumption is in favor of the constitutionality of the statute. This principle has been expressed in many different forms. It has been declared that in no doubtful cases should the court pronounce legislation to be contrary to the constitution; that to doubt the constitutionality of a law is to resolve such doubt in favor of its validity; that all statutes are of constitutional validity unless they are shown to be invalid; and that the courts will resolve every reasonable doubt in favor of the validity of the enactment. It has been said that every intendment is in favor of its validity, and that it must be presumed constitution unless its repugnancy to the constitution clearly appears or is made to appear beyond a reasonable doubt; that it is only when its invalidity is made to appear clearly and plainly and in such manner as to leave no reasonable doubt, that the courts will declare it unconstitutional. Every reasonable presumption must first be indulged in favor of the validity of the act. The opinion has been expressed that the conviction required to overcome the presumption in favor of the statute must be clear and strong and it has been said that a law should never be lightly overthrown or set aside as unconstitutional." 6 R. C. L. § 98 and notes 1 to 12, both inclusive.

For the reasons above stated, among others, and resolving our reasonable doubts in the matter in favor of the validity of chap. 122, we are

unable to say that it is invalid or that it is repugnant to the sections of the constitution above mentioned, and hence we think the plaintiff's action should be dismissed.

ROBINSON, J., concurs.

ROBINSON, J. This is a collusive and friendly suit to annul § 2 of House Bill 25, chap. 122, Laws 1921. The section reads thus:

"The total amount of taxes levied for any purpose, except special levies for local improvements and for the maintenance of sinking funds in any county or political subdivision thereof in any village, town or city within the state shall not exceed an amount equal to one-third of the total combined levies which were made for the years 1918, 1919 and 1920, except that school districts may levy not to exceed 30 per cent in excess of such amount, and provided that any county or political subdivision thereof or any village, town or city may increase such levy in the same proportion as the assessed property valuation increases or has increased over that of the year 1919. Provided, however, that the electors of any county or political subdivision thereof or any village, town or city within the state, may by a majority vote authorize a levy of 25 per cent in excess of this limit."

The act was passed with an emergency clause. In the Senate the vote was: Yeas, 37; nays 10. In the House the vote was: Yeas 109; nays, 0; absent, 3. Thus the bill was passed and the title was agreed to. The immediate cause of the act was a general uproar of the people against the excessive tax levies by the several municipalities of the state. In November, 1919, in Towner county, there had been a special election for the office of senator. The issue was on the excessive tax levies and the League candidate was defeated. Then, at a special session of the legislature on December 11, 1919, there was passed House Bill 59, chap. 65, reducing the state tax levies for the year twenty-five per cent, but that reduction was far from being satisfactory, so at the general election held in November, 1920, the main issue continued to be on the excessive tax levies, for which the Nonpartisan League was held responsible. The result was that the League was nearly defeated. In the Senate and in the House the members were about equally divided. Then, in March, 1921, to comply with the public demand for a limitation of the tax levies the bill here in question was passed as above stated by the unanimous vote of the Senate and the House. The objections to the act here in question is that the title embraces more than one subject and that on its passage

the bill was amended so as to change its original purpose, contrary to §§ 58 and 61 of the constitution. There are several other similar sections which relate not to the actual passage of bills, but to the manner of passing them. Thus it is provided:

§ 63. Each bill shall be read three times, but the first and second readings, and those only, may be on the same day.

§ 66. The presiding officer of each house shall, in the presence of the house of which he presides, sign all bills and joint resolutions.

Those are merely rules of procedure addressed to the legislature, and all such rules are habitually disregarded, and though the constitution declares that all its provisions are mandatory, it does not in substance or effect provide that any statute shall be held void because of a failure to observe the constitutional rules of procedure. It is true that because of such failure the courts have often assumed the power to declare statutes void, and because of that arrogant assumption we have the recent amendment, that: "In no case shall any legislative enactment or law be declared unconstitutional, unless at least four of the judges shall so decide." That amendment is a rebuke to the courts having gone too far in declaring statutes to be void because of defects in the title or the procedure. Now if the courts do persist in declaring such statutes to be void, we may look for an amendment that no court shall have power to declare any statute void. Each member of the legislature, as well as each judge, takes an oath to support the constitution of the state and faithfully to discharge the duties of his office. In their official action, and especially in matters of procedure, the members of the legislature may err, and so may the judges. Neither is infallible. Neither has a right to assume all wisdom or to impute to the other bad faith or a want of common sense. Manifestly it is in no way seemly or proper for a justice of the peace, a trial judge or even a majority of the Supreme Court, to override and declare void a statute passed by the unanimous vote of the legislature, and pursuant to a great popular demand, because forsooth of a mere procedural defect in the passage of the bill. Certain it is the constitution was not framed or passed with a view to annul such acts. It was framed and submitted in 1889. The framers were men of such capacity as are commonly sent to the legislative assembly, and they did not assume to know it all or to declare that any statute should be held void unless passed in a particular manner. Indeed, the fair inference is to the contrary, because while the constitution gives the above and several other rules of procedure, it expressly declares:

Each House shall have power to determine the rules of proceeding.

§ 49. Each house shall keep a journal of its proceedings.

§ 50. The sessions of each House and the Committee of the whole shall be open.

§ 51. Neither House shall, without the consent of the other, adjourn for more than three days.

§ 53. The Legislative Assembly shall meet at the seat of government at twelve o'clock noon on the first Tuesday after the first Monday in January of the year following the election of the members.

Now, what if the legislature should be an hour or a day late in meeting? What if either house should adjourn for more than three days without the consent of the other; what if it failed in any other respect to observe the stated procedure, does that render void an act that is passed by the unanimous vote of each house and approved by the governor? Surely all such rules of procedure, whether in the constitution or out of it are addressed to the members, who may change and vary, or, by general consent, disregard such rules. The rule that all bills shall be printed and a copy laid on the table of each member gives him full opportunity to read and understand each bill regardless of its title. The people, their law-makers and their procedure has greatly improved since 1889 when they swallowed the constitution in bulk as the whale swallowed Jonah, and it well behooves courts to keep up with the march of time and to be ever ready to give a good reason for their decisions. Reason is the soul of the law, and when the reason of a rule ceases, so does the rule itself.

Order reversed.

BIRDZELL, J. (Speaking for the majority of the court). Immediately after the submission of this case, the members of the court, recognizing the practical necessity for an early decision, carefully considered the questions involved and within a few days after the arguments, a tentative opinion was prepared by the writer of this opinion. The controlling principles therein stated were promptly agreed to by a majority of the judges. Later, Mr. Chief Justice Grace and Mr. Justice Robinson, filed opinions upholding the constitutionality of the act in question. Under § 89 of the constitution as amended and under the rule of decision in such cases announced by this court in *Daly v. Beery* 45 N. D. 287, 187 N. W. 104, the votes of the two members control the decision. The majority nevertheless regards it as a duty to set forth the reasons why the act should be held unconstitutional and to add appropriate comments upon what they regard

as the erroneous principles applied by the controlling minority. The original proposed opinion is as follows:

"This is an appeal from an order entered in the District Court of Cass County overruling a demurrer to a complaint. The action is brought by the plaintiff as a tax payer, on behalf of himself and all persons similarly situated, to enjoin a proposed special election in the City of Fargo. The election was called pursuant to chap. 122, Session Laws of 1921. This chapter makes certain amendments to the statutes relating to the exemption of property from taxation and provides for the limitation of tax levies in the manner to be hereinafter stated. Political subdivisions are authorized to exceed these limitations by twenty-five percent, however, if the proposition is favored by a majority vote of the electors. It was to secure this expression of the voters that the special election sought to be enjoined herein was called. The plaintiff and respondent bases his right to restrain the holding of the election on the unconstitutionality of the statute. The objections urged are: First, during the passage of the bill, the purpose was changed in violation of § 58 of the constitution which declares that no bill shall be so altered and amended on its passage through either house as to change its original purpose; second, it was passed in violation of § 63, which provides that every bill must be read through several times; third, the bill embraces more than one subject in violation of § 61, and fourth, that the bill amended and revised an existing law without incorporating the entire section amended as required by § 64 of the constitution.

"The act in question as originally introduced was house bill Number 25, entitled "A Bill For an Act to Amend and Re-enact § 2078, the Comp. Laws of North Dakota for the Year 1913 and chap. 223 of Session Laws of North Dakota for the Year 1919, Relating to the Exemption of Property from Taxation." The House Journal shows the passage of this bill, with slight amendments not at present material, but without sufficient votes to enact the emergency clause. With the emergency clause stricken, the bill was messaged to the Senate. While pending there, it was amended by striking out everything after the words, "A Bill," and inserting, substantially, the contents which now appear as chap. 122 of the Session Laws of 1921. The title of the inserted measure is as follows:—"A Bill for an Act to Amend and Reenact Subsection 11 and Subsection 15 of chap. 223, Session Laws of North Dakota for the Year 1919, Relating to Taxation and More Specifically to the Exemption of Property from Taxation; and Providing for a Limitation of Tax Levies Upon all Tax-

able Property." It will be seen that the last clause of the title introduces for the first time the subject of the limitation of taxes levies. § 1, of the bill deals with the subject of exemptions by amending two paragraphs or subsections of the preexisting statute, chap. 223 of the Session Laws of 1919. It does not purport to reenact the section in its entirety in the amended form—the remaining paragraphs or subsections of the statute not being incorporated in the bill. § 2 of the bill embraces a subject matter that formed no part of the original bill as it passed the house. It limits the amount of taxes that may be levied in political subdivisions to one-third of the combined levies for the years 1918-19-20 and provides that this limitation may be exceeded by twenty-five percent if authorized by a majority vote of the electors of political subdivisions.

"Reading and comparing House Bill twenty-five as originally introduced with the statute which it was designed to amend, the purpose of the bill is so clear that it is not capable of being misunderstood. It was designed for the sole purpose of removing the exemptions from structures and improvements on agricultural lands, city, town and village lots, household goods and furnishings, clothing and personal belongings, mechanics' and farmers' tools, implements and equipment. The bill was so framed that this change would be effected by dropping from the law paragraphs or subsections numbered 10 to 15, both inclusive; that is, the entire section was to be amended and reenacted omitting the subsections embracing the specific exemptions stated. The act did not relate in any manner to the subject of levying taxes for the support of the various political subdivisions. When the bill was amended in the Senate, the entire subject matter originally contained in the body of the bill was stricken out and there appeared in its stead a re-statement of two subsections which would have been entirely repealed had the original bill passed. These are subsections 11 and 15. They relate respectively to structures and improvements on village, town and city lots and to the tools, implements and equipment of the farmer. The Senate amendment reduced these exemptions in each instance from \$1000.00 to \$500.00. This is the only part of the bill as amended in the Senate which deals with the subject matter contained in the original bill as introduced and passed in the House. To state the matter succinctly, the relation between the original bill as passed by the House and the bill as amended in the Senate and as ultimately passed both houses, is this: The original bill would have repealed entirely the exemptions in favor of improvements implements and tools along with other exemptions, whereas the amended bill merely

reduced 50%, the exemptions in favor of the structures and improvements and tools, implements and equipment of farmers. Thus far, the amended bill relates to the same subject as the original bill and the prime purpose of the original bill; namely, that of reducing exemptions from taxation is not altered. The amendment merely reflects a compromise from the extreme position of the original bill. But the amended bill also embraces a subject matter introduced in the Senate for the first time and after the bill had passed the House—that of the limitation of tax levies by political subdivisions. There is no direct relation between the provisions of law relating to the exemption of items of property from taxation and the limitation of levies by political subdivisions. So far as the subject matter is concerned, it would have been as appropriate to have tacked the levy limiting feature upon a bill providing for the taxing of itinerant venders as upon the bill in question. There was nothing in the original title to the bill to convey the remotest idea that under that title the legislature would attempt to restrict the power of governmental subdivisions in the matter of levying taxes. The title was specific, not general. It conveyed no more hint of legislation upon this subject than of legislation regulating the salaries of school teachers or policemen. If the limitation on the power of local subdivisions to levy taxes is embraced within the scope of the title of the original bill or within the purpose of the legislation sought to be enacted under that title, any subject, however remotely connected with the public revenues, could have been included. The constitutional requirements of singleness of subject and constancy of purpose exist and are favored to the end that the members of the legislature and the public may be apprised of the exact character of pending legislation and that every legislative proposition shall be considered on its own merits, rather than be compromised by an artificial attachment to a foreign subject matter. The meaning of these constitutional provisions is so well understood that discussion is not required to clarify it. We are clearly of the opinion that the act in question is void in so far as it relates to the subject of limitation of levies in political subdivisions, both for the reason that the purpose of the legislation was changed during passage and that the legislation deals with two distinct subjects. These subjects clearly are not related to a consistent single purpose reflected in the legislation itself, as was the case in *Great Northern Ry. Co. v. Duncan* 42 N. D. 346, 176 N. W. 992. These provisions of the constitution are mandatory and it is the sworn duty of the members of this court to uphold them. It follows that

there is no law under which the special election may be held and that the order appealed from must be affirmed.

"The effect of the statute in so far as it relates to the question of exemptions is neither involved nor considered and no opinion is expressed thereon."

The opinion of Mr. Justice Robinson argues that because excessive taxes had become a political issue, the legislature was not bound to observe constitutional requirements in the passage of legislation to relieve the situation, and that, if bound in any way to observe such requirements, the failure to do so should be overlooked in view of the concurrence being unanimous in one body and nearly so in the other. The further argument It will readily be perceived that this logic strikes out of the constitution provisions with reference to the manner in which adjournments may be taken, etc., which must of necessity be of a directory character, it follows that all requirements as to the manner of passing legislation are directory. It will readily be perceived that this logic strikes out of the Constitution that portion of the Bill of Rights which is contained in § 21 and which reads: "The provisions of this constitution are mandatory and prohibitory unless, by express words, they are declared to be otherwise." This is stricken out in so far at least as it has any application to legislation. It is a well established principle of constitutional law that the courts will not interfere with the legislature in the performance of legislative functions nor direct how they are to be performed. From this it necessarily follows, under our system of government through coordinate branches, that those who are injured by the failure of the legislature to observe the mandatory requirements laid down in the constitution can only seek relief in the courts after the legislative act is completed. If relief be then denied on the pretext that provisions which are expressly mandatory and prohibitory are directory merely, the constitution is reduced to a mere scrap of paper. It no longer stands as the fundamental law of the state. Its protective features are in reality but a "delusion and a snare." And if the doctrine of this opinion is to become the controlling principle of constitutional law in this state the constitution should be repealed in toto as a document inimical to the public welfare on account of the false hopes it inspires and the false security it gives to individual rights against governmental encroachment. The whole history of our constitutional experience will be searched in vain to find an instance where legislative attempts to settle political issues or unanimity of action on a given subject has been

judicially recognized as a reason for subverting the plain language of the fundamental law. Has the day of actual legislative supremacy arrived? Are the Bill of Rights and the constitution no longer "the law of the land?"

It may be true that the amendment to § 89 of the constitution requiring the vote of four judges of this court to determine that an act of a legislative assembly is unconstitutional, evidences a desire on the part of the people to accept more completely than they have in the past, legislation at its face value; but by the very fact that the people in the constitution require four of the five judges to declare an act unconstitutional they recognize as a judicial function the determination of constitutional questions. This court cannot evade its grave responsibility under this or any other section of the constitution by a resort to homilies on the duty of courts to keep up with the march of time.

In passing upon constitutional questions a court is of course reluctant to determine that the legislature has transgressed mandatory constitutional provisions and it should never do so, except where the violation is clear. Even then, it acts with a due sense of the delicacy of the situation. It should not be deterred in its action, however, by the feeling that it is unseemly for it to declare the law which plainly exists as against void action of the legislative assembly. In this connection a striking inconsistency is to be noted in the opinion of Mr. Justice Robinson. It is there regarded as unseemly for a court to uphold the constitution against void action of the legislature as involving an imputation of "bad faith or want of common sense" on the part of members of the legislative assembly. But there is no hesitancy in the same opinion to declare that every member of the assembly habitually violates his oath of office through the failure to observe constitutional requirements in the passage of measures. In determining a law to be unconstitutional, this court obviously does not impugn either the "good faith" or the "common sense" of the legislature, nor does it even inquire into its motives, but the same dignified respect that dictates a reluctance to interfere with the action of another governmental department upon such a serious matter prompts the majority of this court, at least, to refrain from wholesale characterization of the members of a co-ordinate branch of the government as deliberate perjurers.

The division of opinion between the majority and the minority members of the court upon the legal principles involved may doubtless best be illustrated by considering the principles stated and applied in the opinion of Mr. Chief Justice Grace. In that opinion, House Bill 25 (which be-

came chap. 122 of the Session Laws of 1921) is shown to be an amendment (or amendments) of chap. 132 of the Session Laws of 1890 relating to revenue and taxation. The act of 1890 was entitled, "An Act Prescribing the Mode of Making Assessments, and the Levy and Collection of Taxes, and for Other Purposes Relative Thereto." It is pointed out that under this title the legislature provided in one section for certain exemptions from taxation and in another dealt with the limitation of levies by political subdivisions. It is said that as the original bill (House Bill 25) relates to taxation and as the completed act (chap. 122, Session Laws 1921) likewise deals with this general subject to the extent of amending parts of the law relating to revenue and taxation, the purpose of the bill was not changed during passage because it still relates to taxation. The fallacy of this reasoning we think becomes at once apparent upon considering its logical consequences. In providing originally, for instance, as in chap. 132 of the laws of 1890, a complete scheme for the assessment, levy and collection of taxes it would obviously be necessary to deal with every step required to bring about the ultimate consummation—money in the treasury. The scheme would necessarily embrace the manner of assessment—looking toward equality, reasonable levy—requiring limitation, and remedies for collection to the end that the scheme may be complete. It deals with subject matter parts of which for other purposes are wholly remote from each other. For instance, one section makes the taxes on bank stock a lien on dividends; another provides how the State Board of Equalization shall be constituted. One section authorizes the auditor to demand a fee of twenty-five cents for each deed or certificate of sale for delinquent taxes; another requires the assessor to designate the number of the school district in which each person assessed is liable for a tax. Following the logic of the opinion of the Chief Justice, if a bill were introduced to amend the section which provides that the tax on bank stock is a lien on the dividends it could be converted into an act changing the personnel of the State Board of Equalization, and vice versa. Or if a bill be introduced as a bill to amend the section relating to the county auditor's duties in connection with tax sale certificates, it could be converted into an act regulating the duties of assessors with regard to the assessment of property. Could it with any reason be said that in the instances supposed the purpose of the legislation would not be changed? The majority of this court is utterly unable to follow reasoning leading to any other result.

How far would the reasoning of the opinion of the Chief Justice ex-

tend? If it is applicable to the code of revenue and taxation to the extent that a bill introduced for the purpose of modifying one provision of such code may be later changed to modify any other provision of the same code without change of purpose, it would seem equally applicable to any code. This holding must be further examined in the light of its consequences. If it is followed in the future by two members of this court, it means that § 58 of the constitution is practically nullified in so far as future legislation may pertain to our existing statutory law. In 1895, the legislature approved the work of a code commission by passing as bills seven codes prepared by it, each code being embraced in a separate bill under an appropriate title. No session of the legislature has been held since the passage of these codes (which became the Revised Codes of 1895) in which bills were not introduced to amend one or more sections of them. If the rule stated in the opinion under consideration be sound any act to amend any section of any one of these codes could readily have been converted at any time during passage into an act to amend any other section of the same code without changing its purpose. And it would make no difference how far remote the subject matter of the two proposals might be, so long as that subject matter was appropriately contained in the particular code. Thus, a bill to amend a section vesting certain appointive power in the governor might be changed to one regulating the boundaries of school districts without changing its purpose; because, forsooth, both matters have, during the history of legislation, been deemed to be properly included in one bill when a former legislature undertook the ambitious project of revising the codes. Surely, the test as to whether or not the purpose of legislation is changed during passage is not whether the original bill and the bill as passed might both be connected with some broad subject that would make it possible or even appropriate to deal with both subjects under one title in some conceivable major scheme of legislation! We confidently assert that such a test is without authority in constitutional commentaries or precedents. It practically deprives § 58 of all the meaning it ever had. It takes from the people the protection that an observance of its requirements would give. It makes possible all the mischief that this provision of the constitution was designed to prevent, as under this holding most any innocent title—innocent because it serves notice of a very limited subject matter of proposed legislation—is converted into a veritable dragnet for drawing into the legislative whirlpool a vast quantity of

proposed measures of which the public, or even the members of the legislature themselves, can have no notice prior to the third reading of a bill. The majority of the members of this court regard the decision as mischievous in the extreme.

The opinion under consideration, following much the same line of reasoning, also holds that the title of the act is not duplicitous within § 61 of the constitution. In our opinion it requires no further discussion to demonstrate the fallacy of this holding, but we must likewise take note of its consequences. Under it omnibus legislation of every character is invited. Members of the legislature can now constitutionally tack on to a bill relating specifically to any given subject, additional matter without end and separate proposals without number so long as they all relate to some broad subject such as taxation, civil procedure, criminal procedure or the like, and the members will be constantly confronted with the alternative of voting against legislation they desire or, to use a figure applied by our associate, of swallowing the act whole as the whale swallowed Jonah. It was the purpose of § 61, of the constitution to prevent the legislature from effectively adopting any such procedure as this; but now that it is judicially recognized, the clear purpose of § 61 is thwarted and omnibus legislation may well become the rule. It is not difficult to tack on to legislation dealing with one specific subject other proposals that may be linked with the first under some broad general subject. After all, how much legislation is ever proposed that is not in some manner related to something that has gone before? To say that, this generic relationship may be seized upon to establish singleness of subject where two or more distinct legislative proposals are contained in the same bill—where the proposals are in no manner connected with any consistent purpose discoverable in the bill itself—therefore, is to practically deny the possibility of having more than one subject.

Thus § 61 of the constitution, too, is effectually deprived of all the meaning it ever had. The rule laid down in this opinion if consistently followed by two members of this court, also takes from the people the protection that an observance of § 61 would give. It makes possible all the mischief that this section was designed to prevent. If those who propose to amend a section of the law relating to the exemption of property from taxation cannot have that proposal considered on its merits except as it is linked with a proposal to limit the amount of taxes that may be levied by the political sub-divisions of the state, what other

obstacles may not be thrown in the way of considering other distinct legislative proposals upon their merits? The legitimate fruits of this decision appear to us to be omnibus and log-rolling legislation without end.

A word as to the authorities cited in the opinion of Mr. Chief Justice Grace. An examination of them will, we are confident, disclose that they have no application to the case in hand. The principle applied in the cases cited, is familiar and sound. As we understand it, it is this: That where the title of an amendatory act does not indicate the subject of the amendment further than by reference to the act amended and to declare the purpose to amend, the title is sufficient, provided the subject matter of the amendment is properly one to be embraced under the title of the act amended. Thus, in amending a section of the prohibition law defining intoxicating liquors, it was held proper to make any definition that would have been appropriate under the original measure under going amendment and that it was not necessary to state in the title of the amendatory act the exact character of the amendment. *State v. Fargo Bottling Works*, 19 N. D. 396. See, also, *Erickson, et al. v. Cass Co. et al.* 11 N. D. 494. In the opinion of the majority, this principle does not aid a duplicitous title nor render valid legislation which results from a clear change of purpose from that originally evidenced by the bill. It does not sustain legislation that goes beyond the title of the amendatory act considered in its relation to the parts amended. *Dolese et al. v. Pierce* 124 Ill. 140. It only supplies a defect in a title which is apparent rather than real, and this it does by referring to the title of the act amended. The question before us is not one of the sufficiency of the title at all, but of duplicity of subject matter and change of purpose. If a bill be introduced for the purpose of amending a given section of some pre-existing chapter and if it emerges from the legislature as a bill to amend an entirely different section of the same chapter and one having no logical connection with the first proposal, the purpose is clearly changed notwithstanding the two sections were originally parts of the same act. And if a bill be introduced relating to subjects so clearly distinct as the compensation of assessors and the rate of interest payable on tax certificates, the subject is none the less duplicitous because they have in the past been dealt with in a single act under an appropriate title prescribing a revenue and taxation code.

Upon other occasions the minority members, and particularly Mr. Jus-

tice Robinson, have voiced sentiments concerning the questions in hand that seem to us to be altogether at variance with the views expressed in this case. In *McCoy v. Davis* 38 N. D., 328 164 N. W. 951, Justice Robinson, in a dissenting opinion, aptly states, (p. 339, Official Reports) "*§ 61 of the Constitution is mandatory*. Under it, every bill for an act must embrace only one subject, which must be expressed in its title. The title of an act must go with it from the beginning to the end, so as to give notice to the law makers and the people, of the subject and purpose of the act." See also, Robinson J. in *State ex rel, Gaulke v. Turner*, 37, N. D. 635-670, *State ex rel Fargo, v. Wetz* 40 N. D. 299-337, 176 N. W. 992 and *Great Northern Railway Co., v. Duncan* 42 N. D., 346. In the latter case, Justice Robinson asserted that the title of the act manifestly embraced four subjects where it included the limitation of tax levies, restriction of debt limits and regulated the salaries and duties of officers which were dependent upon assessed valuation. This dissenting opinion evidently expressed the sentiments of Mr. Justice Grace for he concurred in the result. The subject matter of that act, as viewed by the majority of the court, disclosed a single purpose on the part of the legislature to preserve normal limitations and salaries during a period of anticipated higher assessed valuation. If the subject were in fact duplicitous as there held by the minority, we are at loss to understand how the subject in the case at bar can be regarded as single.

The majority of this court is of the opinion that the act is clearly unconstitutional, for the reasons originally stated.

CHRISTIANSON and BRONSON, JJ., concur.

CITIZENS STATE BANK OF SELFRIDGE, Appellant, v. OLAF SMELAND, Respondent.

(184 N. W. 987.)

Garnishment—statute requiring publication of summons against defendant within 60 days held applicable in garnishment proceedings.

1. Where a garnishee summons was served upon a garnishee alone on Jan. 8th, 1918, a disclosure by the garnishee made on Jan. 12th, 1918,

and the summons and complaint filed in the District Court on Jan. 18th, 1918, and where, about two and one half years later, an affidavit for publication of the summons was filed upon the ground that the defendant was and had been a non resident, publication thereof had, and judgment, subsequently upon default, rendered against the garnishee, it is *held* that the provisions of § 7383 C. L. 1913 requiring the publication of a summons within sixty days applies and the judgment is void.

Appeal and error—direct action to vacate void judgment upheld where not objected to below.

2. A direct action to vacate such void judgment, (when entertained by the trial court without objection), instead of a motion or other proceeding therefor, may be upheld.

Opinion filed Nov. 8, 1921.

Action to vacate a judgment in Morton County, *Berry, J.*

Plaintiff has appealed from an order sustaining a demurrer.

Reversed.

Norton and Kelsch, for appellant.

The right to proceed by garnishment is purely a statutory right and the statute must be substantially complied with to confer and preserve the jurisdiction of the Court in such proceedings. *McPhee v. Nidda*, 111 Pac. 1149 (Wash.).

"A summons is issued when it is duly drawn and signed with the intention that it be served." § 7383 Compiled Laws 1913; *Smith v. Nicholson*, 5 N. D. 426; § 7438 Compiled Laws 1913; *Atwood v. Tucker*, 26 N. Dak. 637.

"The statutory remedy by motion, is, however, not the only mode of assailing a judgment. In cases not embraced within the statute, resort may be had to a Court of Equity." *Freeman v. Wood* 11 N. D. 8; *Yorke v. Yorke*, 3 N. D. 343; *Campbell v. Warren et al.* 19 N. D. 645.

Jacobsen & Murray, for respondent.

Garnishment is purely a statutory remedy, and is separate and distinct from the remedy of attachment, and not any of the attachment statutes are applicable. *Park, Grant & Norris v. Nordale*, (N. D.) 170 N. W. 555.

The rule is laid down in attachment cases that the only reason why the

summons must be served within specified time is that it is so required by statute. *Doheny v. Worden*, 75 App. Div. 47; 77 N. Y. Supp. 959; *Fisher v. Nash*, 47 App. Div. 234; 62 N. Y. Supp. 646; *Stowe v. Stacey*, 14 New York, C. L. V. Proc. 45.

In the absence of Statute, the writ of attachment is valid although service by publication was undertaken two years after the issuance of the writ. *Robinson v. Marr*, 145 Ill. App. 178; *McClung v. Sieg*, 54 W. Va. 467; 46 S. E. 210; *Wester v. Long*, 63 Kansas, 876; 66 Pac. 1032.

BRONSON, J. This is an action to vacate a judgment against the plaintiff as garnishee. An appeal has been taken from an order sustaining a demurrer to the complaint. Among other things, the complaint sets forth the following allegations: On January 3, 1918, the defendant prepared a summons and complaint in an action against one Flynn, also a garnishment summons and affidavit therein, naming the plaintiff herein as garnishee. On January 8, 1918, the garnishment summons and affidavit were served upon the garnishee. On January 12, 1918, the garnishee disclosed the possession of a note for about \$340, owned by Flynn. On January 18, 1918, the summons and complaint were filed in the district court. More than two years later, on June 28, 1920, there was filed in the district court an affidavit for publication of the summons, stating that the defendant Flynn was not a resident of the state and that the place of his residence was unknown. On November 20, 1920, there were filed, by the attorneys for Smeland, affidavits of default, stating that the summons was published for six weeks from July 1, 1920, to August 5, 1920, and that no answer or demurrer had been served upon them, although the statutory time therefor had expired. Pursuant to findings of the trial court, judgment for \$310.15 and costs in favor of Smeland and against Flynn was entered on November 20, 1920. Likewise pursuant to the order of the trial court, judgment for \$240.44 and interest in favor of Smeland and against the plaintiff herein, as garnishee, was entered on December 27, 1920. The complaint also alleges that the defendant did not make publication of the summons within 60 days, as required by statute; that the plaintiff, several months after its disclosure, believing that the action of Smeland had been discontinued, paid to others the property of Flynn in its possession; that the judgment against the garnishee is void; that its remedy by motion is not now available, § 7483, C. L. 1913; and that it possesses no other plain, speedy, or adequate remedy at law. The trial court, in sustaining the demurrer, held that the

complaint did not state a cause of action; that there is no statutory limitation, in garnishment proceedings, upon the time when an affidavit for publication must be filed; that it was not necessary for Smeland to proceed with publication of the summons against Flynn within 60 days after the service upon the garnishee.

We are of the opinion that the trial court erred. The jurisdiction of the trial court in the action against Flynn and in the garnishment proceeding were mutually dependent upon appropriate proceedings in each action. The garnishment proceedings, although deemed an action. § 7581, C. L. 1913, were nevertheless dependent upon jurisdiction in the main action. If no jurisdiction would be secured against the defendant, no jurisdiction would remain in the garnishment proceedings upon which a judgment might be rendered against the garnishee. To permit the garnishment process to be served and the jurisdiction of the trial court to obtain over the "res," it was necessary that a summons in the main action simultaneously issue. § 7568, C. L. 1913. The court might acquire a jurisdiction either by the service of the summons or the service of the garnishee summons. § 7583, C. L. 1913. Upon this service of the garnishee summons herein the court acquired a jurisdiction. The garnishment proceedings thereupon were deemed an action by Smeland against the plaintiff, as garnishee, and Flynn, as the defendant. § 7581, C. L. 1913. The garnishment action was then an action pending. The court then possessed jurisdiction to proceed by publication of the summons in the main action. The main action and the garnishment action were then mutually dependent upon the other for the retention of jurisdiction.

Jurisdiction, if it existed at all, was necessarily predicated upon the nonresidence of the defendant. Otherwise, the garnishment proceedings would be void because no service was made upon the defendant. § 7571, C. L. 1913.

Section 7383, C. L. 1913, provides that an action is commenced by the service of a summons; that an attempt to commence an action is deemed equivalent to the commencement thereof, when the summons is delivered with the intent that it shall be actually served to the sheriff or other officer of the county in which the defendant resides, etc.; that such an attempt must be followed by the first publication of the summons or the service thereof within 60 days.

The contention of the respondent that this section only concerns the statute of limitations, as stated in the subsequent sections, must be

denied. The section is a general provision in the Code of Civil Procedure. Thus it has been during and since territorial days. § 62, Code Civ. Proc. 1877. The policy of the law expressed throughout the Code of Civil Procedure is for the expedition of litigation. §§ 7423, 7425, 7432, 7539, C. L. 1913. It must be presumed that when the garnishee made its disclosure, and Smeland thereafter filed his summons and complaint, there was an intent to hold jurisdiction and to deliver the summons and complaint for purpose of securing service upon the defendant as a nonresident. Otherwise there existed no jurisdiction. Such delivery and filing, together with the jurisdiction acquired over the garnishee, brought the proceedings, in our opinion, within the purview and policy of the statute, and required a publication within the time prescribed. Such publication was not made, and the judgment accordingly is void. See *Atwood v. Tucker*, 26 N. D. 622, 631, 145 N. W. 587, 51 L. R. A. (N. S.) 597; *Rhode Island v. Keeney*, 1 N. D. 411, 45 N. W. 341.

Respondent contends that plaintiff's remedy was by motion and not by action, unless satisfactory reasons are alleged for not proceeding by motion. This is an action to vacate a void judgment. The proper practice undoubtedly was to seek the exercise of the inherent powers of the court by motion, or to appeal from the judgment. *Gaar, Scott & Co. v. Spaulding*, 2 N. D. 414, 51 N. W. 867. Such proceedings would be more expeditious. § 7483, C. L. 1913, does not apply. *Martinson v. Marzolf*, 14 N. D. 301, 309, 103 N. W. 937. However, an action to vacate a void judgment may be entertained. 23 Cyc. 946; *Freeman v. Wood*, 11 N. D. 1, 8, 88 N. W. 721. The trial court did entertain this action without objection. We are not disposed to disturb the action of the trial court because of the existence of other more appropriate methods of procedure.

The order is reversed, with costs.

ROBINSON, J., concurs.

GRACE, C. J., concurs in the result.

BIRDZELL, J. In my opinion the proceeding should have been by motion, but as the whole matter was before the lower court, and it apparently considered the merits as fully as if a motion had in fact been made. I am of the opinion that this court should consider the merits. I agree with the principal opinion.

CHRISTIANSON, J. (concurring in part and dissenting in part). This is an equitable action to vacate and annul a certain judgment. There was a general demurrer to the complaint. The trial court sustained the demurrer, and the plaintiff has appealed. The question presented to the trial court, and also presented to this court, is whether the complaint did or did not state a cause of action. I am inclined to the view that the complaint did not state a cause of action, and that the trial court was correct in so ruling. There is no question but that the relief which plaintiff seeks to obtain in this action might have been obtained by a motion to vacate the judgment made in the action in which the judgment was entered. For it is well settled that the remedy by motion applies not only in cases which fall within the provisions of § 7483, C. L. 1913, authorizing the vacation of the judgment taken against a party through his mistake, inadvertence, surprise, or excusable neglect, but is equally applicable, and exists wholly independent of the statute, in cases where judgments have been rendered without jurisdiction or obtained through fraud upon the injured party and the court. *Yorke v. Yorke*, 3 N. D. 343, 353, 55 N. W. 1095; *Williams v. Fairmount School District*, 21 N. D. 198, 204, 129 N. W. 1027. Inasmuch as it clearly and indisputably appears that a remedy by motion was and is both available and adequate, it seems to me that the complaint wholly fails to set forth a cause of action for the vacation and annulment of the judgment. See *Freeman v. Wood*, 14 N. D. 95, 105, 103 N. W. 392; *Freeman on Judgments* (4 ed.) § 497; 15 R. C. L. p. 748.

Inasmuch as my associates are of the opinion that an action will lie under the facts set forth in the complaint in this case, even though the remedy by motion is available, and hence have found it necessary to also discuss and decide questions relative to the validity of the judgment, I deem it proper to say that I agree with what is said by Mr. Justice Bronson in that portion of his opinion covered by ¶ 1 of the syllabus. In other words, I am entirely agreed that if the facts set forth in the plaintiff's complaint in this case were presented in support of and established upon a motion to vacate the judgment in the original action, it would be the duty of the trial court to set aside, vacate, and annul the judgment.

THE STATE OF NORTH DAKOTA, ex rel. VADNAIS, v. L. L. STAIR, Warden of the State's Penitentiary.

(185 N. W. 301.)

Criminal law — habeas corpus—writ may be invoked by prisoner unlawfully restrained of liberty while on probation.

1. A person who has been placed on probation under a suspended sentence cannot be deprived of the liberty thus granted except in pursuance of the laws in such cases made and provided; and in case he is deprived of his liberty in violation of the rights and benefits thus conferred upon him, he may properly invoke the Writ of Habeas Corpus.

Habeas corpus — probationed prisoner, wrongly deprived of his liberty, may show that Board of Experts found that he had not violated its rules.

2. In case of his arrest and incarceration, such person may show on habeas corpus that the Board of Experts, the board under whose jurisdiction such persons are placed, have at no time found that he has violated any of the rules and regulations prescribed for probationers, but on the other hand have found that he did not violate such rules and regulations; that he has not, in fact, violated any of such rules and regulations; and that the Board of Experts have never terminated the probation.

Application by the State on the relation of W. E. Vadnais for a writ of habeas corpus to L. L. Stair, Warden of the State's Penitentiary.

Granted.

Per Curiam Opinion.

Wm. Langer & E. T. Burke, for petitioner.

Olaf Braatlien, States Attorney of Divide County and *W. A. Anderson*, Assistant Attorney General, for respondent.

PER CURIAM. This is an original application for a writ of habeas corpus which was presented to this court after a denial of the application by Judge Nuessle, one of the judges of the Fourth judicial district. It appears from the petition that on the 18th day of January, 1921, the relator, Vadnais, was sentenced by the district court of Divide county to imprisonment in the state penitentiary for a term of five years, on a charge that he, while county auditor of such county, had falsified public records; that the execution of such sentence was suspended by the district

court which imposed it, and the defendant placed on probation; that thereafter the relator obtained employment, and in all other things complied with the rules and regulations applicable to persons placed on probation; that thereafter the state's attorney of said county notified the Warden of the State Penitentiary that he wished the relator interned in the penitentiary; that thereafter a field officer of the penitentiary took the relator in custody; that since on or about March 10, 1921, the relator has been detained in the penitentiary; that he has never in any respect violated any of the rules or regulations of the Board of Experts; that the Board of Experts has at no time terminated the probation, nor has the district court which imposed the sentence in any manner revoked or set aside the order of suspension. A hearing was had before this court at which the records of the Board of Experts were produced and offered in evidence, and the members of such board, including the Warden of the State Penitentiary and other witnesses, were sworn and testified orally. From the records and such oral testimony it appears, without contradiction, that the relator has in no manner violated any of the rules or regulations of the Board of Experts, and that the Board of Experts has never so determined. On the contrary it appears that after a hearing had the Board of Experts arrived at the conclusion that the relator had not violated any of the rules and regulations applicable to persons on probation. It appears further that at such meeting the state's attorney appeared and made the charge that before the sentence was passed upon the relator, an attorney who represented the relator in such criminal case agreed with the state's attorney that in the event sentence was suspended the relator would assist the state's attorney in correcting "the public records of such county, and to help rid the public records of such county of all defalcation and crime," and said state's attorney claimed that the relator had failed to comply with this agreement. As already stated, the Board of Experts, after hearing the charges of the state's attorney, decided that the relator had not violated any of the conditions imposed upon him as a probationer; but, in view of the attitude of the state's attorney, they adopted a resolution that the relator be not released from custody until the state's attorney recommended that he be released. The state's attorney reiterated the same charge before this court which he made before the Board of Experts. He was sworn and examined as a witness upon the hearing before us. It appears from his testimony that, after the suspension of the sentence,

the relator came to the state's attorney's office, and that for some reason it was deemed necessary to have a conference at some other time, and that the state's attorney made an appointment to have the relator call at some subsequent date, and that the relator failed to appear at the time of such appointment. This is the only tangible proposition presented by the state's attorney.

The statute provides:

"In all prosecutions for crime, except as hereinafter provided, where the defendant has pleaded or been found guilty, and where the court or magistrate has power to sentence such defendant to the penitentiary, and it appears that the defendant has never before been imprisoned for crime, either in this state or elsewhere (but detention in an institution for juvenile delinquents shall not be considered imprisonment), and where it appears to the satisfaction of the court or magistrate that the character of the defendant and circumstances of the case are such that he is not likely again to engage in an offensive course of conduct, and where it may appear that the public good does not demand or require that the defendant shall suffer the penalty imposed by law, said court or magistrate may suspend the execution of the sentence, and place the defendant on probation in the manner hereinafter provided." § 10950, C. L. 1913.

"Whenever a sentence to the penitentiary has been imposed, but the execution thereof has been suspended and the defendant placed on probation, the effect of such order shall be to place said defendant under the control and management of the board of trustees of the penitentiary, and he shall be subject to the same rules and regulations as apply to persons paroled from the penitentiary after a period of imprisonment therein." § 10952, C. L. 1913.

"Whenever it is the judgment of the court that the defendant be placed upon probation, and under the supervision of the penitentiary, it shall be the immediate duty of the clerk of the said court to make a full copy of the judgment of the court, with the order for the suspension of the execution of the sentence thereunder, and the reasons therefor, and to certify the same to the warden of the penitentiary, to which the court would have committed the defendant but for the suspension of the sentence. Upon entry in the records of the court of the order for such probation, the defendants shall be released from custody of the court as soon as the requirements and conditions of the board of trustees

of the penitentiary have been properly and fully met." § 10954, C. L. 1913.

"Whenever a person placed upon probation, as aforesaid, does not conduct himself in accordance with the rules and regulations of the institution in whose charge he has been placed, the field officer thereof may, without warrant or other process, arrest said person and convey him to said institution, and the board of trustees of the penitentiary may, after a full investigation and a personal hearing, because of such conduct, forthwith terminate the probation and cause said person to suffer the penalty of the sentence previously suspended. Any person under probation who has violated the conditions of his probation shall, under order of the board of trustees of the penitentiary, be subject to arrest in the same manner as in the case of an escaped convict. In all such cases of termination of probation, the original sentence shall be considered as beginning upon the first day of imprisonment in the institution." § 10956, C. L. 1913.

"A member of the State Board of Control, chosen and designated by said board, the Warden of the State Penitentiary, the prison physician, a chaplain of the State Penitentiary, and one other person to be chosen as a member at large by the State Board of Control shall constitute the Board of Experts whose duty it shall be to pass upon the application for discharge of the inmates of the penitentiary, who may have been sentenced under the indeterminate sentence law, and also to pass upon the applications of the inmates of the penitentiary, who may make application to be paroled as provided by law. The State Board of Control shall elect one of its members as well as the member at large to sit upon the Board of Experts at their first meeting in April and thereafter at the April meeting in each odd-numbered year. The terms of these members of the Board of Experts shall be two years, commencing immediately after the April meeting of the Board of Control in the odd-numbered years. The State Board of Control of state institutions shall certify to the Governor and the State Auditor, the names of the members selected by them to act as members of the Board of Experts as soon as they are elected and have qualified as members thereof. The Board of Experts shall determine and fix the date when an inmate may be paroled or discharged, and shall keep a complete record of all the findings and orders of the board. It shall be the duty of the Board of Experts to provide blanks to record applications and to formulate rules and regu-

lations governing the conduct of the inmates applying for a parole and the manner in which they may become eligible for discharge or parole. It shall also be the duty of the Board of Experts to meet once in each month and to keep a complete record of all the inmates discharged or paroled by them and to make a biennial report to the State Board of Control of all inmates paroled who have been discharged, and statistics pertaining thereto." Chap. 233, Laws 1915.

In this case there is no question but that the sentence passed upon the relator was suspended, and he placed upon probation under the applicable statutory provisions. Nor is there any question but that he complied with the requirements and conditions of the Board of Experts. It is contended by the attorney for the respondent in this case that a person who has been paroled or placed on probation has no civil rights, that he still remains a convicted felon, and that he is not entitled to invoke the writ of habeas corpus. In our judgment this argument is wholly unsound. Manifestly when a sentence is suspended and the defendant placed on probation upon certain conditions, and subject to certain rules and regulations, certain obligations are placed or imposed upon the party so placed on probation, and incidentally certain rights or privileges are vested in or conferred upon him. See *Church on Habeas Corpus* 2d ed. §§ 458-458e. On the one hand if he violates the conditions the probation may be terminated and the sentence which has been suspended be enforced. On the other hand if the person who has been so placed on probation continues in good faith to comply with the conditions imposed he is certainly entitled to enjoy the rights and privileges which have been thus conferred upon him. It will be noted that our laws specifically provide that the probation may be terminated only "after a full investigation and a personal hearing." (§ 10956 C. L. 1913). And the Board of Experts is required to "keep a complete record of all the findings and orders of the Board." Chap. 233 Laws 1915. In this case the evidence is undisputed that the Board of Experts have not found that the relator has violated any of the rules or regulations of the board of experts, nor has any order been entered directing the probation to be terminated. On the contrary the members of the Board of Experts specifically testified that it had not been shown to them that the relator had violated any of the rules or regulations under which he was at liberty; that they had not so found, and that on the contrary whatever finding

they had made was to the effect that he had not violated such rules or regulations.

The writ of habeas corpus is the great writ of liberty. No human being ever sinks so low that he or she may not in the proper case apply to the courts of this land for and obtain the benefits of this great writ. Manifestly, if such writ does not lie in a case like this then a person whom the district court has placed on probation under the rules and regulations established by the Board of Experts may be deprived of such liberty and freedom even though he has not in the slightest particular violated any of the conditions imposed upon him. But it seems well settled that the writ of habeas corpus will lie in behalf of a person who has been wrongfully deprived of the liberty which he enjoys under a parole or a suspended sentence. In *Ruling Case Law*, it is said: "Questions involving the nature of pardons sometimes arise in habeas corpus proceedings. A pardon is frequently conditional, as the executive may extend his mercy on what terms he pleases, and annex to his bounty a condition subsequent or precedent on the performance of which the validity of the pardon will depend. If the convict does not perform the condition of the pardon, it will be altogether void, and he may be brought to the bar and remanded to suffer the punishment to which he was originally sentenced. The question whether there has been a violation of, or non-compliance with, the condition or conditions of a pardon may be investigated and determined in habeas corpus proceedings brought by the convict himself to test the validity of his arrest and detention for an alleged violation of the conditions. Likewise, the court may inquire into the validity of a pardon which the governor attempted to revoke. One who has been released on parole may on rearrest for violation of conditions show on habeas corpus that he has performed the conditions, or that he has a legal excuse for not having done so." (12 R. C. L. 1244.) See, also, *Church on Habeas Corpus*, §§ 458-458e. The cases cited in support of the text fully sustain the principles so announced.

It is our opinion that the petitioner is unlawfully restrained of his liberty by the respondent, and that he is entitled to a discharge from the imprisonment of which he complains, and he is therefore ordered discharged therefrom. It is of course understood that this release leaves the petitioner in all things subject to the conditions imposed upon him as a probationer.

ROBINSON, CHRISTIANSON, BIRDZELL, and BRONSON, JJ., concur.

GRACE, C. J., concurs in the result.

UNION NATIONAL BANK OF MINOT, Appellant, v. ANDREW PERSON and EDLA R. PERSON, Respondents.

(185 N. W. 266.)

Fraudulent conveyances — plaintiff's evidence held not to establish conveyance with intent to defraud creditors.

1. Plaintiff's action is brought to procure a certain deed executed and delivered by the defendant, Andrew Person to his wife, Edla R. Person, declared fraudulent and void.

It is *held* that plaintiff has failed to establish as a fact that the conveyance was made with the intent to defraud the creditors.

Opinion filed Oct. 19, 1921. Rehearing denied Nov. 15, 1921

Appeal from a judgment of the District Court of Burleigh County, Coffey, J.

Judgment affirmed.

Fisk & Murphy, and *Cameron & Wattam*, for appellant.

A discrepancy of 25% between the debt paid and the value of the property conveyed was held such an excess as to entitle the creditors to avoid the conveyance as to the excess even though no actual fraud was imputed. *Guitchtel v. Dewall*, 59 N. J. Eq. 651; 41 Atl. 227.

A conveyance by the husband to his wife of property worth \$5,000.00 for a debt amounting to \$2,856.00 was held to be void as to the excess and creditors allowed to participate. *Ryan v. Mayer*, 108 Mich. 638; *First National Bank v. Smith*, 149 Ind. 443.

Where the husband disposed of all his property to his wife for a consideration entirely inadequate, the court imputed to the vendor an intent to defraud and imputed knowledge to the vendee and avoided the

conveyance in toto in behalf of creditors. This case is on all fours with the case at bar. *Clark v. Bell*, 40 Tex. Civ. App. 3989 S. W. 38.

The following cases lay down the same rule on fact very similar. *Russell v. Davis*, 133 Ala. 647; 31 So. 514; 91 Am. St. R. 56; *Cox v. Collis*, 109 Iowa 270; 80 N. W. 343; *Wiltse v. Flack*, 115 Iowa 51; 87 N. W. 729; *Griswold v. Szwaneck*, Neb., 118 N. W. 1073.

"A husband cannot give to his wife that which the law regards as belonging to his creditors. Hence, if he is insolvent, or if his conveyance leaves him with an amount of property insufficient to pay his debts, it may be avoided at the instance of existing creditors." 12 R. C. L. p. 516.

"A conveyance from husband to wife requires less proof to show fraud, and, when a prima facie case is made, stronger proof to show fair dealing, than would be required if the transaction were between strangers." 12 R. C. L. 515.

This court has recognized the above rule. *Meichen v. Chandler*, 20 N. D. 233.

Theodore Koffel, for respondents.

The wife is not required to keep any books or account when dealing with her husband in relation to her separate estate. *Buhl et al v. Peck et ux*, 37 N. W. 876.

That relationship between the vendor and vendee is not a badge of fraud, nor a ground for suspicion, has been recently held by our own Court. *First National Bank of Ashley v. Mensing*, 180 N. W. 58; *Fluegel v. Henschal*, 74 N. W. 996.

No presumption of fraud can arise from the mere fact that the parties to the conveyance in question are husband and wife. Nor can there be any ground for scrutinizing the transaction more carefully or with greater suspicion than if the conveyance had been made to strangers. *Beach v. White, Walk*; 495; *Perkins v. Perkins*, 1 Tenn. 537; *Teller v. Bishop*, 8 Minn. 226.

The relationship does not create a presumption of fraud. Note 2, 90 Am. St. Rep. 497.

Neither was she required to take from her husband any kind of acknowledgements of indebtedness for her advance. *Adoue v. Spencer*, 56 L. R. A. 817 and note.

Mere suspicion does not render a conveyance fraudulent. *Steele v. DeMay*, 60 N. W. 684.

Where there is transfer of title as well as of possession this section has no application. *Walklin v. Horswill*, 24 S. D. 191; 123 N. W. 668.

An assignment accomplished by immediate change of possession is not fraudulent. *Wright v. Lee*, 10 S. D. 263; 72 N. W. 895.

Filing chattel mortgage is equivalent to actual delivery and continued change of possession. *Reichert v. Simons*, 6 Dak. 239, 42 N.W. 657.

Possession may be by agent and that agent may be the vendor. *Grady v. Baker*, 3 Dak. 296; 19 N. W. 417.

An assignment free from fraud in its inception is not invalidated by subsequent fraudulent acts. *Wright v. Lee*, supra.

A conveyance with the sole object of securing an honest debt is not fraudulent. *Paulson v. Ward*, 4 N. D. 100; 58 N. W. 792.

A conveyance is not fraudulent because the husband is indebted at the time of conveyance. *Kelly's Appeal* 77 Pa. St. 232.

Indebtedness or even insolvency is no obstacle or hindrance to a transfer in good faith of property for a debt due the wife. *Lehman v. Levy*, 30 La. Ann. 745.

A conveyance by a husband to his wife in consideration of money borrowed from her without notice of fraudulent intent is good as against other creditors. *Hagen v. Robinson*, 94 Ind. 138; *Thompson v. Feagin*, 60 Ga. 82.

In an action of quia timet the question of title between the parties may be fully litigated and determined and a decree rendered assigning the title to the real estate, or any part of it, to the party entitled thereto. *Dolen v. Black*, 67 N. W. 760; *Snowden v. Tyler*, 31 N. W. 661; *Bausman v. Kelly*, 36 N. W. 333; *Eagen v. McDonald*, 153 N. W. 915.

GRACE, C. J. This action was brought to have a certain deed executed and delivered by the defendant Andrew Person to his wife, Edla R. Person, declared fraudulent and void as against the plaintiff, a creditor. The action was tried to the court without a jury. It made findings of facts, conclusions of law, and an order for judgment in defendant's favor. Judgment was entered in pursuance to the order, and this appeal is from the judgment and a trial de novo in this court requested.

The debt which is the basis of the plaintiff's cause of action is a judgment recovered by it against the defendant and others, on or about December 17, 1919.

The complaint contains the usual and necessary allegations in a cause of action of this nature. The defendants answered separately, alleging

a good and valuable consideration for the transfer, and denied that the conveyance of the property from Person to his wife was made with fraudulent intent to dispose of the property conveyed or transferred for the purpose of placing it beyond the reach of his creditors, and further alleging that Edla R. Person purchased from her husband the premises and property in question in the summer of 1916, and paid him therefor the full value thereof.

The trial court made the following findings of fact. If these findings are sustained by the evidence, the judgment appealed from should be affirmed. They are as follows:

Findings of Fact.

I. That the above-entitled action was duly and regularly commenced in the district court of Burleigh county, N. D., by the issuance of a summons therein as provided by law, dated the 28th day of June, A. D. 1920, and that said summons and the complaint in said action were duly served upon said defendants in Burleigh county, N. D., and that said complaint sets forth a cause of action against the defendants for the transfer of certain property in fraud of their creditors, and that the defendants within the time prescribed by law served their answer thereto and issue joined.

II. That during the month of May, 1916, the defendants entered into a good and valid agreement in good faith, wherein and whereby the defendant Andrew Person sold and assigned and conveyed to the defendant Edla R. Person the premises described in the complaint, together with other property, both real and personal, for a good, valid, and sufficient consideration, and which said agreement was subsequently thereto carried out in full; that the defendant Edla R. Person paid to the defendant Andrew Person the sum of \$11,000 cash; \$4,000 of which had been advanced prior to said agreement at various times and in various sums, and the balance thereof, \$7,000 was paid in full by the defendant Edla R. Person, to the defendant Andrew Person, early in the spring of 1917; that in addition thereto the defendants placed a mortgage on the premises described in the complaint for the sum of \$27,750, which mortgage the defendant Edla R. Person assumed; and further assumed debts and obligations contracted on the improvement of the building on said property amounting to \$3,000 worth of material to the Carpenter

Lumber Company, and \$7,000 to the First National Bank of Bismarck; that at the time of said agreement there were other incumbrances against the property described in the complaint and the other property conveyed, which were paid out of the \$27,500 mortgage, and that the consideration paid by the defendant Edla R. Person was a full, fair, and reasonable consideration for the property both real and personal, transferred to her by her husband, the defendant Andrew Person.

III. That, at the time of the said agreement and the transfer of property therein contracted to be sold and conveyed, the defendant Andrew Person was not indebted to this plaintiff, or any other person, to such an amount or in such sums as would make this transfer fraudulent as to the plaintiff, or any other creditor; and that the defendants had a good and legal right to make the agreement in May, 1916, alleged and proved; that said agreement was made in good faith by both the defendants Edla R. Person and Andrew Person, and without the intent of hindering, delaying, or defrauding the creditors of the defendants or either of them.

IV. That the debts on which the judgment of the plaintiff is founded was created subsequent to the agreement between the defendant Andrew Person and his wife, Edla R. Person; and that the exhibits or said indebtedness show upon their face that all notes signed by the defendant Andrew Person were paid in full, except \$500; that the plaintiff never notified or demanded payment from the defendant Andrew Person prior to the conveyance by said Andrew Person of the property described in the complaint.

V. That the defendant Andrew Person had a good right to honestly believe, and did believe, that the indebtedness and notes which he had signed and which were made payable to the plaintiff had all been fully paid prior to the conveyance of the premises by him to the defendant Edla R. Person.

VI. That the defendant Edla R. Person had no knowledge of any indebtedness of her husband to the plaintiff, nor had she any knowledge of any facts or circumstances which would put her upon her inquiry as to any indebtedness of her husband, Andrew Person, to the plaintiff at the time when she made her agreement with her husband for the purchase of the said premises described in the complaint, and the other property, both real and personal, described in said agreement, nor at the time that she made the final payment of the consideration agreed to be

paid to her husband, nor at the time that the conveyances were actually made to her, nor at any time before said agreement was fully completed between her and the defendant, Andrew Person.

VII. That said agreement, sale, and transfer of the property by the defendant Andrew Person to the defendant Edla R. Person were made in absolute good faith and without the intent on the part of either of said defendants to hinder, delay, defraud, or cheat the creditors of the defendant Andrew Person, or any other person whatsoever; that the said agreement was fair, and reasonable, and legal in all respects, and full consideration paid for the property conveyed.

VIII. That the plaintiff, the Union National Bank of Minot, has wholly and utterly failed to prove any fraud committed by the defendants, or either of the defendants, upon the part of the plaintiff, or any other person, in the transaction complained of or in the conveyance of the property described in the complaint by the defendant Andrew Person to the defendant Edla R. Person, or any of the property agreed to be transferred and subsequently conveyed in the agreement made between the defendants in May, 1916; that the delay in finally completing said agreement between the defendants does not evidence or raise any presumption of fraud between said defendants, but, on the contrary, raises a presumption of good faith, and the belief of the defendants themselves in their right to make the transaction, and to make it in their own way, and at the times it was convenient to them, having no fear of any intervention by any creditor or any other person who might object thereto, and does not manifest a disposition on the part of the defendants to transfer property in haste in order to defeat creditors.

IX. That this is an action to set aside a conveyance in fraud of creditors, and to establish a lien of the creditors upon the premises described in the complaint.

X. That the plaintiff has no right, title, estate, claim, lien, or demand in or to the premises hereinafter and in said complaint described of any kind, nature, or description whatsoever, and is forever debarred and enjoined from asserting or claiming any thereto.

XI. That all and singular the allegations of the answer are true, and the same are hereby adopted as additional findings of fact, and that the defendant Edla R. Person is the owner in fee simple of and to the real estate described in the complaint, to wit: Lots numbered 7 and 8 in block numbered 40 of the Northern Pacific Second addition to the city

of Bismarck, N. D., according to the plat thereof on file and of record in the office of the register of deeds in and for Burleigh county, N. D., free and clear of any lien, claim, or demand in and to the same or any right, title, or estate therein by or of the plaintiffs.

The only error specified by plaintiff is that it desired a review of the entire case in this court. The principal point to be determined is whether there was an actual bona fide sale in May, 1916, of lots 7 and 8, block 40, of the Northern Pacific Second addition to the city of Bismarck, by Andrew Person, in whose name the title of the premises then stood, to Edla R. Person upon the terms and for the consideration as claimed and testified to by them.

The evidence is so abundant in this respect that it may be termed almost conclusive. It clearly shows that the agreement was then made, and that the defendant then made a first payment thereon in the sum of \$4,000, which were for advances which Edla R. Person had prior thereto made to her husband. It further shows that she borrowed \$7,000 from her father, and in the spring of 1917 paid that sum to her husband as a part of the purchase price of the property in question. The defendant Edla R. Person, in the spring of 1916, commenced the erection of "Person Court" on said lots, the construction thereof being under the supervision of her husband. The title of the premises at this time still remained in her husband's name. About 1916 she obtained a loan for the sum of \$27,750 from the Dakota Trust Company, executing a mortgage therefor on these premises signed by herself and husband, and this was filed June 15, 1916. Thereafter she made a further loan with the First National Bank of Bismarck for \$7,000 and became indebted to the Carpenter Lumber Company for the sum of \$3,000, and to Chas. Anderson in the sum of \$2,000. These sums, including the amount she had paid her husband, aggregated about \$50,750 which represented the cost of the property in 1916 to the defendant. Andrew Person purchased lots 7 and 8 in 1909 for \$1,500, and then erected thereon a duplex house of the value of about \$8,000. He also owned lot 1, block 18, River View addition to the city of Bismarck, valued at about \$500; he erected a dwelling house thereon of the value of about \$2,500. In 1916 he sold all these, and as well his personal property, valued between \$1,075 and \$1,500 to his wife. He at that time owed on all the property about \$4,500. His equity in the property was something more than \$9,000. The evidence fairly shows the foregoing facts, and further shows that defendant had paid

her husband \$11,000 in money for the said property in the condition it was before the erection of Person Court.

The evidence fairly shows that, at the time of the sale in 1916, Andrew Person directed a deed to be made of lots 7 and 8 to his wife. It shows further that, when she was making a loan from the Dakota Trust Company on this property, it raised some objection to the title to these premises, the nature of which it is not necessary to here mention. She brought an action in the fall of 1916 to quiet her title thereto. This action was not determined until the fall of 1917, and at the time it was determined Andrew Person gave a deed of these lots to his wife. At the time she brought the action she did not have record title to lots 7 and 8. This, however, is immaterial, for, under § 8144, C. L., 1913, she could maintain the action if she had an estate or interest, lien or incumbrance upon the property, the title of which it was intended to quiet by the action. The plaintiff here was not made a party to that action, and there is no reason why it should have been. It had no interest in property, nor any lien upon it. Its claim, if any, against Andrew Person at that time had not been reduced to judgment, and made a lien against this property, nor was it otherwise made a lien thereon. Plaintiff's judgment was not recovered until December 17, 1919, when one for \$3,071 was recovered and docketed in the office of the clerk of court of Ward county. It was unnecessary, therefore, that the action to quiet title at the time it was brought should include the plaintiff. It is therefore not necessary to further consider any of the facts or circumstances connected with the bringing of the action to quiet title.

We turn now to the examination of the indebtedness, if any, which Andrew Person owed plaintiff at the time of the sale of the premises in 1916. On May 2, 1916, C. M. Knutson, J. H. Jensen, and Andrew Person (who the plaintiff maintains are the members of the Western Building Company, though Person earnestly denied he was ever a member thereof) executed and delivered to plaintiff a promissory note in the sum of \$1,500 due three months after date. On the back of this note there is an indorsement of \$30 accompanied by the notation: "Interest paid 8—3—16." The amount is equal to the amount of the interest on the note from the date thereof for a period of three months thereafter at 8 per cent. per annum. On the face of this note it is marked, "Renewed." On August 3, 1916, the same parties executed their note to the plaintiff for \$1,500. This note is unquestionably a renewal of the note last mentioned. On this note are two \$500 payments indorsed on the face thereof, the first

of which was made October 17, 1916, and the second the following day. On the 21st day of October, three days subsequent to the date of the last payment, this note is stamped paid, and, considering all of the facts and circumstances, there is not the least doubt of its payment in full. The plaintiff had no other claim or obligation against Person excepting a note dated October 2, 1917, for \$2,000, signed by the Western Building Company by J. H. Jensen, and one dated November 22, 1917 for \$500, signed by the Western Building Company, by Knutson and Jensen. Neither of these notes was signed by Person. He, however, in suit brought to recover upon them, was held liable, on the theory that he was one of the partners in the Western Building Company. The judgment recovered is that which plaintiff seeks to have paid by first having the sale of the premises, lots 7 and 8, denominated and declared one in fraud of creditors, and then by appropriate proceedings to have the premises sold and the proceeds applied to the payment of its judgment. It is clear, however, that, at the time of the sale of the premises by Person to his wife, he was in no manner indebted to the plaintiff. The evidence also clearly establishes that he did not know that he was indebted or was under any liability to the plaintiff at any time between the sale or until after the transfer. He did not know of any claim against him except the two \$1,500 notes, one of which was a renewal of the other, and, as renewed, paid, until the commencement of the action by the plaintiff to recover on the \$2,000 and \$500 notes. It is therefore clear that he did not sell and transfer his property to his wife with intent to delay or defraud his creditors or any of them. Whether the transfer is fraudulent is a question of intent. It must clearly appear that there is a fraudulent intent to render a conveyance void. *Dalrymple v. Trust Co.*, 9 N. D. 306, 83 N. W. 245; *Stevens v. Meyers*, 14 N. D. 398, 104 N. W. 529; *Bernauer v. McCaull-Webster Elevator Co.*, 41 N. D. 561, 171 N. W. 282.

If Person had creditors at the time of the sale or the transfer of the premises, that fact alone would not be sufficient to avoid the conveyance. It must further appear and be established as a fact that the conveyance was made with the intent to defraud creditors; this plaintiff wholly failed to do. The trial court has found as a fact that there was no intent to defraud creditors by the sale or conveyance of the property in question. That finding is amply sustained by the evidence. Aside from this, it must be remembered that the purchaser Edla R. Person, according to the proof, paid in cash the full amount of the purchase price, which was the approx-

imate value of the premises and the property she purchased, and that her husband received the same and used it for his own purpose.

True it is that business transactions between husband and wife should be carefully scrutinized in a proceeding challenging the good faith thereof, but this does not mean that every such transaction when so challenged must be looked upon as a badge of fraud. If in such transaction they acted in good faith, and it is not established that it was initiated and consummated with intent to defraud creditors, it is legitimate and valid; it is recognized by and receives the protection of law, the same as transactions between those not standing in a confidential relation or those not related to each other. *First National Bank of Ashley v. Mensing*, 46 N. D. 184, 180 N. W. 58.

The findings of fact of the trial court are clear, concise, and correct, and are adopted, together with such other facts as we have found as the findings of fact of this court. We conclude, therefore, that neither the sale of the premises heretofore mentioned (lots 7 and 8) nor of the personal property was with the intent to defraud any creditors and particularly the plaintiff.

There is no error in the record. The judgment appealed from should be affirmed. It is affirmed. Respondents are entitled to their costs and disbursements on appeal.

CHRISTIANSON, BIRDZELL, and BRONSON, JJ., concur.

ROBINSON, J., dissents.

CITIZENS' STATE BANK OF PINGREE, N. D., a corporation (A. H. Lindemann as Receiver, substituted as plaintiff by order of court), Respondent, v. EVEN SORLEIN and PETER NORLID, Defendants, PETER NORLID, Appellant.

(185 N. W. 269.)

Chattel mortgages — evidence held not to sustain counterclaim for conversion by mortgagee.

In this case the trial court dismissed both the plaintiff's action and a counterclaim by Norlid, the appellant, against the bank for the alleged

conversion of some grain. *Held*, that there is no evidence to sustain the counterclaim and the judgment is affirmed.

Opinion filed Oct. 19, 1921. Rehearing denied Nov. 15th, 1921.

Appeal from the District Court of Stutsman County; *Coffey, J.*

Affirmed.

John A. Jorgenson, for appellant.

"Defendant cannot escape liability for a conversion on the ground that it resulted in no profit or benefit to him." *Plat v. Tuttle*, 23 Conn. 233; *McPheters v. Page*, 83 Me. 234; 22 A. 101; 23 Am. St. Rep. 772; *Flagg v. Mann*, 9 Fed. Cas. N. 4; 843, 3 Sumn. 84; *Bank v. Ransford*, 55 Ind. App. 663; 104 N. E. 604.

Although pleadings in the pending case are sometimes formally offered admissions of the adversary, it is generally held that they may be referred to and commented upon by counsel without such offer. *Abbott's Trial Brief*, Civil Jury Trials, 299; *Jones Com. on Evidence* (Horwitz) § 272; *Tisdale v. President*, 116 N. Y. 416; 22 N. E. 700; *Holmes v. Jones*, *supra*; *Lee v. Heath*, 61 N. J. Law, 250, 39 A. 729; *Levitt v. Cutler*, 37 Wis. 46.

"A principal is liable for an act of conversion committed by his agent while proceeding within the scope of his authority." *Cox v. Reynolds*, 7 Ind. 257; *Garmers v. Wood*, 143 Ia. 635; 118 N. W. 282; 120 N. W. 625; *Ward v. Carson*, 13 Nev. 44; *Shotwell v. Few* 7 Johns, (N. Y.) 302; *Miller v. Reigne*, 2 Hill (S. C.) 592.

John W. Carr, for respondent.

ROBINSON, J. In August, 1919, defendant Sorlein made to the bank a promissory note for \$2,115 and interest, and a chattel mortgage on an undivided half interest in crops to be grown in 1920 on W. ½ and S. E. ¼ of 28—142—66. This land he cultivated under a cropping contract with Peter Norlid. Sorlein sowed, harvested, and threshed the crops. This action is to recover on the promissory note and to foreclose the chattel mortgage. Norlid is made a party defendant under an averment that he claims some interest in the crops. Norlid appeared and answered, claiming a lien on Sorlien's share of the crops because of money due from

him, and claimed that the bank had converted the crop to its own use. Sorlein did not appear. He is no party to the case. The court found that the promissory note had been fully paid, and that the bank had not converted the crops, and dismissed both the action and the counterclaim—and that was right. Peter Norlid appeals, claiming that there was a conversion for which he should recover against the bank and the receiver. The sole question is on the conversion of grain on which Norlid had a lien. The mortgage is dated August 23, 1919, filed August 25, 1919. The cropping contract is dated August 23, 1919. In October, 1920, this action was commenced. On November 4, 1920, the court duly issued to the sheriff of Stutsman county a warrant, commanding him to seize the following described property of Sorlien: 200 bushels wheat; 120 bushels barley; 450 bushels of oats in the granary at the residence of Peter Norlid on said land. On the same day the sheriff made a return that he had levied on the right, title, and interest of the above-named defendant in said personal property. The sheriff did not touch the grain. He left it in the granary of appellant, taking his oral assurance that it would be safe. That was not a conversion by the bank. *Kukowski v. Emerson-Brantingham Implement Co. et al.*, 175 N. W. 706. But the appellant claims that after such levy the bank caused certain persons to take and carry away the grain. Now it appears that all the grain raised on the land had been divided at the separator. The grain in question was a part of Sorlien's share on which Norlid claimed a lien under the cropping contract. It consists of 30 bushels barley, 100 bushels wheat, and some oats. It was a balance of Sorlien's half. There is some evidence that it was taken by Sorlien with two other parties. There is no evidence that the bank converted any of the grain. There is no reason for considering any claim against Sorlien, who is not a party to this action. Any claim against him must be adjudicated in an action against him, and not on a counterclaim against the bank.

The findings of the trial court are correct, and the judgment is affirmed.

CHRISTIANSON, BIRDZELL, and BRONSON, JJ., concur.

GRACE, C. J., concurs in the result.

HENRY O. OLSON, Respondent, v. HORTON MOTOR COMPANY,
a corporation, W. H. HORTON, W. G. KIRBY and W. L. MAR-
TINCKA, Appellants.

(185 N. W. 365.)

Trial — general instruction of law upon submission of special verdict error.

1. The plaintiff brought an action against defendants for false arrest and imprisonment. Certain issues of fact were submitted to a jury on a special verdict. The court in submitting the special verdict also gave what is regarded as general instructions of law. It is *held* that this was reversible error.

Trial — submission of general verdicts with special verdict held error.

2. At the time submitting a special verdict the court also submitted two forms of general verdict under the same instructions, and in connection with the special verdict. It is *held* the submission of the general verdicts in the circumstances in which they were submitted was reversible error.

Opinion filed Nov. 17, 1921.

Appeal from the District Court of Ransom County, North Dakota,
McKenna, J.

Judgment reversed.

Lawrence, Murphy and Nilles, for appellants.

“Arrest under a warrant, valid in form, issued by competent authority on a sufficient complaint, is not false imprisonment, though the indictment under which the warrant issued was procured maliciously and by artifice and misrepresentation, for the purpose of extorting money. The proper remedy is not an action for false imprisonment, but for malicious prosecution. Judgment (C. C. A. 1896) 77 Fed. 271, affirmed. *Whitten v. Bennett*, 86 Fed. 405; 30 C. C. A. 140.

The complaint being sufficient to give the magistrate jurisdiction, the complainant who presented the same was likewise exempt from liability for false imprisonment, and could be reached, if at all, only in an action for malicious prosecution, Judgment (1904) 88 N. Y. Supp. 871, 43 Misc.

Rep. 292, affirmed.—Gilbert v. Saterlee, 81 N. Y. Supp. 960, 191 App. Div. 313.

"In an action for an arrest and false imprisonment, where defendant justifies under a warrant, the warrant, *prima facie*, proves itself, and it is for plaintiff to show that it was illegally issued.

In an action against a deputy marshal for false imprisonment on proof that he was an officer *de facto*, the court in absence of proof to the contrary, will presume that he was also an officer *de jure*. *Prell v. McDonald*, 7 Kan. 426, 12 Am. Rep. 423.

"An action for false imprisonment will not lie where plaintiff has not been arrested; and, though his manual seizure is not necessary to an arrest, there must be some sort of personal coercion." *Hill v. Taylor*, 50 Mich. 549; 15 N. W. 899.

"There is no legal wrong unless the detention was involuntary." 19 Cyc. Law. & Proc. p. 323.

An advocate has neither duty nor right to appeal to prejudices, just or unjust, against his adversary, de hors the very case he has to try. The very fullest freedom of speech within the duty of his profession should be accorded to counsel; but it is license not freedom, of speech, to travel out of the record, basing his argument on facts not appearing, and appealing to prejudices irrelevant to the case and outside of the proof." *Thomp. Trials*, § 963. *Hall v. Wolff*, *supra*; *People v. Carr*, 64 Mich. 702; 31 N. W. Rep. 590; *Turner v. State*, 4 Lea, 206; *Festner v. Railroad Co.* 17 Neb. 280; 22 N. W. 557; *Paper Co. v. Banks*, 15 Neb. 20; 16 N. W. Rep. 833; *Ferguson v. State*, 49 Ind. 33; *Koelges v. Insurance Co.*, 47 N. Y. 638; *Mitchum v. State* 11 Ga. 615; *Rolfe v. Rumford*, 66 Me. 564; *Bullard v. Railroad Co.* 64 N. H. 27; 5 Atl. 838; *Bulliner v. People*, 95 Ill. 396; *Brown v. State*, 60 Ga. 210; *Northington v. State*, 14 Lea. 424; *Flint v. Com.* 81 Ky. 186; *Sullivan v. State*, 66 Ala. 48; *Tucker v. Henninger*, 41 N. H. 317; *Gallinger v. Traffic Co.* 67 Wis. 529; 30 N. W. 790; *Henry v. Railroad Co.* 66 Iowa 52; 23 N. W. 260; *Palmer v. Railroad Co.* (Idaho) 13 Pac. 425; *Lindsay v. Pettigrew* (S. D.) 52 N. W. 874.

"Where a case is submitted for a special verdict, general instructions are not proper. The jury should only be given instructions which are appropriate to the question which they are to answer, and it is error to inform them as to the effect their answers will have upon the ultimate rights of the parties, or to authorize them to answer in the form of a legal conclusion." *Morrison v. Lee*, 13 N. D. 591.

The Supreme Court of Wisconsin, in passing upon this question under

a statute like our own, has repeatedly held that a general instruction is not proper in connection with a special verdict, and that it is error to inform the jury as to the effect of their answers upon the ultimate rights of the parties. *Reed v. City of Madison*, 85 Wis. 667; 56 N. W. 182; *Coates v. Town of Stanton*, 90 Wis. 130; 62 N. W. 619; *Conway v. Mitchell*, 97 Wis. 290; 72 N. W. 752; *Kohler v. West Side Co.* 99 Wis. 33; 74 N. W. 568; *Ward v. C., M. & St. P. Ry. Co. (Wis.)* 78 N. W. 442; *Baxter v. C. & N. W. Ry. Co. (Wis.)* 80 N. W. 644; *Sladky v. Marinette Lumber Co. (Wis.)* 83 N. W. 514; *Musbach v. Wisconsin Chair Co. (Wis.)* 84 N. W. 36; *Mauch v. City of Hartford, (Wis.)* 87 N. W. 816; *Ryington v. City of Merrill, (Wis.)* 87 N. W. 26; See also *I. P. & C. Ry. Co. v. Bush*, 101 Ind. 582.

Curtis & Remington & E. T. Burke, for respondent.

GRACE, C. J. This action is one where plaintiff recovered judgment for \$1,500 against the three defendants, Horton, Kirby, and Martincka, as officers, servants, agents, and employees of the Horton Motor Company, for damages for false arrest and imprisonment.

The complaint, in substance, charges that the defendants conspired together to cause his unlawful arrest and imprisonment. At the close of plaintiff's case the action against the Horton Motor Company was dismissed and the case submitted to the jury on a special verdict as to the three defendants above named. Damages were fixed at the amount above named. Judgment was entered on the special verdict. The appeal is from the judgment. The complaint is short and in the ordinary form in such actions.

The answer, after the interposition of a specific denial of the allegations of the complaint, pleads a justification of the arrest, alleging that it was by authority of law and by virtue of a warrant of arrest duly issued and in the hands of proper authorities and served in an action entitled *State of North Dakota, Plaintiff, v. J. O. Jensen and Hank Olson, Defendants*; that the action was commenced and pending before Hon. H. F. Miller, justice of the peace of Cass county, N. D., who had jurisdiction to issue the warrant of arrest; that the arrest was ordered and directed by the sheriff of Cass county, he having in his possession the warrant of arrest commanding him to arrest Olson to answer the charge of embezzlement.

The defendants specified 26 errors of law and 11 specifications of

insufficiency of the evidence to sustain the verdict and judgment. The material facts in the case are as follows:

Olson, a young man, lived at Lisbon, where he operated a garage. Jensen lived in the same town, and was selling agent of Chalmer and Maxwell automobiles for the Horton Motor Company of Fargo. There was some difficulty between Jensen and the Horton Motor Company not necessary to detail here. On or about the 5th day of August, 1920, Olson went to Halstad, Minn., on an errand for Jensen; while there, on the evening of the date last mentioned, and while he was at the residence of one Mrs. Moe, the mother of Mrs. Jensen, he was arrested by the village policeman, one Sather, who was directed to make the arrest by Kirby and Martincka, two of the defendants who were at this time at Halstad. Sather turned Olson over to Kirby, who took him to Fargo, but did not there turn him over to the sheriff, but instead he took him to the office of defendant Horton, who theretofore and prior to the arrest had sworn to a complaint before H. F. Miller, the justice of the peace, charging the plaintiff and Jensen with embezzlement of an automobile claimed to be the property of the Chalmers Motor Car Company, and upon such complaint the warrant was issued and delivered to the sheriff of Cass county for service. The car in which plaintiff drove to Halstad was his own car.

The proof seems to be quite clear that there was no cause to arrest the plaintiff. He was not in the employ of the Horton Motor Company. He was restrained of his liberty and right of locomotion, not by any public officers, but, as hereinafter stated, by Horton and Kirby. It appears that Martincka did not come to Fargo, and that he had nothing to do with what transpired there in Horton's office. It also appears that this is the particular time, if any, when the plaintiff was restrained of his liberty and right of locomotion. Neither Horton nor Kirby were public officers, but in some way were connected with the Horton Motor Company. Olson was restrained at Horton's office from about 11:00 o'clock p. m. until about 3:00 o'clock a. m. the following morning, when he was permitted to go where he wished. While there, he was questioned by Horton and Kirby, presumably on matters relative to his arrest.

Though the defendants have assigned many errors, they have abandoned everything except the following three points: (1) The total insufficiency of the evidence to justify a verdict for false arrest or false

imprisonment against any of the defendants. (2) Prejudicial remarks of counsel and plaintiffs to the jury calling for punitive damages. (3) Several errors of the trial court with respect to the submission of a special verdict, among which are the submission of general verdicts together with a special verdict, the giving of general instructions with the special verdict, and the giving of instructions clearly advising the jury of the effect the answer to such question would have upon the rights of the parties, and the failure to instruct as to specific questions. As we view the record on appeal, it will be necessary, for the reasons hereinafter set forth, that a new trial be granted. It will not be necessary to here discuss other than the third point above stated. In passing, it may be well to remark, as there will be a new trial, the remarks of counsel mentioned in the second point and claimed to be prejudicial will need no discussion.

In the course of giving the instructions the court submitted a special verdict, which consisted of eight distinct and separate questions, all of which the jury answered. The court at the close of its instructions, in addition to submitting the special verdict, submitted to the jury two forms of general verdict, one of which was in such form that, if the blanks in it were properly filled by the jury, it would be a verdict in defendant's favor. The other, if the blanks were filled, would be a verdict in the defendant's favor. With reference to these forms of general verdict the court stated to the jury that—

"Whichever form of verdict you find, you will have your foreman date and sign the same, and when you have agreed upon your verdict you will notify the bailiff and you will be returned into court."

The defendant at this time objected to the submission of the general verdicts, and excepted to the submitting of general instructions and to the failure to instruct as to specific questions. The jury retired, and after a short time returned in open court for further instructions, and the following occurred:

"Foreman of the Jury: I do not really understand how to fill out this blank.

"The Court: This is the special verdict blank.

"Foreman of the Jury: Yes, sir; we do not understand that we are to write in the names of each individual of the defendants here, or whether they are to be written in as one.

"The Court: This inquiry pertains to the general verdict. Does it not?

"Foreman of the Jury: Yes; there were three blanks here, you see.

"The Court: The court on its own motion withdraws from the consideration of the jury any form of general verdict in this action, and I instruct the jury to confine its finding solely to the questions propounded in the special verdict. Probably that will relieve you gentlemen of your trouble. If you will just return these two blanks covering the general verdict and answer the questions as they appear thereon and under the instructions that I have already given you.

"Foreman of the Jury: That would not be in accordance with the findings. We couldn't on the special verdict—

"The Court: Then you will have to answer these questions then to the best of your ability."

The jury then retired and returned with the special verdict, and the court read each question therein to the jury and asked them if the answers to the questions were as they had found them, and the jury answered in the affirmative. It is not necessary to set out the questions and answers at length.

In these circumstances the query presented is: Can it be said that the jury may not have been prejudiced by the submission of the general verdicts in connection with the special verdict, where, as here, the instructions given were such as may be termed general instead of being confined to the matters covered by the special verdict and such additional instructions as the court may properly give in cases where a special verdict is taken. As we read the instructions, they are so complete that, if a special verdict had not been submitted and the case had been submitted to the jury for a general verdict only, they would have been sufficient.

There is abundant authority sustaining the principle that where a special verdict is taken general instructions should not be given; in other words, in effect, holding that general instructions are not applicable to a special verdict. Cases more or less sustaining this principle are *Goesel v. Davis*, 100 Wis. 678, 76 N. W. 768; *Musbach v. Wisconsin Chair Co.*, 108 Wis. 57, 84 N. W. 36; and, in addition to these, a long list of cases cited under subdivision B of the note to the case of *State v. Hanner*, 143 N. C. 632, 57 S. E. 154, 24 L. R. A. (N. S.) 63. Most of the authorities cited in this part of the note are from Wisconsin, with the exception of

three Indiana cases, one Texas, and *Morrison v. Lee*, 13 N. D. 591, 102 N. W. 223. In a different portion of the note appears the case of *Udell v. Citizens' Street Ry. Co.*, 152 Ind. 507, 52 N. E. 799, 71 Am. St. Rep. 336, which states another rule. In subdivision 8 of the syllabus it is stated that—

“Where a special verdict is requested, no instructions are proper, except such as are necessary to inform the jury as to the issues, the rule for weighing evidence, who has the burden of proof, and whatever else may be necessary to enable the jury clearly to understand its duties.”

This rule is the one adopted by this court in the case of *Nygaard v. Northern Pacific Ry. Co.*, 178 N. W. 962. In that case, in an opinion written by Mr. Justice Bronson and concurred in by one of the other Justices and the writer hereof, the remaining Justices dissenting, the following language was used:

“This court has held that the questions for a special verdict should be plain, single, and direct; that they should contain only the ultimate conclusions of fact in controversy. *Russell v. Meyer*, 7 N. D. 335, 75 N. W. 262, 47 L. R. A. 637; *Lathrop v. Railway Co.*, 23 N. D. 251, 136 N. W. 88; *Swallow v. First State Bank*, 35 N. D. 608, 161 N. W. 207. Plainly questions should not be submitted upon issues of law, or that call for conclusions of law. See note, 24 L. R. A. (N. S.) 30.

“In such cases, this court has held that it is not proper for the court to give general instructions upon the law, as in the case of a general verdict (*Morrison v. Lee*, 13 N. D. 591, 598, 102 N. W. 223); that the court should not charge the jury further than is necessary to assist in answering the questions submitted (*Lathrop v. Railway Co.*, *supra*); that the jury are not required to find upon a fact established by the undisputed evidence (*Swallow v. First State Bank*, *supra*). These holdings, however, do not mean that the trial court may not instruct, within its discretion, as the circumstances require, concerning the issues upon the pleadings, the burden of proof, the legal rules for weighing and reconciling testimony, and also the law involved in material issues of facts submitted. See note 24 L. R. A. (N. S.) 62.”

A principle largely contrary to the one stated in *Nygaard v. Northern Pacific Railway Co.*, *supra*, was stated in the case of *Daniels v. Payne*, 182 N. W. 1010, where, in an opinion written by Mr. Justice Birdzell and concurred in by two other members of the court, and in which dissents

were filed by Justices Bronson and Grace, the following language was there used:

"In submitting a case to a jury for a special verdict, it has been frequently held to be error to give instructions indicating how the answer to certain questions will affect the outcome of the litigation. *Morrison v. Lee*, 13 N. D. 591, 102 N. W. 223, and cases therein cited; 27 R. C. L. 874, 24 L. R. A. (N. S.) note, pp. 62 and 70.

"It is the manifest aim of the special verdict statute (§§ 7632 and 7633, C. L. 1913) to enable litigants to obtain the judgment of the jury as to the facts in a case, disassociated from matters of law. As they are not to apply the law to the facts, instructions as to the law can at best serve no useful purpose.

"While it may be difficult to so frame questions for a special verdict and to give appropriate instructions upon them in such a way as to obscure to the average intelligent juror the effect of the answers, it is scarcely possible to conceive of a more flagrant violation of the policy of the special verdict statute than that which would result from countenancing the full statement of the allegations of fact on the respective sides of the principal provisions of law upon which reliance is placed for recovery."

It is not difficult to perceive that the rule stated in the case of *Nygaard v. Northern Pacific Ry. Co.*, and that stated in *Daniels v. Payne*, supra, with reference to a special verdict, are in direct conflict. There is no possibility of harmonizing them. To attempt to do so would be accompanied with about as much success as to attempt mixing oil and water.

We are of the opinion that the rule stated in *Nygaard v. Northern Pacific Ry. Co.*, regarding a special verdict, is as nearly the correct rule as can be stated; it concededly being a subject-matter which gives rise to numberless technicalities in connection with cases where it is used. And skilled and astute attorneys, and attorneys in general, find in its use a convenient means by which to introduce error into the record, if they are concerned with the weaker side of the case, or in one in which they must depend largely upon technical practice and procedure to bring a measure of success. Perhaps the technicalities which have prevailed in the use of the special verdict are nearing an end since the enactment of chap. 132, Session Laws of 1921, which makes it discretionary with the trial judge whether he shall order a special verdict in cases where an appli-

cation is made for it, and it would indeed be difficult to discern how it would be possible for a trial court to abuse its discretion by refusing to submit a special verdict.

Litigants, under the constitution and laws of this state, in cases involving questions of fact properly triable to a jury, are entitled to have such cases submitted to the jury for a general verdict, accompanied by proper instructions of law, and this procedure will, as a rule, satisfy all litigants except those who desire the use of a special verdict, the use of which affords much opportunity for the exercise of technical procedure, with the result that it is not difficult to insert reversible error in the record, thus at least delaying, and often defeating, justice.

We conclude that the giving of the general instructions in the circumstances of this case was reversible and prejudicial error. We further conclude that it was like error to have submitted the general verdicts in connection with the special verdict, in the circumstances in which they were submitted.

It may be well to notice that the defendants objected to the questions prepared comprising the special verdict and the submission thereof to the jury, and this on several different grounds not necessary here to mention. Objections of this nature were quite fully considered in *York v. General Utility Corporation*, 176 N. W. 355.

The judgment appealed from is reversed. The case is remanded for a new trial. Appellant is entitled to his costs and disbursements on appeal.

BRONSON, J., concurs in the result.

ROBINSON, J. (concurring specially). I concur in the result of the decision as written by Mr. Chief Justice GRACE. The verdict and the judgment is grossly excessive, and for that reason alone a new trial should be granted. It is not the purpose of the law to aid one party in robbing another. While the plaintiff did not sustain actual damages in excess of \$10, or, at most, \$20, he bases the action on a verified complaint asserting and claiming damages to the amount of \$5,000. When a complaint for a personal injury is so grossly and obviously untrue, the plaintiff should not be permitted to recover a dollar in excess of actual damages. And in such a case, when an action is prosecuted by an attorney, as it generally is, for half the amount recovered, the court should

order that he be made a party plaintiff so that his interest in the action may appear. In court practice there should be no deception, no sailing under false colors. An attorney should not be allowed to pose before a jury as a disinterested minister of justice in case he has a half interest in the verdict or the recovery. Such a practice lowers the standard of legal ethics. It brings the legal profession into disrepute. It is demoralizing.

BIRDZELL, J. (concurring specially). I concur in the reversal of the judgment on account of the errors committed in the submission of the case for a special verdict. These errors are of the same character as those involved in *Daniels v. Payne*, 182 N. W. 1010, which case seems to be followed, though condemned, in the principal opinion herein. It is for the reasons stated in the opinion in *Daniels v. Payne*, which are also applicable to the case at bar, that I concur in the reversal of the judgment.

CHRISTIANSON, J., concurs.

W. R. OLSON, Respondent, v. WILLIAM LARSON, Appellant.

(184 N. W. 984.)

Sales — buyer agreeing to keep property if it works satisfactorily must be honestly dissatisfied.

1. Where property is sold, or contracted to be sold, to a vendee, who agrees to keep and pay for the same on condition that it works satisfactorily, the buyer, relying upon such condition, must be honestly dissatisfied with the property.

Sales — instruction held not erroneous as requiring a finding contrary to evidence.

2. Certain instructions are examined and *held* not to be prejudicial.

Opinion filed Nov. 1st. Rehearing denied Nov. 18, 1921.

Appeal from the district court of Williams County, *Fisk*, J.

Affirmed.

Craven and Converse, for appellant.

"Where a machine is taken on trial to be paid for if it does work satisfactory to the purchaser, there is no sale if the purchaser is in fact not satisfied with the work done by the machine, although it does work that other persons might deem satisfactory."

"In such case the purchaser must be dissatisfied in good faith and not pretend to be so on selfish or dishonest grounds." *Garland v. Keller*, 15 N. D. 548.

1. If the vendor agreed to furnish an article that shall be satisfactory to the vendee, he constitutes the latter the sole arbiter of his own satisfaction, provided that any dissatisfaction on the part of the vendee must be real and not feigned.

2. A stipulation in a contract of sale, that the article shall be satisfactory, without stating to whom, means that it shall be satisfactory to the vendee. *Campbell Printing etc. Co. v. Thorp*, 36 Fed. 414; 1 L. R. A. 645; See cases cited in L. R. A. note to above case; *McCormick Harvester Co.* 33 Minn. 32; 21 N. W. 846.

"In case upon reasonable trial, it did not work satisfactory, it was not necessary for defendant to return it to plaintiff in the absence of an express agreement to that effect. It was sufficient for him, within a reasonable time, to notify plaintiff in substance that it did not work satisfactory, and that he declined to accept it." *Gibson v. Vail*, 53 Vt. 476; *Doone v. Dunham*, 65 Ill. 512; *Star v. Torrey*, 22 N. J. Law 190; *Smalley v. Hendrickson*, 29 N. J. Law 371; 2 Benj. Sales (4th Am. ed. Corb's) § 978, 1348.

"A warranty that an engine will work satisfactorily and develop specified power is a warranty that the engine will work satisfactorily in all respects, and the warranty is not limited to the development of power only." *Houghton Implement Co. v. Vavorosky*, 15 N. D. 308.

Geo. Shafer, for respondent.

BIRDZELL, J. This is an appeal from a judgment in favor of the plaintiff for \$1,349.10, and costs, which was entered on the verdict of a jury. The questions involved can most readily be understood by reference to the issues raised by the pleadings and to the facts developed at the trial. The complaint states four causes of action, the first and

principal one being for the purchase price of a certain Fordson tractor and two Oliver plows, alleged to have been sold and delivered to the defendant for the price of \$1,025. The second cause of action is for certain merchandise, to wit: Two breaker bottoms, two breaker lays, two stubble lays, and other extra lays; also gasoline and oil, all alleged to have been reasonably worth the sum of \$183.55. The third cause was for table board and lodging furnished defendant and an employee in the sum of \$15, and the fourth was for the reasonable worth of services rendered defendant in delivering certain property and in making certain trips on his behalf, in the sum of \$12.40. The answer admits the third cause of action (for board and lodging), but denies the others. It alleges that the defendant agreed with the plaintiff that he would attempt to do plowing with a certain Fordson tractor and Oliver plows which he, the plaintiff, was desirous of selling; that in case the plows and tractor did the work which the defendant desired to have done in a manner satisfactory to him and to his hired man, the defendant in that event would buy the machinery; that it was specifically agreed that there should be no sale and no obligation on defendant's part to buy either the tractor or the plows unless they did the work to the entire satisfaction of the defendant and his hired man; and then it is alleged that the defendant made every reasonable effort to do plowing with the machinery and gave it a thorough trial, but that the tractor did not develop sufficient power to plow in a manner satisfactory to the defendant and the hired man. It is alleged that, because of this failure, the defendant never purchased the property embraced in the first and second causes of action. As to the fourth cause of action, it is alleged that the trips were not made for the benefit of the defendant, but for the plaintiff, on account of his desire to make the sale of the machinery.

The plaintiff lived at Charlson, N. Dak., an inland town in McKenzie county, some 20 miles distant from the railroad station of Sanish. He conducted a store and hotel business transporting his freight overland from Sanish. At the time of the transaction in question, he had a sub-agency for the sale of Fordson tractors. The defendant lived at Tioga in Williams county, and owned certain land in the vicinity of Charlson, which he desired to put into crop in 1919. On or about May 14th, the defendant was in Charlson, en route to his farm, for the purpose of making arrangements for plowing. While there he became interested in the purchase of a Fordson tractor, and went with the plaintiff to see

one in operation. On or about the 15th, an arrangement was made whereby the plaintiff was to furnish a tractor for the price of \$1,025, or \$20 above the list price. The defendant gave his check for \$50 which the plaintiff claims was in part payment of the price, and which the defendant contends was simply an evidence of his good faith. The plaintiff was to bring the tractor from Sanish to Charlson. This he did. On the following Monday (May 19th), the defendant returned to Charlson, and he, together with a man furnished by the plaintiff, took the tractor to the defendant's farm. Late that evening the defendant returned to the plaintiff's place of business, and, according to the latter, reported that the tractor worked fine. This is disputed by the defendant. Next day defendant Larson returned to Tioga. The testimony is altogether conflicting concerning the exact nature of the transaction, and particularly with regard to the negotiations subsequent to the delivery of the tractor, the plaintiff claiming that the defendant, after trying the machine, promised to give him a check for the balance of the price, and the defendant that the plaintiff had guaranteed that the tractor would work to the satisfaction of him and his hired man, which he claims it failed to do. The defendant, however, stopped payment on the \$50 check, never paid the balance, and never returned the tractor. The plaintiff admitted that he had agreed that, if the tractor did not pull the two plows on the ground that was to be plowed, the defendant was at liberty to bring it back. The case was submitted to the jury, and a verdict returned for \$1,235.

The principal assignments of error argued upon this appeal relate to the instructions of the court to the jury. It is argued that the instructions did not cover the issues joined, and that they ignored or failed to properly state the law applicable to the contract if made according to the defendant's version of the facts. Regarding the principal issue, the court instructed the jury that the plaintiff, in order to recover, must prove by a fair preponderance of the evidence that, on or about the 15th of May, 1919, he sold and delivered to the defendant the Fordson tractor and two Oliver plows, for which the defendant agreed to pay \$1,025 in cash; that the defendant accepted the property, but failed to pay this sum. This was followed by a charge that, if from the evidence the jury should find that a sale was made upon approval or on trial or on satisfaction, and that the defendant signified his approval or acceptance to the plaintiff, or did any other act adopting the transaction, they should find for the plaintiff.

Then a further instruction was given that, if the jury found from the evidence that a contract for the sale of the tractor was made upon approval or on trial, and the tractor delivered, they should find for the plaintiff if defendant failed to return or tender the tractor within the time agreed upon or within a reasonable time, if no time was agreed upon. A further instruction was given to the effect that, if the sale was made upon approval or on trial or satisfaction, and the plaintiff warranted the tractor and plows to do certain work, and they failed after a fair trial to do such work, and did not fulfill the warranty, then the defendant would have a right to rescind the contract or sale, and, if the tractor and plows had already been received by him, to return them or offer to return them to the seller. This instruction was accompanied by the following statement of law, to which particular exception is taken:

"You are further instructed that, where an agreement is made whereby the party is to take goods on trial, and is to keep said goods, and pay for the same only upon condition that they work satisfactorily to the buyer, the buyer cannot arbitrarily say that he is not satisfied with the goods, but there must be some actual breach of warranty in the property upon which the buyer bases his refusal to accept the goods, or his claim that the same are not satisfactory to him. In other words the buyer must act honestly in his refusal to accept and keep the goods."

Then follows this hypothetical statement referring to the defendant's contention:

"On the other hand, if you find that no contract of sale was made between the parties as claimed in the defendant's answer, but that the defendant simply agreed to take the tractor and plows and give them a trial, and, if satisfactory to him and his hired man after such trial, that he was then going to enter into a contract for the purchase of such tractor, and that previous to such trial no terms had been agreed upon, and that said tractor did not work satisfactory, and would not do the work which it was guaranteed to do by the plaintiff, and that the defendant so notified the plaintiff to that effect, within the time in which he was to make said trial, or, if no time was specified, then within a reasonable time, then your verdict should be for the defendant upon said first cause of action."

We are of the opinion that these instructions fairly state the law applicable under the issues, and the conflicting evidence relating to the transaction. When read as a whole, we think the instructions in effect

stated to the jury that they should not return a verdict for the plaintiff unless he had proved the contract, as alleged by him, accompanied by such condition or warranty as they believed the evidence supported, and that such condition or warranty had been fulfilled or treated as fulfilled by the defendant; and that, if the transaction was as contended for by the defendant, they should bring in a verdict in his favor, if he was honestly dissatisfied with the tractor.

It is claimed that palpable error was committed in that part of the instruction in which the court told the jury that, where a purchaser agrees to keep and pay for goods on condition that they work satisfactorily to him, he cannot arbitrarily say that he is not satisfied with the goods, "but there must be some actual breach of warranty in the property upon which the buyer bases his refusal to accept the goods," and the case of *Garland v. Keeler*, 15 N. D. 548, 108 N. W. 484, is relied upon. That case is authority for the rule that, where a vendor agrees that the property sold shall work satisfactorily to the purchaser, the contract is not fulfilled unless the purchaser is actually satisfied, and that it is not sufficient that the article would satisfy an ordinary man. In the instruction before us the reference in this connection to breach of warranty in the property might be considered as more or less unfortunate, but in our opinion it could not have prejudiced the defendant, for in the immediately following sentence the rule intended to be stated was put in other language which rendered the meaning clear beyond a doubt. The court stated: "In other words, the buyer must act honestly in his refusal to accept and keep the goods." That is the essence of the whole of the preceding statement, and it does accord with the law. The case of *Garland v. Keeler*, *supra*, recognizes this rule in connection with the actual satisfaction rule applied in that case. It is the law that, where satisfaction is contracted for the buyer cannot escape obligation by an arbitrary declaration that he is not satisfied. There must be honest dissatisfaction.

It is said that the court, in instructing or attempting to instruct upon the defendant's theory of the case, erroneously imposed as a condition of finding for the defendant that the jury should find that previous to the trial no terms had been agreed upon. It is pointed out that this is contrary to all of the evidence, and that the defendant was prejudiced by the requirement that the jury must so find a condition contrary to the undisputed facts before they could render a verdict for the defendant. We do not believe that a jury would so construe the clause in question. This

part of the instruction related to the defendant's theory as outlined in the answer—i. e., that he simply agreed to take the tractor and plows and give them a trial, and that he would become a purchaser if satisfied after trial. We are of the opinion that, under the instructions as a whole, the jury clearly would have found for the defendant had they believed his version of the transaction, and that no prejudicial error was committed in the instructions. We think the record discloses that a fair trial had been had, and that no prejudicial error was committed. It is therefore unnecessary to consider the other assignments of error raised on this appeal.

The judgment appealed from is affirmed.

ROBINSON and CHRISTIANSON, JJ., concur.

BRONSON, J., concurs in the result.

GRACE, C. J. (dissenting). The following is a part of the instructions :

"You are further instructed that, if you find from the evidence that a contract of sale for said tractor was made upon approval or on trial or on satisfaction, and that the purchase price agreed on was \$1,025, and further find that said tractor was delivered to the defendant by the plaintiff, and that the defendant failed to return said tractor to the plaintiff, or to tender a return thereof within the time agreed upon, or within a reasonable time, if no time was agreed upon, then you should find for plaintiff on the first cause of action; and you are instructed that the question of what is a reasonable time is a question of fact for you to determine under all the facts and circumstances connected with this particular case."

"If from the evidence in this case you find that there was a contract of sale or a sale entered into between the plaintiff and defendant of the tractor and plows as claimed by plaintiff, and further find that said contract of sale was made upon approval or on trial or satisfaction, and further find that the plaintiff warranted said tractor and plows to do certain work, and that they failed after a fair trial to do such work, and did not fulfill the warranty, then the defendant would have the right to rescind the contract of sale or the sale; and if the tractor and plows had already been received by him to return them or offer to return them

to the seller and recover any portion or part of the purchase price, if he had paid the same."

"You are further instructed that, where an agreement is made whereby a party is to take goods on trial, and is to keep said goods and pay for the same only upon condition that they work satisfactorily to the buyer, the buyer cannot arbitrarily say that he is not satisfied with the goods, but there must be some actual breach of warranty in the property upon which the buyer bases his refusal to accept the goods, or his claim that the same are not satisfactory to him. In other words the buyer must act honestly in his refusal to accept and keep the goods."

In our opinion such instructions were erroneous and the giving of them was prejudicial reversible error. In this case there was no contract of warranty as that term is usually understood. If defendant's version of the contract be true—that the tractor and machinery purchased were to work to his satisfaction and to that of his hired man—then the contract was much broader than that of warranty. It was an entirely different contract and the law of warranty did not apply to it, hence, it was error in the court to have given the instructions on warranty, where the court gave the jury to understand it was the defendant's duty to return the tractor and plows or to offer to return them, after first having rescinded the contract. If the contract were as defendant claims, he was not required to return or offer to return or to rescind the contract if he were dissatisfied; all that was necessary for him to do was to inform defendant that he was not satisfied or that they were not satisfied.

There is sufficient evidence in the record to show that he did so inform plaintiff and also to show that the machinery did not do its work properly so that assuming the truth of defendant's testimony in this respect, there was a basis for his dissatisfaction. Under the instructions the defendant not having returned or offered to return the machinery, it is not improbable that this under the foregoing instructions was the turning point in the case and that on account of this the jury found in favor of plaintiff, whereas it is plain defendant was under no obligation to return or offer to return the property. The only instruction in this branch of the case proper to be given was that if the jury believed from the evidence that defendant was honestly dissatisfied with the tractor and plows, then the jury should find in his favor. The instructions as given was highly prejudicial and did not state the law applicable. *Garland v. Keeler* 15 N.D. 549, 108 N.W. 484; *McCormick Harvesting Machine Co.*

v. Chesrown 33 Minn. 32, 21 N.W. 846. In the latter case in the syllabus it is stated "If, upon such reasonable trial it does not work satisfactorily, it is not necessary for him to return it, (in the absence of an express agreement to that effect), but it is sufficient if within a reasonable time he notify the person furnishing it in substance that it does not work satisfactorily, and that he declines to accept it."

It is wholly immaterial whether plaintiff was making much or little profit in the transaction. The important question is: what was the contract? And in the circumstances of this case that was the question for the jury, under proper instructions by the court, which in this case the court wholly failed to give.

PETER LARSEN, Respondent, v. FRED W. FRIIS, Appellant.

(185 N. W. 363.)

New trial — all grounds must be presented on motion, or they are waived.

1. Where there is a motion for a new trial, rulings of the trial court which constitute proper grounds for a new trial under the statute must be presented upon such motion; otherwise they will be deemed waived.

Sales — evidence sustaining verdict for seller.

2. Evidence examined and *held* that the trial court did not err in refusing to grant a new trial on the ground of insufficiency of the evidence.

Opinion filed Nov. 23, 1921.

Appeal from the County Court of Ward County, *Murray, J.*

Defendant appeals from a judgment and from an order denying a motion for judgment notwithstanding the verdict or for a new trial.

Affirmed.

M. R. Keith and *John E. Greene*, for appellant.

H. H. Cooper and *Thomas B. Murphy*, for respondent.

CHRISTIANSON, J. The complaint in this case is as follows:

"Comes now the above-named plaintiff, and for his cause of action herein complains and alleges:

"I. That on or about the 4th day of September, 1919, plaintiff sold and delivered to defendant in granary on premises belonging to defendant near Kenmare, Ward county, N. D., a quantity of durum wheat for seed purposes, to wit, $54\frac{1}{4}$ bushels of durum wheat, the same being delivered by plaintiff to defendant at defendant's request.

"II. That said wheat was reasonably worth the sum of \$2.66 per bushel, or a total of \$144.30; that no part of said sum has been paid although demand was made upon defendant prior to the commencement of this action.

"Wherefore, plaintiff prays judgment against the defendant for the sum of \$144.30, and interest from this date, and for his costs and disbursements incurred herein."

The defendant interposed a general denial. The case was tried upon the issues so framed. The jury returned a verdict in favor of the plaintiff. The defendant moved in the alternative for judgment notwithstanding the verdict or for a new trial. The motion was denied, and the defendant has appealed to this court from the judgment and from the order denying his motion for judgment non obstante, or for a new trial.

In his brief on this appeal, the appellant says:

"There is but one real point in this appeal. While there are two classes of errors assigned, the real point is the lack of evidence. The first specification of error, as amended, is based on the refusal of the court to grant the defendant's motion to strike out all the evidence on the part of the plaintiff regarding statements made by the witness Hoffein, to the effect that defendant wanted to buy or would buy the 54 bushels of wheat of the plaintiff which were deposited in the defendant's granary. The second specification of error involves the sufficiency of the evidence generally. The motion to strike out the testimony of the plaintiff regarding Hoffein's alleged transaction was made upon the ground that it did not show any agency, or any kind of authority in Hoffein to contract for the purchase of the grain on behalf of the defendant."

A determination of the specifications so alluded to necessitates a consideration of the evidence. The evidence shows that the plaintiff was a tenant of the defendant during the season of 1919, occupying and cultivating certain lands and producing crops of grain thereon. Dur-

ing the threshing season of 1919 the defendant was out of the city, and he wrote to his wife and directed her to get some one to represent the defendant in making a division of the crop on several farms belonging to the defendant, including the lands cultivated by the plaintiff. She engaged one Hoffein to do this, and Hoffein was present at the time and place when plaintiff threshed the grain which he had raised on the land rented from the defendant. The grain was divided at the threshing machine. Plaintiff's share of the grain was hauled to an elevator in Kenmare, and defendant's share was placed in a granary on the premises. Under the terms of the contract the grain was to be divided equally. The last load of wheat threshed, containing some $54\frac{1}{4}$ bushels of wheat, belonged to the plaintiff under such division. It is undisputed that this load of grain was put into the granary of the defendant and mingled with the share of grain belonging to him instead of being hauled and stored in the elevator by the plaintiff. The plaintiff testified that Hoffein told him to put this load of wheat into defendant's granary because the defendant wanted it for seed, and that the defendant would settle with the plaintiff for such wheat. This statement is corroborated by other witnesses. Hoffein stated that he had no recollection of any such conversation as that testified to by the plaintiff. He (Hoffein) claimed that the last load of wheat was put in the granary because it was necessary to use the grain tank in which the wheat was contained to receive oats which was then being threshed. Plaintiff further testified that about two weeks after the grain was threshed and the wheat placed in defendant's granary he (plaintiff) went in to make settlement with the defendant; that as he was about to enter defendant's office, he met Hoffein coming out; that at that time Hoffein said:

"I just been in and talked with Friis and told him how it was. Now you can go in and settle with him."

Plaintiff further testified:

"Q. Then you went in, did you not? A. I went in.

"Q. And you settled with him? A. Yes, sir.

"Q. And what settlement did you make at that time? A. Well, I showed him a statement, and he said, 'Well, Hoffein just showed me one.' He asked me what the price was, and I told him what the price was then. He asked me if I wanted to sell, and I said, 'No; I ain't going to sell before spring.' 'All right,' Friis said, and that was all that was said.

"Q. And you understood that he would take the grain at the price that he would sell on in the spring? A. Yes, sir; the price that I sold the rest of it.

"Q. And as far as you were concerned that settled the negotiations? A. Yes, sir.

"Q. Well, then Mr. Larsen, when did Fred Friis—Fred Friis never settled with you, did he? A. No, sir.

"Q. Has he paid you yet for that grain? A. No, sir.

"Q. And have you asked him to pay for it? A. Yes; a good many times.

"Q. And what was the next time that you had any conversation with Mr. Friis about this money that he owed you? A. Well it was in January some time; the last part of January or the first part of February. I can't just remember the date.

"Q. That was about three or four months after you sold him the grain? A. Yes; four months, I guess.

"Q. And what happened that time? A. Well I drove by there, and he come out and stopped me and told me that he didn't want that wheat.

"Q. And he told you that he wouldn't pay you for it, I presume? A. Well, he said that he didn't want it; that he had changed his mind, and that he wanted to put in Marquis wheat instead of Macaroni.

"Q. And what did you say? A. I say, 'All right; I can take it out.' "

The plaintiff further testified that at the time this latter conversation was had there was so much snow and manure around the granary that he could not remove his grain. That some six weeks or more later he went up there and found that the grain had all been taken out of the granary. The defendant denied that he had ever purchased or agreed to purchase the wheat from the plaintiff. He also denied that he had ever authorized Hoffein to do so. He admitted, however, that Hoffein had notified him that the wheat had been placed in the granary. He also admitted that he had a conversation with the plaintiff a short time thereafter, regarding this grain, but he denies that the conversation was as testified to by the plaintiff. Defendant testified that he had three different tenants haul grain from the granary to be used for seed on farms belonging to the defendant. He was not present at the time any of the grain was taken. That all he knew as to the quantity of grain removed by them was based upon the information given him by those who hauled the grain out. That according to such information the grain removed

by such persons was about 75 bushels less than defendant's share according to the machine measure. At the close of all the testimony, defendant moved that all evidence relating to the statements made by Hoffein indicating a purchase of the wheat be stricken out, on the ground that there was no evidence tending to establish authority on the part of Hoffein to make any such contract in behalf of the defendant. This motion was denied. The denial of such motion is the first error assigned by defendant on this appeal.

As already stated, defendant moved in the alternative for judgment notwithstanding the verdict, or for a new trial, and this appeal is taken both from the judgment and from the order denying the alternative motion for judgment notwithstanding the verdict or for a new trial. That motion was based upon the following grounds:

"(1) Error in law occurring at the trial and excepted to by the defendant, as follows:

"That the court erred in overruling defendant's motion for a directed verdict made at the close of all the testimony.

"(2) Insufficiency of the evidence to justify the verdict and judgment.

"The particulars in which the evidence is claimed to be insufficient are as follows:

"(a) That there is no evidence in the record of any contract or agreement between the plaintiff and the defendant, whereby the defendant purchased the grain described in the complaint or any portion thereof.

"(b) There is no evidence in the record showing that the witness Hoffein, or any other person acting for or on behalf of the defendant has authority in writing or otherwise to make a contract with the plaintiff to purchase for the defendant the wheat described in the complaint or any portion thereof.

"(c) That the undisputed evidence shows that, if there was any understanding on the part of the plaintiff that the defendant was to purchase the wheat, that understanding was removed, and the plaintiff and defendant agreed that the wheat might be removed from the defendant's granary by the plaintiff, which agreement was made long before the commencement of this action."

In the specifications served with the notice of appeal the defendant, in addition to the above, specified as error the denial of the motion for judgment notwithstanding the verdict or for a new trial. In his brief

on this appeal, the defendant asks that the specifications of error be amended so as to include therein a statement that the trial court erred in overruling defendant's motion to strike out the evidence relating to the statements made by Hoffein indicating that he, as defendant's representative, purchased the wheat in controversy. In other words, it is sought to amend the specifications of error so as to assign a ground for a new trial which was not presented at all to the trial court. This, in our opinion, cannot be done. The ruling on the motion to strike out the evidence, if erroneous, was an error of law occurring at the trial which might properly have been raised and presented on motion for a new trial. § 7660, C. L. 1913. The defendant, however, did not see fit to specify such ruling as error on the motion for a new trial; and by failing to do so the error, if any, was waived and it may not be presented for the first time in this court. *State v. Glass*, 29 N. D. 620, 151 N. W. 229. See, also, concurring opinion in *Cohn v. Wyngarden*, ante 344, 184 N. W. 575.

The assignment that the trial court erred in denying defendant's motion for a directed verdict is wholly without merit, as the record discloses that no such motion was made.

Did the trial court err in refusing to grant a new trial on the ground of insufficiency of the evidence? We think not. It is undisputed that the plaintiff placed in the granary belonging to the defendant the quantity of wheat in controversy; that the defendant was promptly informed of this fact; that he directed three different persons to take away quantities of the wheat, and that one of these persons took away the last wheat contained in the granary. It is true defendant claims that the aggregate amount taken away by all three persons was less than the quantity of wheat supposed to have been placed there as defendant's share, according to the threshing machine measure. The three tenants who hauled the grain away from the granary were not called as witnesses, and there is no showing how much any of these parties hauled except the testimony of the defendant as to what they informed him they had hauled, or he had directed them to take. It is undisputed, however, that all of the wheat has been taken away. And, so far as the evidence in this case shows, the only wheat that was taken and all the wheat that was taken was taken at the direction of the defendant by his various tenants. Upon this state of facts we are of the opinion that the defendant has established the cause of action alleged in this complaint. In arriving at this

conclusion we do not find it necessary to determine whether there was or was not a contract of purchase. As already indicated, the sole question raised on the motion for a new trial and on this appeal—aside from the one relating to the motion to strike evidence alluded to above—is that the evidence is insufficient to sustain the verdict. There was no motion for a new trial on the ground that the verdict was contrary to law.

It will be noted that the complaint does not allege that there was any agreement to purchase at a stated price. The amount sought to be recovered is the reasonable value of the wheat. The averments of the complaint are precisely those which would be set forth in a complaint where the defendant had converted the property and the plaintiff elected to waive the tort and sue on the promise which the law implies the defendant to have made. See *Pomeroy's Code Remedies*, §§ 568-573; 4 Cyc. 339-344; 3 *Standard Ency. Proc.* 215.

"A declaration in assumpsit on waiving a tort need not allege the tort or the waiving thereof." 4 Cyc. 344.

The right of an owner to waive the tort and sue in assumpsit for the value of personal property tortiously taken and converted into money or money's worth is recognized by all the authorities. See 4 Cyc. 332. And in this state the owner may recover where the wrongdoer has not sold or otherwise disposed of the property, but retains it for his own use. *Braithwaite v. Akin*, 2 N. D. 365, 56 N. W. 133. See, also, 4 Cyc. 334.

The judgment and order appealed from are affirmed.

ROBINSON, BRONSON and BIRDZELL, JJ., concur.

GRACE, C. J., concurs in the result.

W. L. GARDNER, J. J. MURPHY, Respondents, v. T. L. STANGEBYE, et al, Appellants.

(185 N. W. 369.)

Assignments — assignee of obligation to pay rent held entitled to sue thereon.

This is an action by the assignee of a lease and bond for the payment of rent and there is no claim that the judgment is for more than the sum

due. *Held*, that as the assignee of a contract to pay money the plaintiff has a right to maintain the action.

Opinion filed Nov. 23, 1921.

Appeal from the District Court of Hettinger County, *Pugh, J.*

Affirmed.

Charles Simon, for appellants.

All contracts of suretyship must be strictly construed to impose upon the surety only those burdens clearly within its terms and must not be extended by implication or presumption. 32 Cyc. p. 73; *Sather Banking Co. v. Arthur R. Briggs Co.* 138 Cal. 724; 72 Pac. 352.

The obligee of a bond is the only one who can enforce the liability of surety thereon, unless by virtue of a statute, or of an express provision in the instrument. 32 Cyc. 123, also pp. 125-127.

The assignment of a bond or contract of suretyship terminates the contract. 32 Cyc. 84; 21 R. C. L. pp. 974, 975 and 976.

"The sale of part of leased premises by the lessor, without the consent or knowledge of the lessee's sureties, discharges the latter, though the lease gives the lessor the right to sell the entire premises on the giving of a specified notice. The consent which the parties to a lease must have from a surety thereon in order to alter materially the lease may be implied from the language of the lease. 21 R. C. L. p. 1017, ¶ 65.

Sureties are entitled to stand on the strictness of their obligation. *Young v. Young*, (Ind.) 52 N. E. 776.

Whether one's name is signed to an instrument as principal or surety, he is, of course, equally bound by the obligation. 21 R. C. L. 954.

One who undertakes to guarantee payment of the debt of another has the right to make the terms and conditions upon which he will assume the burden, and if the conditions so assumed are not complied with or waived the guarantor is discharged. *Williamson Heater Co. v. Whitman*, 183 N. W. 404 (Ia.) *White's Administrator v. Life Ass'n. of America*, 35 Am. Rep. 45; 63 Ala. 419; Distinction between surety and indemnitor, 21 R. C. L. pp. 958-959; Distinction between surety and guarantor, 21 R. C. L. 949-950.

Where two or more make a joint promise each are liable to the

promisee for the whole indebtedness or liability, neither is bound by himself but all of them are bound jointly to the full extent of the promise. 9 Cyc. p. 653; Clemens v. Miller, 13 N. D. 176; 100 N. W. 239; Grovenor v. Signor, 10 N. D. 503; Aamoth v. Hunter, 33 N. D. 582.

Harvey J. Miller, for respondents.

"To preclude the assignment of rights arising out of a contract, it must appear that a relation of personal confidence is involved in the nature of the rights themselves." Roehm v. Horst, 20 Sup. Ct. 780, 178 U. S. 1, 5 C. J. 880-2; in re: Wright, 157 Fed. 544; 18 L. R. A. N. S. 193.

In interpreting the terms of a contract of suretyship, the same rules are to be observed as in the case of other contracts. § 6678 C. L. 1913 of N. D.

An account, claim, debt, or demand is liquidated, when it appears that something is due and how much is due.

Kennedy v. Queens Co. 62 N. Y. Suppl. 276. When the amount due is fixed by law or has been ascertained and agreed upon by the parties. 116 Ia. 535, 90 N. W. 338.

ROBINSON, J. This suit is based on a written lease of the Gardner Hotel property in New England and on a bond to pay the rent and on an assignment of the lease and bond. The lease was for one year from December 15, 1916. The lessees covenanted to pay the lessor, his heirs or assigns, as rent for the use of the property, \$375 a month. To secure the same the lessees, Davis and wife, with the appellants as sureties, made to the lessor an undertaking in the sum of \$1,500 to pay the rents. The lease was attached to and made a part of the bond or undertaking.

On August 30, 1917, the lessor did in writing transfer to L. L. Gardner, for the use of himself and his co-plaintiff, the lease and bond, with all sums due or to become due thereon. This action is based on the lease, the bond, and the transfer. The judgment is for the precise amount of rent due on the lease, viz. \$594.48, with interest. There being no facts in dispute, both parties moved for a directed verdict, and the court dismissed the jury and gave judgment for the plaintiff.

Appellant relies on three points or propositions:

(1) That the bond is not assignable.

(2) That the bond is a joint obligation, and the principals should have been joined as parties defendant.

(3) That the action is on an unliquidated demand without joining the principals.

Neither point has any real merit.

A right arising out of an obligation is the property of the person to whom it is due and may be transferred as such. Code, § 5783.

The lease and the bond were an obligation to pay a definite sum as rent. The right to the rent was the property of the lessor, and it was transferable as such. Besides, the lease was made a part of the bond, and it contained a covenant to pay the rent to the lessor, his heirs or assigns.

The second point is on the nonjoinder of the lessees, who, it appears, had left the state and had no property in the state. The evidence shows that an effectual joinder of the lessees was an impossibility, and the law neither does nor requires idle acts. Besides this, the defendants have waived the objection of nonjoinder. Such an objection must be taken by answer or demurrer. Code, §§ 7442-7447. If the complaint had shown that the lessees were alive and within the jurisdiction of the court, the objection might have been taken by demurrer. As the complaint made no such showing, defendants might have answered that the lessees were joint parties to the contract, and that they were alive and at a certain place within the state.

The third point has no shade of merit. This is not an action for damages. It is an action on contract for a precise amount, and there is no claim that the judgment is for a cent more than is due.

Affirmed.

CHRISTIANSON and BIRDZELL, JJ., concur.

GRACE, C. J., and BRONSON, J., concur in the result.

PERPETUA FLECKENSTEIN, Respondent, v. PROVIDENT INSURANCE COMPANY, Appellant.

(186 N. W. 91.)

Insurance — in an action on a life insurance policy; question of delivery held one for jury.

1. In an action upon a life insurance policy where the insured at the time of the application directed the soliciting agent to send the policy to be issued to a banker with whom the insured did business and the application contained a memorandum to send the policy to such banker, and, where the Insurance Company, acting upon the application, issued the policy and sent the same to such banker, who was its agent, with instructions, uncommunicated to the insured, to deliver only upon being satisfied after personal investigation concerning the good health of the insured, it is *held*, upon the record, that the question of delivery was one for the jury.

Insurance — question as to insured's health on delivery of policy held one for the jury.

2. Where an insurance policy is delivered pursuant to a stipulation in the application that it shall not take effect unless delivered to and received by the insured while in good health, and where the insured, a married man aged 24 years, was in apparent perfect health when the application was signed, Oct. 21st, and the policy issued, Oct. 30th, and so continued until the evening of Nov. 8th, the day when the policy was delivered, excepting that he complained of a headache in the evening of Nov. 6th and during the day of Nov. 7th, and where during the evening of Nov. 8th the insured stated to have a fever, on Nov. 9th had a high fever and was then partially confined in bed, and on the afternoon of Nov. 10th died through "broncho-pneumonia" following an attack of "influenza," and where the entire evidence concerning the good health of the insured subsequent to the issuance of the policy and until his death is dependent solely upon lay testimony unaided by that of medical science, it is *held* that the question of the good health of the insured, when the policy was delivered, was for the jury.

Opinion filed Nov. 28, 1921.

Action in District Court, Hettinger County, *Hanley, J.*

From a judgment in favor of the plaintiff and an order denying a new trial the defendant has appealed.

Affirmed.

Newton, Dullam & Young, for appellant.

There was no delivery of the policy. Delivery while the applicant was in good health was essential to a completed contract. *Thompson v. Travelers' Insurance Co.* 13 N. D. 444; *Bowen v. Prudential Ins. Co. of America*, 51 L. R. A. (N. S.) 587; *May on Insurance*, 4th ed. Vol. 1, p. 60.

The defendant is not bound by any estoppel or waiver. *Roth v. Mutual Reserve Life Ins. Co.* 89 C. C. A. 262.

The general rule is that a return of the policy is not essential to the avoidance of a policy, nor is its retention a waiver. *Blaeser v. Milwaukee Mechanics Mutual Ins. Co.* 37 Wis. 31; 19 A. R. 747; *Woodard v. German American Ins. Co.* 128 Wis. 1; 106 N. W. 681.

Jacobson & Murray, and *Benjamin Rigler*, for respondent.

The non-return of the premium made the company liable upon its contract for the policy of insurance, if it failed to issue such a policy. *Stearns v. Merchants Life & S. Co.* 38 N. D. 525.

Physical delivery of the policy is not necessary. A legal delivery is sufficient. *Unterharnscheidt v. Missouri State Life Ins. Co. (Iowa)* 138 N. W. 459; *New York Life Ins. Co. v. Pike*, 117 Pac. (Col.) 899; *New York Life Ins. Co. v. Greenlee*, 84 N. E. 1101, (Ind.); *Thompson v. Mich. Mutual Life Ins. Co.* 105 N. E. (Ind.) 789; *Francois v. Mutual Life Ins. Co. of New York (Ore.)* 106 Pac. 323.

"When a company received an application for insurance, acts on it, signs and seals a policy complete in form, and forwards it to its agent for delivery to insured, the policy is deemed to have been issued from the date of its deposit in the mails." *Rose v. Mutual Life Ins. Co. of New York*, 88 N. E. (Ill.) 204; *Stilp v. New York Life Ins. Co. (Wis.)* 169 N. W. 606.

The company having knowledge that the policy was not physically delivered, by putting the plaintiff to expense in furnishing proof of loss, is now estopped to set up want of physical delivery as a defense to paying loss. *Beauchamp v. Retail Merchants Ass'n (N. D.)* 38 N. D. 483; *Tero Detroff & Co. v. Equity Fire Ins. Co. (Iowa)* 167 N. W. 660; *Veenstra v. Farmers' Mutual Fire Ins. Co. of Ottawa and Allegan*

Counties (Mich.) 161 N. W. 824; Springfield Fire & Marine Ins. Co. v. E. B. Cockrell Holding Co. (Okla.) 169 Pac. 1660.

An insurance company cannot take the applicant's money, keep it and get the benefit of it, and lead the applicant into believing he has a valid policy, and then at the same time take the position that there is no insurance. Horswill v. Mutual Fire Ins. Co. (N. D.) 178 N. W. 798; Yusko v. Middlewest Fire Ins. Co. (N. D.) 166 N. W. 539; Life Ins. Clearing Co. v. Altshuler, (Neb.) 75 N. W. 862; Watts v. Equitable Mut. Life Ass'n of Waterloo (Iowa) 82 N. W. 441; Commercial Union Assur. Co. v. Schumaker (Ind.) 119 N. E. 532; American Bankers' Ins. Co. v. Thomas, (Okla.) 154 Pac. 44; Rhodes v. Kansas City Life Ins. Co. 156 Mo. App. 281; 137 S. W. 907; Prudential Ins. Co. v. Shively, 1 Ohio App. 238.

Statement.

BRONSON, J. This is an action upon a policy of life insurance. The defense is that no contract of insurance was ever completed, the policy was not delivered and no premium ever paid. The jury returned a special verdict. From judgment entered, pursuant thereto, in plaintiff's favor, and from an order denying a new trial, the defendant has appealed. The record discloses some evidence as follows, or to the following effect: The insured, the husband of the plaintiff beneficiary, was a farmer 24 years old at the time of his death. On Oct. 21st, 1918, at the farm place of the insured, about 7 miles from Haynes or Hettinger, the soliciting agent of the defendant received the application of the insured for a life insurance policy of \$2,000.00. Then, he issued to the insured a receipt acknowledging the payment of \$62.62, to apply as payment for the first year on the proposed insurance. The receipt contained the following statement: "Insurance if issued, to be from date of Company's approval, but above amount will be returned if the applicant is examined and the policy is not issued."

In the application there is the following agreement, "That the insurance hereby applied for shall not take effect unless the first premium is paid and the policy delivered to and received by me while in good health, and that the policy shall be issued as of the date of the company's approval."

On Oct. 22nd, 1918, the insured was examined by the Medical Exami-

ner. The home office memoranda of the defendant show that the application was received on Oct. 24th, 1918, and was approved by its Medical Director on Oct. 30th, 1918. Such memoranda contain the statement, "Ins. begins Oct. 30th, 1918," and the policy was issued and dated accordingly. The secretary of the defendant testified that on Nov. 6th, 1918, the application was officially approved and mailed to C. E. Bigham, Haynes, N. D., its local agent. Accompanying the policy, were form instructions, signed by a form signature, viz:

Provident Insurance Company by....., Secretary:
These instructions read as follows:

"We hand you herewith the above policy which you are authorized to deliver only upon the condition that after personal investigation you have satisfied yourself that the applicant is not suffering from influenza or its after effects or any other disease and the completion of the inclosed personal health certificate, indicating that he has not been ill and that his state of health is the same as when his original examination was taken.

"In case there are any impairments which, in your judgment, would warrant a further postponement, please return the policy to this office with a statement of the facts.

"You will appreciate that due to present conditions, it is necessary that we take the precautions herein mentioned, and your most careful and hearty co-operation will be appreciated until conditions return to normal."

The widow testified that the soliciting agent, after the application and receipt were signed, told her husband that "if he was not accepted, he could have his money back within a week, the note would be returned." That her husband did not receive the note back. That her husband told the agent to send the policy to Mr. Bigham at Haynes. That her husband was doing business with Mr. Bigham at Haynes. That her husband also banked at Hettinger. That Haynes was about one quarter of a mile nearer than Hettinger. She also testified that from Oct. 30th, 1918, to Nov. 4th, 1918, her husband was in perfect health. That on Nov. 4th, 1918, he was in Haynes (the last time before his death) and was perfectly well. That on Nov. 5th and 6th, he was in perfect health. That in the evening of Nov. 6th, he complained of a headache. That on Nov. 7th he was still complaining of a headache but

was up and around. That on Nov. 8th he was up and around during the day time; during the night he started to get fever. That on Nov. 9th, he had pretty high fever and was in bed although he got up and walked around the room. On Nov. 10th, at 2:30 p. m., he died. The soliciting agent of the defendant testified in response to the question whether her husband had asked him to send the policy to Mr. Bigham, his banker, that he did not ask him to send it to the banker. That he did not represent to the husband that if the application was not accepted he would have his money back in a week. Upon the application, produced by the defendant and offered in evidence by the plaintiff, there appears on the back, upper margin thereof, the following: "Send policy to Chas. Bigham, Haynes." This is followed on the lower margin by the soliciting agent's certificate. Both are apparently in the same handwriting and made by the same lead pencil. On the face of this application is the declaration signed by the insured that he has paid to the soliciting agent \$62.62. That he holds his receipt therefor and assents to the terms thereof. Mr. Bigham testified that he was the cashier of the bank at Haynes, and the agent of the defendant company. That he received the insurance policy involved together with the instructions on Nov. 8th, 1918. That about Nov. 6th, 1918, the insured called at the bank. That then he paid two notes there. That in his opinion at that time the insured was a mighty sick man. That the general pallor of his face showed it and in general he appeared to be sick. That he had this observation in mind when he received the instructions with the policy. That he never delivered the policy. He did not testify that he returned the policy or advised the defendant concerning his observation. On Dec. 8th, a banker at Richardton advised the defendant of the death of the insured, by letter, stating therein correctly the number of the policy, and requesting the necessary blanks to be sent for proofs of death. On Dec. 19th, 1918, the defendant replied: "We are handing you herewith necessary proofs for completion and upon their return we will give the matter of the claim under the policy our prompt attention."

The secretary of the company testified that the company was first advised that the policy had not been delivered on or about Jan. 17th, 1919. On Feb. 8th, 1919, the banker at Richardton through letter requested another physician's certificate to be sent by reason of the former blank sent, having been mislaid or lost. On Feb. 11th, 1919, the defendant inclosed another physician's statement to be used with the understanding

that the company does not bind itself in any way as to the payment of the claim. On Feb. 9th, 1919, the banker further advised the defendant that it had taken them until that day to get in touch with the doctor who attended the deceased and that doctor had advised him that physician's statement had been mailed direct. On the last day of February, 1919, the defendant by letter advised the banker that it had not received the physician's certificate. On Mar. 14th, 1919, the banker by letter sent to the defendant papers concerning proofs of death.

The special verdict submitted to, and returned by, the jury is as follows:

"Question: Did Edmund Fleckenstein, the insured, at the time he made out the application for life insurance, inform the soliciting agent, Mr. Johnson, that C. B. Bigham, at Haynes, was his banker? A. Yes.

"Question: Did Edmund Fleckenstein, at the time he made his application for life insurance to the defendant company, request that the policy be sent to C. B. Bigham, his banker at Haynes, North Dakota? A. Yes.

"Question: Did the soliciting agent of the defendant company, Mr. Johnson, promise and represent to Edmund Fleckenstein, the insured, that if he did not receive a return of his premium within one week, that he would be sure that his application for insurance was accepted? A. Yes.

"Question: Was Mr. C. B. Bigham, the banker of Edmund Fleckenstein, the insured at the time that said Fleckenstein made his application for insurance with defendant company, and at the time that the policy was received by said Bigham? A. Yes.

"Question: Was Edmund Fleckenstein, the insured, in good health at the time the insurance policy involved in this action was received by the said C. B. Bigham? A. Yes.

"Question: Did the defendant company's officers, at the time that it sent out to the plaintiff the first blank proofs of death, have knowledge that the policy had not been physically delivered to the insured? A. Yes.

The defendant contends that the record discloses no delivery of the policy and, neither waiver nor estoppel affecting the company.

Delivery.

Does the evidence warrant the findings of the jury that the policy was delivered while the insured was in good health? In this regard the de-

defendant maintains that neither the company nor its agent had any notice of any instructions by the insured that the policy be sent to his banker at Haynes, and, further, that, even so conceding, the delivery would be and was invalid because the evidence conclusively shows that on Nov. 8th, 1918, the health of the insured was impaired and he was then suffering from a mortal disease. There is evidence, however, in the record to warrant the finding that the defendant had notice of the instructions of the insured to send the policy to Bigham, his banker. On the back of the application the directions appear. In the memorandum of the home office concerning this application, there is inserted by some one, "to C. E. Bigham, Haynes, N. D." "See back of app." This is an apparent recognition of the directions on the back of the application. Neither the directions nor the memorandum state "agent" after the word Bigham. There is nothing in the record to show that either the soliciting agent or the insured knew that Bigham was the agent of the defendant. Possibly, the insured would have made the application to his banker, Bigham, if he had so known. The defendant accepted and approved the application. It issued the policy on Oct. 30th, 1918. It sent the policy pursuant to the instructions given. The insured was not advised concerning any secret instructions to Bigham or that Bigham was its agent. The insured did not contract for conditional delivery of the policy to Bigham, pursuant to Bigham's agency and dependent upon Bigham's investigation, opinion or judgment upon the insured's condition of health. The insured contracted for the issuance of a policy upon the defendant's approval, and for its delivery to Bigham, his banker, conditional only upon the payment of the first premium and his condition of good health when so delivered.

Upon the record the jury was warranted in finding that the policy was so delivered or entitled to be delivered to Bigham pursuant to the contract as made. This follows further from the fact that the record does not disclose that Bigham, as agent, acted upon the instructions or pretended to follow them. Although he testified that on Nov. 6th, 1918, he saw the insured and then the insured, in his opinion, was a very sick man, nevertheless, the record fails to disclose that he so advised the defendant, or returned the policy. Further, it was over two months thereafter, in accordance with the secretary's testimony, before the defendant knew that the policy had not been physically delivered to the insured. Furthermore, the parties did not contract that

the policy should not take effect until physically delivered. The contract of insurance was conditional upon payment of the premium and delivery to and receipt by the insured while in good health. The contract requirements did not necessarily demand as a condition precedent a manual delivery. *Bowen v. Prudential Ins. Co.* 178 Mich. 63, 144 N. W. 543, 51 L. R. A. (N. S.) 587, 590, 591. *Unterharnscheidt v. Mo. State Life Ins. Co.*, 160 Iowa, 223, 138 N. W. 459. *Phoenix Assurance Co. v. McAuthur*, 116 Ala. 659, 221 South, 903, 67 Am. St. Rep. 154. See 25 Cyc. 718, 721; *Thompson v. Mutual Life Ins. Co.* 56 Ind. App. 502, 105 N. E. 780; *N. Y. Life Ins. Co. v. Pike* 51 Colo. 238, 117 Pac. 899. Upon the record, Bigham might be the agent of the insured, as well as the agent of the insurer. *Amarillo Nat. Life Ins. Co. v. Brown* (Tex. Civ. App.) 166 S. W. 658, 661; *Young v. St. P. F. & M. Ins. Co.*, 68 S. C. 387, 47 S. E. 682. *Joyce, Ins. Vol. I, § 661.*

Good Health of Insured: Was the insured in good health when the policy was delivered to Bigham?

In *Joyce on Insurance*, Vol. 3, § 2004, it is stated:

"The term, 'good health' does not mean absolute perfection; but is comparative. The insured need not be entirely free from infirmity or from all the ills to which the flesh is heir. If he enjoys such health and strength as to justify the reasonable belief that he is free from derangement or organic functions, or free from symptoms calculated to cause a reasonable apprehension of such derangement, and to ordinary observation and to outward appearance his health is reasonably such that he may with ordinary safety be insured and upon ordinary terms, the requirement of good health is satisfied. Slight troubles, temporary and light illnesses, infrequent and light attacks of sickness not of such a character as to produce bodily infirmity or serious impairment or derangement of vital organs, do not disprove the warranty of good health."

In *Goucher v. Trav. Men's Ass'n.* (C.C.) 20 Fed. 596, 598, the court states:

"The term 'good health,' as here used, does not import a perfect physical condition. It would not be reasonable to interpret it as meaning absolute exemption from all bodily infirmities, or from all tendencies to disease. It cannot mean that a man has not in him the seeds of some disorder. As has been well remarked by some of the law writers, 'such an interpretation would exclude from the list of insurable lives a large proportion of mankind.'"

In *Peacock v. N. Y. Life Ins. Co.*, 20 N. Y. 293, 396, it is stated:

"The word 'health,' as ordinarily used, is a relative term. It has reference to the condition of the body. Thus it is frequently characterized as perfect, as good, as indifferent, and as bad. The epithet 'good' is comparative. It does not require absolute perfection. When, therefore, one is described as being in good health, that does not necessarily nor ordinarily mean that he is absolutely free from all and every ill which 'flesh is heir to.'"

See, also, *Morrison v. Ins. Co.*, 59 Wis. 162, 18 N. W. 13; *Grattan v. Met. Life Ins. Co.*, 92 N. Y. 274, 44 Am. Rep. 372; *Met. Life Ins. Co. v. McTague*, 49 N. J. Law 587, 9 Atl. 766, 60 Am. Rep. 661.

In *Thompson v. Travelers' Ins. Co.*, 13 N. D. 444, 101 N. W. 900, the stipulation in the policy stated, "This policy shall not take effect unless the first premium is actually paid while the assured is in good health." The Court said:

"It will be noted that this provision is not a mere representation that the assured was in good health, or a statement of his belief or opinion that such was the fact. It is equivalent to a warranty of the fact, and it is a fact agreed upon by the parties as a condition precedent to the attacking of defendant's liability. Apparent good health was not sufficient. The fact that a disease may be latent and unknown does not relieve the insured from his stipulation. It is the fact of good health which governs."

In *Donahue v. Mut. Life Ins. Co.*, 37 N. D. 203, 221, 164 N. W. 50, 56, (L. R. A. 1918A, 300,) Justice Christianson stated:

"The term 'good health' is a comparative term and should be held to mean what is ordinarily understood by the term."

See *Murphy v. Met. Life Ins. Co.*, 106 Minn. 112, 118 N. W. 355. Note 17 L. R. A. (N. S.) 1145; 43 L. R. A. (N. S.) 726; L. R. A. 1916F, 173.

In this record there is no expert or medical testimony concerning the good or ill health of the insured subsequent to the approval of the application. The determination of the health of the insured subsequent to the approval of the application is dependent wholly as a question of fact, upon lay testimony, unless this court imbued with the wisdom to be gleaned from medical science can determine, as it were like experts, as a matter of law, the question of good or ill health. The reason why the aid of medical science was not sought to be placed in the record,

is not stated. See *Donahue v. Mut. Life Ins. Co.*, 37 N. D. 203, 217, 164 N. W. 50, L. R. A. 1918A, 300. It is not questioned in the record that the insured when the application was taken and when the policy was issued was in good health. Then, apparently, he was a healthy and sturdy young man. The lay testimony in the record further is undisputed that his good health continued until Nov. 6th, 1918. Then, Bigham, observed in his opinion that he was a very sick man. The widow observed that in the evening of Nov. 6th, he complained of a headache; that also on Nov. 7th, he complained of a headache and on the evening of Nov. 8th, he started to get a fever. Otherwise he had been theretofore up and around. The immediate cause of his death was "Broncho-pneumonia" following "influenza." Upon the record when was he not in good health? When does an attack of influenza or the existence of bodily conditions precedent thereto render one not in good health? Apparently, if we were to speak from statistics and the visual and mental knowledge forcibly brought to our attention during the epidemic of influenza in 1918, the disease was no respecter of persons. It attacked those apparently physically well and strong as rapidly as those otherwise. It attacked the young and vigorous even perhaps in greater numbers than the old and the weak. One might be apparently perfectly well today—and, on the morrow, attacked by the disease, nigh unto death. Does a headache render one not in good health? Nature's signals are constantly being given concerning one's bodily conditions. Perhaps, speaking out of our experience and the medical lore, not yet too definitely nor exactly known concerning influenza, we would readily say as a matter of fact, that the insured must have been necessarily in poor health on Nov. 8th, 1918. Because then the disease was at work and he died in fact on Nov. 10th, 1918. If the matter is to be determined on the record and by lay testimony, is not the question made one of fact for the jury, a question upon which the minds of reasonable men may differ. *Dorey v. Met. Life Ins. Co.* 172 Mass., 234, 51 N. E. 974; 25 Cyc. 950; *Horne v. Hancock Mut. Life Ins. Co.* 53 Pa. Sup. Ct., 330, 333; *Healy v. Met. Life Ins. Co.*, 37 App. D. C. 240, 246. Upon this record we so believe and determine. It follows that the judgment and order must be affirmed. It is so ordered.

BIRDZELL, J., concurs.

CHRISTIANSON, J. (concurring). The pivotal questions in this controversy are: (1) Was the policy ever delivered? and, (2) Was the in-

sured in good health at the time the policy was delivered? The jury in this case, in effect, answered both questions in the affirmative. It is the contention of the defendant insurance company that the evidence is insufficient to justify these answers; and it is asserted that both questions must be answered in the negative as a matter of law.

The evidence is by no means conclusive, but a careful consideration thereof leads me to the conclusion that it cannot be said, as a matter of law, that negative answers should have been made to these questions. In other words, I am of the opinion that there is evidence from which reasonable men might reach the conclusions which the jury, in this case, did reach.

GRACE, C. J. (concurring). The principles of law announced in the opinion of Mr. Justice Bronson in this case are largely similar and to the same effect as those announced by this Court in the case of *Donahue v. Mutual Life Insurance Co.*, of New York, 37 N. D. 203, 164 N. W. 50, L. R. A. 1918A, 300.

ROBINSON, J. (dissenting). The Insurance Company appeals from a judgment against it for \$2,000 and interest and costs, and from an order denying a motion for a new trial. The judgment is on a special verdict and on general findings of fact by the court. The defense is that the insurance contract or policy was never delivered to the deceased and that he never paid any premium. The answer avers and the fact is, that the deceased made to the Company a regular written application for insurance and on November 6th, 1918, the application was considered and approved by the Company and a policy of insurance was mailed to Mr. Bigham, the agent of the Company. On November 8th, 1918, the policy of insurance was received by the agent with special instructions in regard to the delivery, and on November 10th, 1918, and before delivery, the deceased died of influenza. On November 8th, 1918, the agent of the Company received the insurance contract with a letter as follows:

"Chas. E. Bigham, Agent, Haynes, N. Dak.

"Dear Sir—We hand you herewith the above policy which you are authorized to deliver only upon the condition that after personal investigation you have satisfied yourself that the applicant is not suffering

from influenza or its after effects or any other disease *and the completion of the enclosed Personal Health Certificate*, indicating that he has not been ill and that his state of health is the same as when his original examination was taken.

"In case there are any impairments which, in your judgment, would warrant a further postponement, please return the policy to this office with a statement of the facts.

"You will appreciate that due to present conditions, it is necessary that we take the precautions herein mentioned, and your most careful and hearty co-operation will be appreciated until conditions return to normal. Yours truly,

"Provident Insurance Company,

"By —, Secretary."

Certain it is that the policy was never delivered to the deceased, except by mailing the same to Bigham, the agent of the company. Certain it is that on November 8th, 1918, the deceased was sick unto death and Bigham never had authority to deliver the policy. Certain it is that the deceased never paid any insurance premium, except by giving a note which has not been paid. The plaintiff contends that Bigham was the banker and the agent of the deceased, as well as the agent of the company and that delivery of the policy to Bigham was a delivery to the deceased. But there never was a delivery of the policy to Bigham except for a special purpose and pursuant to special instructions, and he never had authority to deliver the policy because when he received it the deceased was on his deathbed. The letter shows that Bigham had no authority to make delivery, save on certain conditions with which there was no compliance.

Then it is claimed that by furnishing ordinary blanks on which to make proof of death the company put the plaintiff to the expense of making proof. To give any force to that point we must allow that the claim of the plaintiff was so dubious that it would not have been made if the company had not furnished the proof blanks. It appears that when application was made for the blanks the company knew nothing, had no knowledge, concerning the delivery of the policy and in a courteous way the agent immediately forwarded the blanks, which was entirely proper. We can hardly believe that the claim of the plaintiff was so shallow that she would not have made proof of death even though the Company had refused to furnish the blanks.

The special verdict answers six questions to this effect:

1. That when the deceased made his application for insurance he informed Johnson, the soliciting agent of the company, that Bigham was his banker.

2. That he requested the policy to be sent to Bigham.

3. That Johnson, the agent, promised the deceased that his policy would be accepted or his note returned within a week.

4. That Bigham was the banker of the deceased at the time he made application for insurance, and at the time the policy was received by him.

5. "Q. Was the deceased in good health at the time the insurance policy was received by Bigham? A. Yes.

6. "Q. When the Company sent blank proofs of death, did it know that the policy had not been delivered? A. Yes."

Those findings are wholly unsupported by the evidence; and what if the deceased requested the policy to be sent to his banker or to any other person. His request did not make a contract. There was no delivery of the policy to Bigham nor any obligation to deliver it to him. It was merely sent to Bigham with special instructions showing that it was not to be delivered to a dead person or to a person on his death bed. There was no evidence that Johnson promised or had authority to promise the deceased that his application would be accepted within a week or any time, and that in case of failure his note would be returned. Johnson had no authority to bind the company by any promises or representations. The written application to the company for insurance is signed by the deceased. It reads thus:

"I agree as follows: That the insurance hereby applied for is not to take effect unless the first premium is paid and the policy delivered to and received by me while in good health; that the agent taking this application has no authority to make, modify or discharge contracts or to waive any of the company's regulations or requirements."

The testimony is short. It shows conclusively that Bigham received the policy on November 8th, when the deceased was on his death bed. Bigham testifies that he saw the deceased on November 6th and that he was then a *mighty sick man*. That he showed it by the general pallor of his face and in general appeared to be sick.

"Q. You never delivered the policy? A. No, sir.

It is true that Johnson received the application for insurance and gave a pencil receipt for \$62.62, agreeing that it should be returned if the

applicant is examined and the policy is not issued; but it is not true that the policy acknowledges the receipt of \$62.62, or any sum. It is true that deceased never paid any insurance premium, and that his estate is not liable to pay any such premium. Doubtless he gave something called a note, but because of his sudden death before delivery of the policy the note became mere worthless wastepaper. Hence it is entirely clear that the plaintiff has not shown, and she never can show, any existing and completed contract of insurance. The judgment should be reversed and the action dismissed.

W. J. PARMETER, Respondent, v. WILLIAMSBURGH CITY FIRE INSURANCE CO., Appellant.

(185 N. W. 810.)

Insurance — execution of mortgage held not to change interest of insured under fire policy.

1. In an action upon a policy of fire insurance, where a farm dwelling and its contents was insured, it is *held*:

That the execution of a real estate mortgage upon the land did not change the title, interest, or possession of the insured.

Appeal and error — finding substantially supported by evidence not disturbed.

2. That the findings of the trial court determining that the dwelling did not become unoccupied for a period of ten days are presumed correct and will not be reversed if there be evidence substantially supporting.

Opinion filed Dec. 1, 1921.

Action in District Court, Dunn County, *Pugh, J.*

The defendant has appealed from a judgment in favor of the plaintiff.

Affirmed.

Lawrence, Murphy & Nilles, for appellant.

"A witness who feigns forgetfulness of circumstances collateral to

his main story which he must recollect if he has any memory at all, and with respect to which he is open to contradiction if untrue is unworthy of belief." *Gibbons v. Potter*, 30 N. J. Eq. 204.

Assignment of property and insurance thereon as security for a debt renders the policy void under a provision in the policy making it void if the interest of the insured is other than unconditional ownership, or if any change takes place in his interest, title, or possession. *Smith v. Ins. Co. (S. D.)* 42 L. R. A. (N. S.) 172; 137 N. W. 47; 14 R. C. L. p. 1120.

A mortgage is within a condition against conveyance of any interest in the property. 79 Tex. 23, 11 L. R. A. 293, also 88 Mich. 94, 13 L. R. A. 684.

A provision against change of interest is violated by the inclusion of the property in a mortgage thereof through negligence or inattention of the assured. *Fireman's Fund v. Barker*, 6 Colo. App. 535.

A condition making the policy void if the interest of the insured in the property should be changed in any manner, whether by act of the parties or by operation of law will include the giving of a mortgage upon the property. *O'Neil v. Ottawa Ins. Co.* 30 U. C. C. P. 151, 12 Can. L. J. 2071.

A conveyance, absolute in form by the insured is a transfer or change in title, avoiding the policy, although there is a written defeasance dehors the deed or an equivalent contemporaneous parol agreement. *Barry v. Hamburg Ins. Co.* 11 N. Y. 1, 18 N. E. 405.

A conveyance to secure the payment of a debt for the construction of a building made without insurers consent, invalidates the policy. *Athens Mutual F. Ins. Co. v. Evans*, 132 Ga. 703, 64 S. E. 993; *Gibbs v. Ins. Co.* 61 N. W. 137 (Minn.).

Occupancy of a dwelling house implies the actual use of the house as a dwelling place, the presence of human beings therein as at their customary place of abode. *Ashworth v. Builders' Mut. F. Ins. Co.* 112 Mass. 422, 17 Am. Rep. 117; *Herrman v. Adriatic F. Ins. Co.* 85 N. Y. 162, 39 Am. Rep. 644; *Burner v. German-American Ins. Co.* 103 Ky. 370, 45 S. W. 109; *Stoltenberg v. Continental Ins. Co.* 106 Iowa 565, 68 Am. St. Rep. 323, 76 N. W. 835; *Sonneborn v. Manufacturers' Ins. Co.*, supra; *Bonenfant v. American F. Ins. Co.* 76 Mich. 564, 43 N. W. 682.

And the leaving some one to look after the house when it becomes

vacant is not sufficient to save the forfeiture of the policy. *Bonenfant v. American F. Ins. Co.* 76 Mich. 653, 43 N. W. 682.

Even though the person left in charge lives within the same inclosure. *Burner v. German-American Ins. Co.* supra.

Even the fact that the insured, or some member of his family, or his hired man, visits the dwelling house every day to see that things are all right is not sufficient to save forfeiture. *Weidert v. State Ins. Co.* 19 Or. 261, 20 Am. St. Rep. 809, 24 Pac. 242.

A vacancy beyond the time limit, without a permit or consent, forfeits the policy. *Piscatauga Savings Bank v. Traders Insurance Co.* 8 Kan. App. 241, 55 Pac. 496; *Examiner Phoenix Ins. Co. v. Burton*, Tex. Civ. App. 39 S. W. 319; *Joyce on Ins. Co.* 4 p. 3802.

If a house is left for an entire season with no one in it, a policy containing a condition that it shall be void if the premises become "vacant" or "unoccupied" is avoided, though the furniture be left therein. *Herman v. Adriatic Fire Ins. Co.* 85 N. Y. 162, 39 Am. Rep. 644; *Alston v. Old State Ins. Co.* 80 N. C. 326; *Fitzgerald v. Connecticut Fire Ins. Co.* 64 Wis. 463, 25 N. W. 785; *Joyce on Ins. Vol. 4*, p. 3802.

And merely leaving furniture where the building is unoccupied at night is insufficient, even though a hired man has general oversight of the property and frequently inspects the same. *Hanscom v. Home Ins. Co.* 90 Me. 333, 38 Atl. 324, 27 Ins. L. J. 19; *Joyce on Ins. Co. Vol. 4*, p. 3803; *Soubert v. Fidelity-Phoenix Ins. Co.* 40 L. R. A. (N. S.) 58-59.

If the policy has become void by reason of a violation of a condition against nonoccupancy without the consent of the insurer indorsed on the policy it is not revived when occupation of the premises is subsequently resumed. *Joyce on Ins. Vol. 4* p. 3800; *Moore v. Phoenix Ins. Co.* 62 N. H. 240, 13 Am. St. Rep. 556; See §§ 2239, 2240 herein; *East Texas Ins. Co. v. Kempner*, 87 Tex. 229, 47 Am. St. Rep. 99, 27 S. W. 122; *Joyce on Ins. Vol. 4*, p. 3800.

A statement in answer to an inquiry in an application made by stipulation a part of the policy, but which partially discloses the truth as to the amount of mortgages or the character of the same, and which is calculated to induce the belief that the entire truth has been told concerning the same, when as a fact it has not and there are other mortgages, or mortgages to a larger amount than stated, will avoid the policy. 14 R. C. L. 1062; *Connecticut, Treadway v. Hamilton Mutual Ins. Co.* 29 Conn. 68; *Iowa, Glade v. Germania Fire Ins. Co.* 56 Ia. 400, 9 N. W. 320;

Massachusetts, *Brown v. Peoples' Mut. Ins. Co.* 11 Cush. (65 Mass.) 280; *Hayward v. New England Mutual Fire Ins. Co.* 10 Cush. (64 Mass.) 444; *Kibbe v. Hamilton Mut. Ins. Co.* 11 Gray (77 Mass.) 163; *Bowditch Mut. Fire Ins. Co. v. Winslow*, 8 Gray (74) (Mass.) 38, s. c. 3 Gray (69 Mass.) 415; *Falls v. Conway Ins. Co.* 7, 7 Allen (89 Mass.) 46; *Minnesota, Cerys v. State Ins. Co.* 71 Minn. 338, 73 N. W. 849, 27 Ins. L. J. 258; *New Hampshire, Marshall v. Columbian Mut. Fire Ins. Co.* 7 Fost. (27 N. H.) 157; *New York, Smith v. Agricultural Ins. Co.* 118 N. Y. 522, 23 N. E. 883.

T. F. Murtha, for respondent.

Courts quite uniformly hold that under provisions similar to the one under consideration, the giving of a mortgage does not void the policy. 19 Cyc. 742; 19 Cyc. 745; 19 Cyc. 746-D; *Wolf v. Ins. Co.* (Wis.) 91 N. W. 1014 6 Syl.; *Peak v. Ins. Co.* (Utah) 51 p. 255; *Koshland v. Ins. Co.* (Or.) 49 p. 866.

The deeds being in fact mortgaged did not avoid the policy, 19 Cyc. 746-D; *Barry v. Ins. Co.* (N. Y.) 17 N. E. 405; *Ins. Co. v. Gibe*, (Ill.) 44 N. E. 490; *Ins. Co. v. Fox*, (Neb.) 96 N. W. 652; *Henton v. Ins. Co.* (Neb.) 95 N. W. 670; *Bank v. Ins. Co.* (Kan.) 49 p. 329; *Bldg. & L. Asso. v. Ins. Co.* (Kan.) 86 p. 142; *Slobodisky v. Ins. Co.* (Neb.) 72 N. W. 483; *Wolf v. Ins. Co.*, (Wis.) 91 N. W. 1014; *Myles v. Ins. Co.* (Wash.) 193 p. 703; *Bowling v. Ins. Co.* (W. Va.) 103 S. E. 285; *Ins. Co. v. Shepard* (Ind.) 126 N. E. 447; *Lavenstein v. Ins. Co.* (Va.) 101 S. E. 331; 99 S. E. 579.

The false swearing, if there was such, to avoid the policy, must be willful, and upon a material matter. 19 Cyc. 855-6; 19 Cyc. 950, note 42; *Alfred Hiller Co. v. Ins. Co.* (La.) 32 L. N. S. 453, annotated.

Our Court has said in no uncertain terms that the Insurance Company cannot hold on to the premiums and avoid liability. *Yusko v. Ins. Co.* 39 N. D. 66; 166 N. W. 539; *Horswill v. Ins. Co.* 178 N. W. 798; *L. R. A.* 1917 D. 1091, 4 Syl.; *L. R. A.* 1917 F. 663; See 6530 to 6544, *C. L. N. D.* 1913.

BRONSON, J. This is an action upon a policy of fire insurance. By consent a jury was waived and the cause submitted to the trial judge. The defendant has appealed from a judgment entered upon findings favorable to the plaintiff. In February, 1916, defendant issued to the plaintiff its insurance policy upon his dwelling and household furniture,

in the amount of \$750, for a term of three years from February 21, 1916. This policy was a renewal of like insurance theretofore written by the defendant in February, 1913, for the plaintiff's wife, and thereafter transferred by the defendant to the plaintiff upon the decease of his wife. The dwelling was situated upon 160 acres of land in Dunn county, which formerly was the United States government homestead of the plaintiff's wife, and thereafter passed to the plaintiff upon her decease. Plaintiff's title was quieted by judgment dated May 20, 1916. This house was a one-story building about 12x20, with a rubberoid roofing, and contained two rooms. The plaintiff and his wife fully occupied this building as their home until her death, which occurred, apparently, shortly prior to the year 1914. Then, pursuant to plaintiff's testimony, he continued to live in the house, and occupied the same up until the time of its destruction by fire. He worked for his father, who lived about 1½ miles distant from his place, and frequently stayed there. In this dwelling remained the household furniture and plaintiff's personal belongings. When this policy was written there were unsatisfied mortgages existing against the land. Later these mortgages were satisfied. Plaintiff placed a new real estate mortgage upon the land. He also issued a warranty deed, which was used, pursuant to his testimony, for purposes of security only. Plaintiff testified that the soliciting agent of the defendant knew about the mortgages when the application was received. Notice of loss was given to the defendant by plaintiff's affidavit to the effect that he was absent from the premises from the morning of December 4 until the afternoon of December 6, 1918, and that the property was burned during his absence. In plaintiff's proof of loss he claimed 250 mechanical books. At the trial he testified that the fire occurred during the latter part of November; that at the time he was away in Dickinson; absent from the premises four days, and that the loss by fire occurred during such absence. He testified that he only had 32 mechanical books, and the statements of notice of loss and proof of loss were incorrect in the respects mentioned. The defendant introduced testimony to the effect that from the month of March until the middle of August, 1917, there was no one about plaintiff's premises; that the windows were boarded up; the doors closed; no lights were seen there at night, and there were no signs of occupancy; further, that in the year 1916 the plaintiff lived during one whole month at his father's place.

It is the contention and defense of the defendant that the policy became void because: (1) The hazard was increased; (2) the interest of the insured was not unconditional and sole; (3) there was a change in interest, title, and possession of the subject of insurance through the mortgages upon the property; (4) that material facts concerning the subject of insurance were misrepresented; (5) that plaintiff practiced false swearing concerning insurance after the loss; (6) that the property became and remained, for a period of 10 days, vacant or unoccupied. The only defense worthy of consideration, in our opinion, is that which concerns vacancy or unoccupancy. There is no evidence sufficient to warrant overruling the findings of the trial court concerning the other defenses. The insurance policy does not provide that the existence or making of a real estate mortgage is a ground of forfeiture. In this state the giving of a real estate mortgage creates neither a change of interest, title, or possession. There is no showing of any increase of hazard except that which concerns vacancy or unoccupancy. However, concerning the question of vacancy or unoccupancy, defendant strenuously attacks the credibility of plaintiff's testimony. Defendant does not contend that the building was set on fire, but maintains that plaintiff's inconsistent statements concerning the time of the fire and his whereabouts at such time, and concerning the property destroyed, and the general lack of definiteness in his testimony, serve to place in jeopardy the correctness of the trial court's finding upon the question of vacancy and to establish a preponderance of proof in favor of the defendant, showing grounds of forfeiture by reason of unoccupancy. The policy provides that it shall be void if the building be or become vacant or unoccupied and so remain for 10 days. The terms "vacant" and "unoccupied" are not synonymous. The former term generally refers to inanimate objects; the latter, to animate occupancy. 14 R. C. L. 1103; 19 Cyc. 729. The house was not at any time vacant from the date when the insurance was written until the time of the fire. The personal belongings of the plaintiff and of his deceased wife, the furniture of the home, all continued to remain in the home place. The amount of loss sustained by the plaintiff on his home and household goods appears to be considerable in excess of insurance thereupon. Plaintiff explains about not being around the premises when at work over at his father's, concerning boarding up the windows so as to protect against cattle rubbing against the same, and about locking the doors.

This testimony was not necessarily unreasonable in view of the fact

that the plaintiff's wife was no longer there at home, and manifestly he still continued a working man. We are not impressed that the plaintiff's testimony shows any earmarks or badges of fraud. Such being the case, its credibility, perhaps, is not broken down by the fact that he openly states that mistakes were made in the notice of loss and proof of loss. Perhaps it might be surmised that, if there were intent to defraud, these mistakes might not occur out of his own mouth. The stipulation in the policy concerning unoccupancy provides a condition of forfeiture. It is inserted for the benefit of the insurer and is to be strictly construed. *Traders' Ins. Co. v. Race* (Ill.) 29 N. E. 846.

The trial court has found for the plaintiff upon the issue of unoccupancy. Ordinarily the question of occupancy is one of fact for the jury. *Horswill v. Mut. Ins. Co.* (N. D.) 178 N. W. 798, 799, 14 R. C. L. 1103; *Cooley, Briefs Ins.* vol 2, 1686. The findings of the trial court in the instant case take the place of a verdict. They are presumed to be correct, and will not be disturbed where substantial support exists in the evidence. *Jasper v. Hazen*, 4 N. D. 1, 5, 58 N. W. 454, 23 L. R. A. 58; *State Bank v. Maier*, 34 N. D. 259, 268, 158 N. W. 346; *Griffith v. Fox*, 32 N. D. 650, 654, 156 N. W. 239; *Stavens v. Nat. Elev. Co.*, 36 N. D. 9, 14, 161 N. W. 558. Otherwise this court would become a trier instead of a reviewer of facts upon appeals in such cases. We are not prepared to say, as a matter of law, that the findings are clearly opposed to the preponderance of the evidence, or that they do not find substantial support in the evidence.

The judgment is affirmed with costs.

GRACE, C. J., and CHRISTIANSON, and BIRDZELL, JJ., concur.

ROBINSON, J., dissents.

THOMAS STEAD, Respondent, v. J. E. MANHART, Appellant.

(185 N. W. 1009.)

Judgment — where pleadings, judgment, etc., in defendant's former action

against plaintiff were in evidence, oral testimony whether an item was in issue in the former action held admissible.

1. In an action to recover for goods and labor furnished, where a cropper recovered against his farm owner in a former action the goods and labor furnished by him, and the owner in this action recovered for his goods and his labor furnished to the cropper, and where, in each action, in the former, the owner, and, in the latter, the cropper, claimed an agreement to mutually offset their accounts for such goods and labor, which was disallowed by the jury upon the recovery allowed, it is *held*, for reasons stated in the opinion—

That the trial court properly received oral testimony concerning the presentation of a specific item for hauling lumber in the former action.

Evidence—held that court properly took judicial notice of former case between the same parties.

2. That the trial court properly took judicial notice of the former case upon being requested and upon electing so to do.

Recovery—held not limited by recovery in former action.

3. That the recovery of the owner in this action was not limited to the amount of the recovery of the cropper in the former action.

Opinion filed Dec. 2, 1921.

Action in District Court, Bottineau County, *Burr*, J. From an order denying a new trial the defendant has appealed.

Affirmed.

W. H. Adams, for appellant.

W. J. Cooper, for respondent.

BRONSON, J. This is an action upon an account for goods and labor furnished. The defendant has appealed from an order denying a new trial. The facts, necessary to be stated, are as follows: The plaintiff owned several quarters of land in Bottineau county. During the years 1912 to 1917, inclusive, he made farm contracts with the defendant, as cropper, to crop the lands upon shares. This action is brought to recover for hay and grain furnished by the owner to the cropper, and for the labor of such owner and his horses, rendered in connection with the farming of the lands. This is the second action between the parties. In the

fall of 1917, the cropper, the defendant herein, brought an action against the plaintiff herein, to recover the balance due for wheat, oats, and flax obtained by the owner from the cropper and for an amount paid for threshing, also for wheat, rye, board, horse feed, pasturing and wintering stock, painting, hauling lumber, breaking, and butter, all furnished by the cropper to the owner. In that action the plaintiff owner interposed a general denial. Pursuant to the trial of that action judgment was entered in December, 1919, for about \$1,150, in favor of the cropper. This judgment apparently was paid to the cropper's attorney. Thereupon the plaintiff owner, in April, 1920, the cropper having removed to the state of Illinois, instituted garnishment proceedings against the cropper's attorney, as garnishee, and instituted this action. The attorney disclosed some \$700 due the cropper. He appeared and interposed an answer setting up a general denial. At the trial, the owner offered evidence to the effect that the cropper, during the years 1915 to 1917, used certain hay, oats, and wheat of a certain value that belonged to the owner; that during such years he performed work and furnished horse teams, in connection with the cropper's farming operations, of a certain value; that there was no agreement to pay, but an understanding (oral) that anything he furnished the cropper, he would furnish back, such as in other articles; that any work he performed, the cropper would return in similar work, or its equivalent. The cropper offered evidence to the following effect: He minimized or denied the items of goods or labor furnished. That concerning the labor of the plaintiff or his teams he fully compensated therefor by work of the cropper performed for the owner in return, and pursuant to which settlement therefor was made. The plaintiff, in rebuttal, testified that since 1914 the work that the cropper had performed for him was the hauling of one load of lumber in 1915, and that he had made a charge for such item in the former action. Upon objection of the cropper to this testimony the trial court suggested the introduction of the files and records in the former action, and that the court be requested to take judicial notice thereof. Thereupon the plaintiff so offered and so requested. The cropper objected upon the ground that in the former action the cropper did not sue nor recover upon any items that were offset by what the owner had coming. That the items in such former action were additional. The trial court charged the jury that the cropper could not offset in this action any of the items upon

which he claimed the right of recovery in the former action. The jury returned a verdict for \$650 in favor of the plaintiff.

It is the contention of the defendant cropper that the trial court erroneously received evidence concerning the item of a charge for hauling lumber in the former action, improperly took judicial notice of the proceedings in the former action, and erroneously charged the jury in that respect. It is also contended that the evidence is insufficient to sustain the verdict, for the reason that if it be assumed that the cropper's items recovered in the former action are the items he attempts to offset in this action, then the amount of the same did not exceed \$410.65 in the former action, and, in this action, the recovery of the owner is \$369.60 in excess thereof. That in accordance with the plaintiff's own testimony he can recover no more than the cropper recovered. We are of the opinion that the defendant's contentions cannot be sustained. The trial judge in denying the motion for a new trial filed an extensive memorandum opinion. He modified the verdict by striking therefrom an item of \$50 and interest, concerning oats furnished, which he permitted the plaintiff to establish at the trial after amendment of its bill of particulars. He stated that in the former action the cropper sued for various items of labor and goods furnished (amounting to over \$1,290 as alleged). The cropper secured a verdict for \$1,119.05. That in the former action the owner admitted owing the cropper \$708.40. That the owner in such action attempted to set up a counterclaim for his goods and services rendered, but it was disallowed through the objection of the cropper, because it was attempted to be asserted by way of amendment on the eve of the trial. That in such action the owner claimed that the goods and services rendered by one were to be offset by those rendered by the other. The jury, however, in such action did not find with the owner upon such claim, and allowed the cropper \$400 above the amount admitted by the owner. That, in effect, the jury did not mutually offset the accounts of the parties. That what the cropper recovered in such action was not the difference between the two accounts of the parties. That the owner, excluded in the former action from asserting his claim, was not excluded from, or limited to, a recovery in this action of the amount only that the cropper had recovered in the former action. That the court did take judicial notice of the former case, because it became necessary so to do when the cropper in this case claimed an agreement to mutually offset the accounts. We are of the opinion that the trial court did not err. The

agreement to mutually offset accounts, not having been recognized as a matter of fact in the former action, is not now entitled to recognition as a matter of law. The plaintiff in this action offered in evidence the pleadings, instructions of court, verdict and judgment in the former action. The trial court properly received oral testimony concerning the item for hauling lumber, having been at issue and in the evidence of the former case. 23 Cyc. 1535, 1539. The trial court properly took judicial notice of the former case to the extent that it did. It was requested the court elect so to do. § 7937, C. L. 1913; *Amundson v. Wilson*, 11 N. D. 193, 196, 91 N. W. 37. The pleadings in the former action show that items for hauling lumber by the cropper were at issue. There is evidence in this action that the specific item upon which the cropper sought to offset in this action was asserted and considered in the evidence of the former action. It is well settled that a question of fact once at issue and tried in a former action may not be retried in a subsequent action between the same parties 15 R. C. L. 973; *Horton v. Emerson*, 30 N. D. 258, 152 N. W. 529; *Kupfer v. McConville*, post, 185 N. W. 1005. The trial court properly submitted to the jury the question whether the cropper attempted to assert herein the same item litigated in the former action.

The order is affirmed, with costs.

BRONSON, CHRISTIANSON, and BIRDZELL, JJ., concur. GRACE, C. J. concurs in the result.

ROBINSON, J., dissents.

N. W. SIMONS, et al, Respondents, v. MILO B. DOWD, et al, Appellants.

(186 N. W. 261.)

Stipulations — claim for hail insurance held to belong to crop owner.

1. M. had been the owner of certain lands subject to liens of mortgages and a judgment. The mortgages were foreclosed. The judgment creditor, (D.) took assignments of the Sheriff's Certificates and at the expir-

ation of the period of redemption took sheriff deeds. M. continued in possession and sowed crops. His grantees brought actions to determine adverse claims to the land. In these actions, D. answered, setting up no claim to the crops and no claim for the value of use and occupation. The crops were destroyed by hail in July. In August and September, judgments were entered in the adverse claims actions in favor of the defendant D. without a disposition of the claim for hail insurance, but with the specific understanding that M. would be permitted to harvest such crops as remained. It is *held*:

Where crops, sown by one whose possession is continuous, have been destroyed by hail during the period of his possession and where all claims to title is stipulated in favor of another as owner on condition that the possessor's claim to the crop is recognized, the claim for hail insurance belongs to the owner of the crop.

Opinion filed Dec. 5, 1921.

Appeal from the District Court of Williams County, *Fisk, J.*

Affirmed.

B. H. Bradford, for appellant.

The owner of the land is the owner of the growing and unsevered crops. *Wadge v. Kittelson*, 12 N. D. 452; *Warner v. Sohn*, 21 Ann. Cas. 427, (Neb.); *Hartshorne v. Ingels*, 23 L. R. A. 531 (Okla.); *Carlisle v. Killbrew*, 6 L. R. A. 617; *Altee v. Hinckler*, 85 Am. Dec. 407; 8 R. C. L. p. 367.

Craven & Converse and *John J. Murphy*, for respondents.

The title to the crops at all times was vested in the adverse holders of the land and Dowd, though owner of the fee title to the land, never at any time had any title or interest whatever in or to the crops. *Golden Valley Land & Cattle Co. v. Johnstone*, 21 N. D. 101; *Gunderson v. Holland*, 22 N. D. 258; *Roney v. Halverson*, 29 N. D. 13; *Aultman Taylor Co. v. O'Dowd*, Minn., 75 N. W. 756. This case has been repeatedly cited by North Dakota Supreme Court with approval. *Stockwell v. Phelps*, 34 N. Y. 363; *Page v. Fowler*, 39 Cal. 412, 2 Am. R. 462; *Johnson v. Fish*, 103 Cal. 420, 38 Pac. 979.

BIRDZELL, J. This is an appeal from a judgment in favor of the

plaintiffs in an action brought to restrain certain of the defendants from paying hail insurance to the defendant Milo B. Dowd. The facts necessary to be stated are as follows: The defendant Dowd was the owner of a judgment of about \$7,000 against one L. A. McGinnity. See *Dowd v. McGinnity*, 30 N. D. 308, 152 N. W. 524. Prior to the transactions directly involved in this litigation McGinnity had been the owner of lands upon which this judgment was a lien. McGinnity had also given mortgages on the lands which had been foreclosed in two proceedings, each embracing different tracts. Dowd, within the year of redemption from these mortgage foreclosures, obtained assignments of the sheriff's certificates of sale, and, at the expiration of the period for redemption, obtained sheriff's deeds. This was all completed before the beginning of the cropping season of 1919—one deed issuing in November 1918; the other March 3, 1919.

During the period of the litigation between Dowd and McGinnity which resulted in the judgment in Dowd's favor, McGinnity transferred or sold his property so that it appeared of record in the name of his brother, Frank McGinnity, and, through leases, the right of possession was in his (L. A. McGinnity's) wife as tenant. The personal property was transferred to certain creditors, among whom were some of the plaintiffs, and they resold or transferred it to Mrs. McGinnity.

After the sheriff's deeds were issued the McGinnitys continued to farm the lands during the season of 1919. Certain actions were brought in April by Frank J. McGinnity and Nellie McGinnity, wife of L. A. McGinnity, to determine adverse claims to the lands. One of these actions was tried in August, 1919, on stipulated facts, and Dowd was successful. After the submission of this case to the court, the other action came on for hearing, and plaintiff's counsel announced that he could see nothing to attack in the foreclosure proceedings through which the defendant Dowd claimed, and that he had no evidence to offer. The defendant objected to a dismissal of the action and asked for an affirmative decree quieting title. It was then understood that the plaintiff's attorney would stipulate for the entry of a judgment in favor of Dowd. The matter was not concluded, however, that day, and the day following defendant's counsel requested the plaintiff's attorney to sign a stipulation for judgment. At that time plaintiff's counsel objected on the ground that the McGinnitys had put in the crop, that whatever crop was there belonged to them, and that they should not be disturbed on

account of it. Counsel testifies that there was in fact an understanding reached that the 1919 crop was to go to McGinnity. The defendant's attorney, however, while admitting that the McGinnitys were to be permitted to harvest such crops as remained, further testified that he stated to plaintiffs' counsel that the crops were no good, that they had been hauled out twice, that they would never be cut, and that the defendant Dowd would not waive any rights to possession of the land, nor any right to anything, upon which counsel signed the stipulation for the entry of judgment. This was about the middle of August, 1919, and the judgments in the two actions were entered, one in August, and one in September.

It appears that in July, 1919, there were two hailstorms, which damaged the crops growing upon the lands in question. The losses were adjusted, with the participation of the McGinnitys, at 100 per cent., and in the course of time a hail insurance warrant for \$3,115, payable to the order of Dowd, was sent, care of the clerk of the court, and it is this fund that is in litigation here. Dowd claims it by virtue of the ownership of the lands, and the plaintiffs claim it through assignment from the McGinnitys, and by virtue of the latter's alleged ownership of the crop.

The appellant contends for two main propositions: (1) That, as Dowd owned the land at the time the crops were destroyed, and as McGinnity had no lawful right therein, he (Dowd) was the owner of the crops; and (2) that the plaintiffs are not in a position to assert, equitably, any right to the insurance.

There can be no doubt that Dowd was the owner of the land at the time the crops were put in and for the entire period covered by this controversy. The two judgments entered after the crops were destroyed are conclusive to this effect. But, if it be conceded that the ownership of the crops would ordinarily follow the ownership of the land (and upon this we express no opinion), on the record before us we are of the opinion that it does not follow that Dowd was entitled to the insurance. The McGinnitys had been long in possession of the land. It was being taken from them through foreclosure proceedings. It seems that to test the validity of these proceedings they had brought the actions to determine adverse claims. Dowd, in answering, merely asked that he be adjudged to be the owner in fee, and that, if the foreclosures upon which his title was based should be decreed invalid, he be adjudged to be the owner of the

mortgages foreclosed. These actions were brought early in the spring and, in the very nature of the situation, a contest was invited to determine, not merely the title, but the right to possession, including the right to the crops. Dowd did not see fit to assert at this early date any claim to the crops, neither did he seek recovery for the use of the occupation, as he might well have done. § 8145, Compiled Laws of 1913. At the time these actions were being settled in August, the crops, had they been standing, would have been practically mature; but they had been destroyed by hail. This fact was adverted to by Dowd's attorney, and it was assigned as a reason why McGinnitys should stipulate unconditionally for the entry of judgment in Dowd's favor. At that time the further assurance was given that such crop as remained might be harvested by them. It is clear to our mind that there was then no thought of any hail insurance, and it is equally clear that the only interest that McGinnitys were claiming was the crops, and that Dowd conceded the claim. In view of these facts, the hail insurance must be held to belong to the McGinnitys. It has been properly subject to the payment of both the flat tax and the indemnity tax against the land.

It follows that the judgment appealed from must be affirmed.

It is so ordered.

CHRISTIANSON, BRONSON, and ROBINSON, JJ., concur.

GRACE, C. J. concurs in the result.

FRANK J. LANGER and WILLIAM LANGER, Plaintiffs v. FARGO MERCANTILE CO., a corporation dissolved, T. A. Quirk, C. O. Follett, and Croil Hunter, directors and trustees of Fargo Mercantile Company, a corporation dissolved; Fargo Mercantile Co., a corporation, T. A. Quirk, C. O. Follett and Croil Hunter, directors of said Fargo Mercantile Co., a corporation, Defendants.

(186 N. W. 104.)

Corporations — directors of dissolved corporation continuing after expiration of charter held trustees for stockholders.

1. In an action for an accounting brought by two stockholders in a dissolved corporation against the directors as trustees, where it appeared that the charter of the corporation had expired by limitation; that without actual knowledge of this fact the business was conducted for more than three years in the same manner as before; that dividends were declared and paid from time to time; that upon discovery of the fact that the charter had expired, and that the directors were liable as trustees under § 4567 of the Comp. Laws for 1913, three of the directors, to avoid the expense and sacrifice incident to liquidation, agreed to and did form a new corporation under substantially the same name; that, without notice to the plaintiff stockholders, they caused the assets to be appraised and purchased by the new corporation; that the stock of the new corporation was allotted to stockholders in the old, other than the plaintiffs; and that the defendants caused to be deposited in payment for plaintiffs' stock par value, plus 6 per cent. interest from the date of last dividend, which plaintiffs refused to accept—it is *held*:

Under § 4567 of the Comp. Laws of North Dakota for 1913 the defendant directors became trustees for the stockholders of all the assets of the dissolved corporation.

Corporations — where business is continued after expiration of charter, dividends distributed held stockholders' property, and not to be applied on liquidation claims to reduce res of the trust.

2. Where a corporate business is conducted for a period of time after the expiration of the charter without knowledge of that fact, and dividends are declared and distributed in the usual course, such dividends are the property of the stockholders, and are not, by operation of law, applied on liquidation claims to reduce the res of the trust.

Corporations — good will attaches to corporate business the same as to partnership business, and trustees on dissolution must account therefor.

3. Good will attaches to a corporate business to the same extent as to a partnership business and upon dissolution the trustees must account to the stockholders for its value.

Corporations — good will of corporation paying large dividends after charter expired held to have substantial value, to be measured in money.

4. Where the charter of a corporation expires after a long period of prosperity in the conduct of its business, and where for a period of years prior to its termination dividends had been earned and paid greatly in excess of a reasonable rate of interest on the capital invested, the good will has a substantial value, capable of being measured in money.

Corporations — sale of assets by directors after charter's expiration held voidable at election of stockholders not notified.

5. Where trustees, without notice to the stockholders or to the cestuis que trustent, appoint appraisers to appraise the assets in their hands, and where they dispose of the same for an inadequate consideration to a new corporation in which they are the principal stockholders, the transaction is voidable at the election of the stockholders not notified.

Corporations — where charter terminated, and business continued by new corporation taking benefits of good will, a stockholder not notified may follow his property into the new corporation or recover money judgment.

6. Where, after the termination of the charter, arrangements are made by the trustees whereby the business is continued without interruption by a new corporation, which reaps all of the benefits attaching to the good will, a stockholder, whose liquidation claim has not been satisfied and who is excluded from the new corporation, may follow his property into such new corporation, or, at his option, recover a money judgment for the value of the interest in the old corporation as represented by a like interest in the new.

Corporations — good will of corporation must be disposed of by its trustees to best advantage for stockholders.

7. Where the good will is not accounted for by the trustees, and the court, in an action for accounting, is compelled to value it, it must be valued as "if it had been sold in the most advantageous manner and under such circumstances that it would have produced the largest sum for all of the parties interested."

Corporations — in suit against directors as trustees for accounting services of certified accountants not allowable as costs.

8. Fees paid to a certified accountant will not be allowed as part of the costs, where his services were principally valuable to one of the parties, and where the facts gathered by him were at all times available to such party from the books which are not shown to have been complex.

Opinion filed Dec. 5, 1921.

Appeal of both parties from the District Court of Cass County, *Cole*, J.
Judgment affirmed.

Young, Conmy & Young, for defendants-appellants.

"Before there can be a de facto corporation, there must be a valid law under which a corporation may be formed, a bona fide attempt to incorporate under it, and an actual exercise of corporate powers." *Jennings v. Dark*, 92 N. E. 778, 782, 175 Ind. 332; *Gillette v. Aurora Ry. Co.* 81 N. E. 1005, 1009, 228 Ill. 261; *Marshall v. Keach*, 81 N. E. 29, 227 Ill. 35; 118 Am. St. Rep. 247; 10 Ann. Cas. 164, citing *American Trust Co. v. Minnesota & N. E. R. Co.*, 42 N. E. 153, 157, Ill. 641; *Bushnell v. Consolidated Ice Mach. Co.* 27 N. E. 596, 138 Ill. 67; 1 Cook, Stock. Stockh. & Corp. (3d ed. § 234).

"The requisites to constitute a 'corporation de facto' are three: (1) A charter or general law under which such a corporation as it purports to be might lawfully be organized; (2) an attempt to organize thereunder; and (3) actual user of the corporate franchise." *Whipple v. Tusworth*, 99 S. W. 86, 89, 81 Ark. 391, citing *Tulare Irrigation Dist. v. Shepard*, 22 Supp. Ct. 531, 185 U. S. 1, 46 L. ed. 773; *Clark Corp.* 90; *Finnegan v. Noerenberg*, 53 N. W. 1150, 52 Minn. 239, 18 L. R. A. 778, 38 Am. St. Rep. 552; *Stout v. Zulick*, 7 Atl. 362, 48 N. J. Law 599; *Eaton v. Walker*, 43 N. W. 638, 76 Mich. 579, 6 L. R. A. 102; *Swartwout v. Michigan Air Line R. Co.* 24 Mich. 393; *McFarlan v. Triton Ins. Co. (N. Y.)* 4 Denio 392; *Spring Valley Waterworks v. City of San Francisco*, 22 Cal. 434; *Mackall v. Cheaspeake & O. Canal Co.* 94 U. S. 308, 24 L. ed. 161; 3 Cook Corp. (4th ed.) § 637.

"A corporation, after the expiration of the period fixed for its existence in the law under which it is organized, is not even a de facto corporation, and its existence as a corporation may be attacked collaterally." *Clark v. American Canal Co. (Ind.)* N. E. 1083; 1 *Clark and Marshall on Corporations*, § 82c (4) p. 247, Vol. 2 § 305; *Guaga Iron Co. v. Dawson*, 4 Blackf 202; *Morgan v. Lawrenceburg Ins. Co.* 3 Ind. 392, 65 Am. Dec. 768; *Broadley v. Rappell*, 113 Mo. 545, 32 S. W. 645, 34 S. W. 841, 54 Am. St. Rep. 685; *Krutz v. Paola Town Co.* 20 Kan. 491, 24 Pac. 977; *Supreme Lodge of Knights of Pythias v. Weller*, 93 Va. 605, 25 S. E.

891; *Dobson v. Simonson*, 86 N. C. 492; No. 15, *Sons of Temperance v. Ashton*, 92 N. C. 578; *Sturges v. Vanderbilt*, 73 N. Y. 384; *White v. Campbell*, 5 Humph. (Tenn.) 38.

"If a corporation is dissolved it ceases to be a going concern and thereafter its good will is of no value. "The act of liquidation destroys the value of such good will as a value separate and apart from the value of the tangible assets.'" *Fletcher's Cyclopaedia Corporations*, Vol. 8, p. 9177, § 5571; *Watkins v. National Bank* (Kan.) 32 Pac. 914; *Rossing v. State Bank* (Ia.) 165 N. W. 254.

W. S. Lauder, for plaintiffs-appellants.

A trustee may not lawfully deal with the trust property for his own advantage, or for the advantage of the company or corporation in which he has a personal interest. *Clendenning v. Hawk*, (N. D.) 86 N. W. 114, see pp. 116-117, 10 N. D. 90; *Anderson v. First Nat'l. Bank*, (N. D.) 64 N. W. 114; *McKay v. Williams*, (Mich.) 35 N. W. 159; *Kimball v. Ranney* (Mich.) 80 N. W. 992; *King v. Remington et al* (Minn.) 29 N. W. 352; *Stettinische v. Lamb* (Neb.) 26 N. W. 374; *Veeder v. McKinley*, *Lansing Loan & Trust Co. et al* (Neb.) 86 N. W. 982; *Frazier v. Jenkins*, (Kan.) 57 L. R. A. 575; *Ferguson v. Gooch Trustee*, (Va.) 40 L. R. A. 234; *Kindman et al v. O'Connor* (Ark.) 13 L. R. A. 490; *Moore v. Mandlebaum*, (Mich.) 8 Mich. 432; *Wormley v. Wormley* (U. S.) 5 L. ed. 651; *Harding v. Handy*, (N. S.) 6 L. ed. 429 (Chief Justice Marshall); *Michaud v. Girod* (U. S.) 11 L. ed. 1076, see particularly column 2, p. 1098. One of the three leading cases of this country, *Richardson v. Jones*, (Md.) 22 Am. Dec. 293; *Cumberland Coal & Iron Co. v. Sherman*, (N. Y.) 30 Barb. 553; *Gardner v. Ogden* (N. Y.) 78 Am. Dec. 192-22 N. Y. 327; *Barnes et al v. Lynch et al* (Okla.) Pac. 995; *Brunner v. Finley et al* (Pa.) 41 Atl. 334; *Sage et al v. Culver et al* (N. Y.) 41 Atl. 513; *Wayne Pike Co. et al v. Hammons et al* (Ind.) 27 N. E. 487.

"The State alone can complain of the exercise by a corporation of its franchise beyond the period for which it was organized." *Miller v. Newburg etc. Co.* 31 W. Va. 836—12 A. S. R. 903; *Brady v. Delaware Mut. Ins. Co.* 45 Atl. 345 (Del.); *Arlington Hotel Co. v. Rector*, 124 Ark. 90—186 S. W. 662; *Wilson v. Brown*, 175, N. Y. S. 688.

The defendants are estopped to deny the corporate character of the old company down to Aug. 13, 1918. It is the settled law of the land that

a corporation transacting business and holding itself out as such, to the public, is estopped to deny its corporate character. It is also settled law that, in the absence of fraud, a person who has contracted or otherwise dealt with an association in such a way as to recognize and, in effect admit its legal existence as a corporation is thereby estopped to deny its corporate existence in any action arising out of or involving such contract or dealing. *Wilder Mfg. Co. v. Corn Products Refining Co.* 236 U. S. 165; *Andes v. Ely*, 158 U. S. 312; *Wallace v. Loomis*, 97 U. S. 146; *Rannels v. Rowe*, 145 Fed. 296—74 C. C. A. 376; *Decatur First Nat'l Bank v. Henry*, 49 So. 97 (Ala.); *Kansas City So. R. Co. v. McClintock* 107 Ark. 48 Ann. Cas. 1914 C 1247; *Cal. Fruit Exc. v. Buck*, 163 Cal. 223—124 Pac. 824; *Kelleher v. Denver Music Co.* 48 Colo. 212, 109 Pac. 860; *Fish v. Smith*, 73 Ky. 379, 84 A. S. R. 161; *Henry Gold Min. Co. v. Henry*, 25 Idaho 333, 137 Pac. 523; *Lincoln Park Chapter R. A. M. v. Swatek*, 204 Ill. 228, 68 N. E. 429; *Jennings v. Dark*, 175 Ind. 332, 92 N. E. 778; *Faulkner v. Farmers Produce etc. Co.* 170 Ky. 22, 185 S. W. 151; *Quincy Canal v. Newcomb*, 7 Metc. (Mass.) 276.

The doctrine of estoppel to deny corporate existence, by reason of having contracted with the corporation, is not limited to contracts between the corporation and strangers but applies also in the case of contracts, between a corporation and its stockholders or members. *Fish v. Smith*, 73 Ky. 379, 84 Am. St. Rep. 161; *Gilman v. Drusem*, 111 Wis. 400, 87 N. W. 557.

And the foregoing is particularly true where the party, so contracting, has also recognized the existence of the corporation by taking an active part therein as promoter, stockholder, member or officer. *Henry Gold Min. Co. v. Henry*, 25 Idaho 333, 137 Pac. 523, 14 C. J. § 253.

A trustee may not use or deal with the trust property for his own profit. Also no trustee, so long as he remains in the trust, may undertake another trust adverse in its nature to the interest of his beneficiary in the subject of the trust without the consent of the latter. A trustee may not use the influence which his position gives to obtain any advantage over his beneficiary. In so far as pertains to the assets and business of the new corporation the defendants are involuntary trustees, at least to the extent of plaintiff's property that was taken over by the new company. The following authorities fully sustain our contention. *U. S. v. Debell*, 142 C. C. A. 284; *Nestor v. Gross*, 66 Minn. 371, 69 N. W. 39; *Rollins v. Mitchell*, 52 Minn. 41, 53 N. W. 1020; *Henderson v.*

Murray, 121 N. W. 214; 39 Cyc. 172 and note 32; 1 Perry on Trusts (5 ed.) chap. 5, 166 et seq; Hammond v. Pennock, 61 N. Y. 145.

"The good will of a business is an asset and cannot be appropriated by majority stockholders." Mapes v. Metcalf, 10 N. D. 601; Cook on Corps. Vol. 2, § 641, p. 1835; Trentman v. Wahrenburg, 65 N. E. 1057, 1060 (Ind.); Merchants Ad. Sign Co. v. Sterling, 57 Pac. 468, 71 Am. St. Rep. 94.

BIRDZELL, J. This is an action by two stockholders against a dissolved corporation and the directors as trustees thereof. The relief sought is a judgment that the individual defendants, the directors, be charged as trustees of the property and assets of the old corporation; that they be required to account for the same; that a sale of the property and assets of the dissolved corporation to a new corporation of similar name be adjudged to be null and void; that the affairs of the old corporation be liquidated according to law; that a receiver, trustee, or trustees, be appointed to conserve the property; that the plaintiffs be permitted to follow their interests in the old corporation by requiring the purchasing corporation to issue to them stock in proportion to their property interests in the old corporation; and for general relief. Upon a motion for the appointment of a receiver the district court denied the application, and from the order an appeal was taken to this court, where the order was affirmed. Langer v. Fargo Mercantile Co. et al., 174 N. W. 90. After the conclusion of the trial on the merits, findings and conclusions were made by the district judge to the effect that the individual defendants became trustees; that no valid sale of the property and assets had been made by them; that the affairs of the dissolved corporation had never been lawfully liquidated; that the plaintiffs might elect, on or before May 20, 1921, whether they would take stock in the new corporation with an accounting for dividends earned after the formation of the new corporation, or take a money judgment for the value of their stock on August 13, 1918, the day of the formation of the new corporation, at \$275 per share, with an accounting for profits and earnings to the date of the entry of judgment. The latter option was accepted, and judgment entered accordingly in favor of the plaintiffs for \$39,873.10. From this judgment both parties have appealed, and the action is here for trial *de novo*.

Avoiding, for the present, the statement of any controverted facts,

the following statement is sufficient to convey the situation giving rise to the litigation: In 1895, the Fargo Mercantile Company was organized under the laws of this state with a capital stock of \$50,000, for the purpose of conducting a wholesale grocery business at Fargo. The time fixed for the existence of the corporation was 20 years from March 15, 1895, but for all purposes of this litigation the corporation came into existence on April 1, 1895, as evidenced by the corporate seal. The organizers and directors were J. C. Hunter, T. A. Quirk, and C. H. Reineke. Of these, J. C. Hunter retained his connection with the business until his death in October, 1916. T. A. Quirk is still connected with the business, but in 1903 Reineke sold his interest to the defendant C. O. Follett, who succeeded him as director, later becoming vice president and manager. From time to time the stock was increased until the capitalization reached \$250,000. The board of directors was also increased in number, and on April 1, 1915, the date of the expiration of the charter, the directors were J. C. Hunter, T. A. Quirk, C. O. Follett, and Croil Hunter. The plaintiff F. J. Langer became a stockholder in March, 1903, purchasing 50 shares at par. He later transferred a portion of this stock to the other plaintiff, William Langer. This stock subsequently shared ratably in increases of the capitalization, whether effected through stock dividends or cash. At dissolution, William Langer owned 100 shares and F. J. Langer 25 shares, the other stock being owned as follows: J. C. Hunter, 1,202 shares, Croil Hunter, 50 shares, H. F. Hunter, 50 shares, T. A. Quirk, 700 shares, and C. O. Follett, 373 shares.

The business was successful from the beginning. The first year it paid a dividend of 8 per cent. During the period of its existence it never paid less than that, and it ran as high as 50 per cent. It averaged for the entire period down to and including 1915 18.39 per cent. The most active managers of the business during the period of its growth were J. C. Hunter and C. O. Follett. After the expiration of the charter, April 1, 1915, the business was conducted the same as it had been before, without knowledge, apparently, on anybody's part, that the charter had expired. Knowledge of this fact was first acquired in the latter part of July, 1918, when the Secretary of State returned the corporation report and check for the filing fee, with the information that the charter had expired. Upon receipt of this information, the defendants Quirk and Follett took steps to organize a new corporation, adopting the name Fargo Mercantile Co. in lieu of Fargo Mercantile Company. Croil

Hunter, who was in a military camp at the time, was consulted, and co-operated in the organization of the new corporation. At this time a memorandum agreement in triplicate was entered into between Quirk, Follett, and Croil Hunter, binding them by mutual promises to form a new corporation for the purpose indicated in the agreement. The agreement recites that the parties had just learned of the expiration of the charter and of their obligations under § 4567 of the Compiled Laws, following which it contains these recitals:

"And whereas the assets of said defunct corporation consists of miscellaneous stock such as is usually carried by a wholesale grocery, and various notes and accounts, all of which could be sold and moneys collected only at some sacrifice and considerable expense by the ordinary process of liquidation; and whereas the parties hereto are desirous of avoiding this sacrifice for themselves and all other stockholders who are entitled to participate in the proceeds of the liquidation: Now, therefore, the parties hereto mutually agree one with the other to form a corporation for the purpose of purchasing the assets of the defunct corporation, and agree to accept and take as the name of the corporation to be formed the same name as the defunct corporation, to wit, Fargo Mercantile Co., and for the protection of such stockholders as are not parties to this instrument, to pay for the assets of said concern, including mercantile stock, notes and accounts, etc., as nearly as may be the true and full value thereof as of the date of the purchase by the proposed corporation."

The articles of incorporation of the Fargo Mercantile Co. dated from August 9, 1918. The property and assets of the dissolved corporation were appraised by appraisers selected by the defendants for the purpose, S. D. Lyon and E. G. Gearey. The appraised value was fixed at \$540,332.87. To this amount the defendants, Quirk and Follett, arbitrarily added, in round numbers, \$29,000. The new corporation made a written offer to purchase the assets for \$569,416.63, to be paid \$258,750 in cash and by assuming and guaranteeing outstanding debts amounting to \$310,666.63. This offer was accepted by the directors of the dissolved corporation, and settlement was made by delivery of the stock of the new corporation, except that no stock was delivered to the Langers or to H. F. Hunter for their respective interests in the old corporation. Settlement with Hunter was made by means of money advanced by T. A. Quirk, and it was proposed likewise to settle for the Langer shares with money advanced by C. O. Follett. The Langers had not been advised

of the steps taken to organize the new corporation and to dispose of the assets of the old corporation by sale to the new. It seems that the proportionate share of the stock the Langers would have received had they been admitted to the new corporation on the same terms as other stockholders were admitted was assigned to Follett, and that the money furnished by him to be paid to the Langers was deposited in a bank. Notice was then given, and a request made that they send in their old certificates and receive the money deposited. The amount thus deposited was par value, plus 6 per cent. interest from the last dividend paying date. The Langers were first notified of these transactions by registered letters dated August 28, 1918.

During the period of the trusteeship, that is, subsequent to April 1, 1915, three dividends were paid as follows: January 3, 1916, 25 per cent.; January 5, 1917, 28 per cent.; January 6, 1918, 25 per cent., making a total on the Langer stock of \$9,750.

Prior to the beginning of this litigation, Follett received, as manager, a salary of \$6,000, Croil Hunter, as secretary and treasurer, \$3,600, and the defendant, Quirk, no salary. Beginning in January, 1919, salaries were voted to Follett, as manager, \$12,000, to Hunter, as secretary and treasurer, \$17,000, to Quirk, \$9,000—thus increasing the salary account \$26,400.

It is the contention of the plaintiffs that the stock was fairly worth \$300 per share; that the judgment below does not make sufficient allowance for earnings since August 1, 1918; and that there should be incorporated in the judgment the amount expended by them for the services of an expert accountant. The defendants contend that, as the corporation was automatically dissolved by the expiration of the charter April 1, 1915, the individual defendants then became chargeable as trustees for the property and assets of the corporation, and that the right of the plaintiffs is a right to their share of the property and assets determinable as of that date. The book value of the assets April 1, 1915, is shown to have been \$556,426.89, and liability to creditors \$264,793.22, making a net book value apportionable to stockholders, \$291,633.67 or \$116.65 per share. It is shown that, on this basis, the Langer stock was worth \$14,581.25. But the book value is not conceded. By appraisalment it is reduced, principally, by discounting bills and accounts receivable 25 per cent., so that the net valuation of the Langer stock is given as \$9,672 on April 1, 1915. It is contended that the corporation was in reality unwittingly liquidated

through the subsequent transaction of business in the ordinary manner, so that, by January 1, 1916, the indebtedness outstanding on April 1 had been paid, and all that remained to complete the liquidation was to pay to each stockholder the share of the assets due him. It is then shown that this was in fact subsequently done, though without thought of settlement, through the payment of certain amounts as dividends. These payments, it is said, were in reality payments on liquidation claims. In this way, the Langers received \$9,750, or \$77.50 more than the liquidating value of their stock, on April 1, 1915. By allowing interest, however, it is conceded that on this basis there was owing to the Langers, on April 20, 1921, \$928.94. Additional calculations are made by the defendants based upon a theory that the plaintiffs might be entitled to a share of the profits of the business subsequently conducted on an "investor's basis." In arriving at the amount apportionable on this basis, the net earnings, beginning April 1, 1915, are distributed according to the total amount of capital employed in the business—taking credit, however, for the payments actually made on the Langer stock during this period. There would remain due the plaintiffs on this theory \$10,731.81. But it is contended that this basis is not equitable to the defendants, as they had assumed the responsibility of management, furnished all the credit and most of the capital with which to produce the earnings. Another contention entering vitally into the judgment is that good will cannot be taken into consideration in estimating or determining the liquidating value of the shares. Without this, it is claimed that no such value as that arrived at by the district court can be supported.

In addition to the contentions of the parties stated above, there are controverted questions relating to the valuation of items in the statement of assets. These contentions involve, principally, the discounting of bills and accounts receivable and the valuation of the real estate.

In the brief of the defendants there is considerable argument directed to the capacity in which they were acting after the expiration of the charter. It seems to be the purpose of this argument to demonstrate that during the period following April 1, 1915, the Fargo Mercantile Company was not a corporation de facto. While it is conceded that the directors were trustees under the statute (§ 4567, C. L. 1913), it is contended that they were nevertheless transacting the business as partners; and, being in law, partners, payments made to stockholders must be considered as applied on liquidation claims. Conceding that the Fargo Mercantile

Company was not, during this period, a corporation de facto, we cannot grant that the stated conclusion follows. Nor can we see wherein any importance attaches to the question as to whether the business was conducted by a de facto corporation or by the defendants as partners. In either event the defendant directors must still be charged as trustees under the statute. Regardless of the capacity in which the business was being conducted, the plaintiffs were entitled to the pro rata share, paid to them the same as all other stockholders. If the business transacted in the name of the Fargo Mercantile Company was in fact and in law a partnership business, it was clearly owned by all of the stockholders, and not merely by the trustees who happened to be most active in the conduct of the business, and any amounts paid to the stockholders from earnings would be rightfully theirs as owners.

The fallacy of the argument that payments made by the trustees subsequent to April 1, 1915, must be applied on liquidation claims of the stockholders is made apparent by considering the consequences that would follow if it were upheld. Every stockholder received like payments, with the result that before the discovery of the fact of dissolution they had all been overpaid on the principal of their liquidation claims, and there remained due to each only a small amount as interest. By the payment of this small amount as interest, the director trustees, according to this argument, would become the owners of the business, and this would be true regardless of the amount of stock owned by persons other than the directors. It needs no argument to demonstrate that trustees may not thus acquire for their own benefit the res of a trust.

The principles of law upon which the defendants are chargeable for the profits made through the handling of the trust property are clear and plain. The Code (Comp. Laws) provides, § 6282, that a trustee may not use or deal with trust property for his own profit or for any other purpose unconnected with the trust in any manner. § 6290 gives to the beneficiary of a trust an option to require the trustee to account for all profits made. The law is well settled, even in the case of surviving partners continuing to use the capital supplied by a deceased partner, that a partner continuing the business becomes chargeable with the proportionate share of the profits during the time it is so used, instead of being liable merely for interest. *Washburn v. Goodman et al.*, 17 Pick. (Mass.) 519; *Long v. Majestre*, 1 Johns, Ch. (N. Y.) 305; *Case v. Abeel*, 1 Paige, Ch. (N. Y.) 393. The obligations of trustees continuing a corporate business

beyond dissolution are certainly no less than this. We hold that the trustees were properly chargeable with the profits of the business during the period of the trusteeship, and that the distribution made from time to time in the shape of dividends simply discharged this trust obligation, and did not reduce the res of the trust or the obligation to pay over the principal in the shape of the value of the stock itself.

This brings us to the question of the value of the stock. The principal controversy here concerns the propriety of considering an element of value aside from the credits and tangible assets—the element of good will. It is forcefully argued by the defendants that, as the period of corporate existence had expired and there was no longer any right to conduct the business in a corporate capacity, it had no going concern value; that no value can attach to the good will unless the probability that old customers will resort to the old stand (to use Lord Eldon's expression) is a probability that exists in favor of some one. As the corporation is dead and as the stockholders must be held to have taken their stock with knowledge of the limitation of corporate existence contained in the articles, they have, it is claimed, no interest in any such probability. The business comes to an end when the charter expires, and no stockholder has any interest in any business that may be organized to succeed it, except as he may participate in the new arrangement. This argument is supported by *Rossing v. State Bank of Bode*, 181 Iowa, 1013, 165 N. W. 254, *Green v. Bennett* (Tex. Civ. App.) 110 S. W. 108, and appears to be recognized as valid by 8 Fletcher Ency. of Corporations, § 5571. Notwithstanding the logical force of the argument and the authority cited in its support, we cannot agree to its soundness. We can perceive no distinction in this respect between the good will attaching to a business conducted by a corporation and that attaching to a partnership business. A partnership is just as completely dissolved upon the death or withdrawal of a partner as a corporation is by the expiration of its charter or by the voluntary discontinuance of its business through consolidation or otherwise. Partners are just as much bound to anticipate the legal possibilities of dissolution through death of a partner or voluntary withdrawal as are stockholders in a corporation to contemplate a lawful termination of the corporate activities, and such possibilities are in the contemplation of the contracting parties to the same extent in both instances. Yet it is universally held that a partner cannot succeed to

the benefits attaching to the good will without rendering himself accountable to the estate of the deceased partner or to the retiring partner for its value.

A situation in many ways similar to that disclosed on the record in the instant case was presented to the Supreme Court of Wisconsin in the case of *Lindemann v. Rusk*, 125 Wis. 210, 104 N. W. 119. The facts, briefly stated, are that in 1891 the Bank of Viroqua was organized by the incorporators, Rusk and Lindemann, each taking half of the stock, the charter to continue for 10 years. In 1893 Rusk died. Lindemann from the organization and until the expiration of the charter was in the active management of the bank. In December, 1900, just before the expiration of the charter, Lindemann organized a new bank under the name, "Bank of Viroqua," the stock of which was subscribed for by himself and children. The new bank opened and started business the morning of the day following the expiration of the charter of the old bank, and the Lindemanns, in this manner, secured the benefit of the good will, if any, of the old bank. In an action to secure the complete liquidation of the old bank and compel an accounting, the court, in discussing the element of good will, answered many of the arguments advanced by the defendants in this case. We therefore feel justified in quoting the opinion at length and adopting the holdings as applicable to the case at bar. The court said:

"The trial court found that, at the time the bank ceased to do a going business under its charter, it 'owned and was possessed of a good will, which was of the reasonable value at that time of \$16,000,' and held that it had been wrongfully appropriated by William F. Lindemann, the surviving director of the bank, for the benefit of the new bank of Viroqua, organized by himself and his children, and which conducted a banking business in the offices of, and in immediate succession to, the old bank. That a banking corporation may have a good will, which, when acquired, constitutes a species of property, is abundantly supported by authority. *Bank of Tomah v. Warren*, 94 Wis. 151, 68 N. W. 549; *People ex rel. A. J. Johnson Co. v. Roberts*, 159 N. Y. 70, 53 N. E. 685; *Mitchell v. Read*, 84 N. Y. 556; *Washburn v. Nat. W. P. Co.*, 81 Fed. 17, 26 C. C. A. 312; *Wilmer v. Thomas*, 74 Md. 485, 22 Atl. 403. Good will is the result of the employment of capital in some established business. It augments its value, and is an incident to the conduct of the enterprise. It exists at the place where the busi-

ness is carried on, and gives value to the enterprise because of the benefits that are likely to come to a successor and which arise from being connected with its reputation. It is this which gives to the opportunity of securing this connection to continue the public patronage in the same respect a commercial value. It is strenuously insisted that the old Bank of Viroqua could not convey good will, for want of power to transfer a place, a name, or tangible assets to which it could attach. It is true the bank might not be able to transfer particular business rooms or offices, but the good will as to the place is not confined to such limits; and it might well attach to this banking business, if continued at offices or rooms in the city of Viroqua other than those formerly occupied by it. It is said the name 'Bank of Viroqua' could not have been transferred by it to be exclusively used by a successor. If the general proposition that a defunct corporation whose affairs are being liquidated and closed up retains no right to the use of a corporate name be granted, yet such is not the situation presented by the facts of this case. We have before us a corporation with an established business, which, under the statutes, was continued for three years from the time it ceased to conduct a going banking business, for the purpose and with power, by its directors and managers, to settle up and liquidate its affairs. Nothing would prevent such officers from transferring to another banking corporation the right to use its name as its successor in business by purchase of its tangible assets and good will and the right to hold itself out to the world as successor to the old bank. The objection that such a course would necessarily include the selling of the liabilities of the old bank seems entirely unfounded, for it would have been entirely feasible to have paid up and settled all liabilities in connection with the new enterprise with probable advantage and convenience to both. That such a course of business is practicable is abundantly shown. The facts of the case show that the Lindemanns organized a new bank under the old name, conducted its business in the offices where the affairs of the old were being liquidated and settled, and practically dealt with the affairs of the old bank as its successor, and thus acquired the benefits of the good will of the old bank. Under these circumstances we find the trial court's conclusion to the effect that the old bank was possessed of a good will at the time Lindemann took possession of its assets is well supported by the evidence. As trustee of the bank's property, with power to liquidate its affairs, it was Lindemann's

duty to dispose of the good will, with the tangible assets of the bank, in the most advantageous manner. He failed to do so, but appropriated it to the use of the new bank organized by himself and children. *Bank of Tomah v. Warren*, supra; *Rowell v. Rowell*, 122 Wis. 1, 99 N. W. 473; *Slater v. Slater*, 175 N. Y. 143, 67 N. E. 224, *Mellersh v. Keen*, 28 Beav. 453; *Williams v. Wilson*, 4 Sandf. Ch. 379. Under such circumstances the appropriation of the good will for the benefit of the new bank may be treated as a sale, and will be held valid or voidable at the option of the Rusks, for whom he was fiduciary. *Rowell v. Rowell*, supra; *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909. Under the rule of these authorities, the beneficiaries may require the new bank to account for the profits realized by it through the wrong of its organizers and owners in appropriating the asset of the good will of the old bank. The facts proven and found by the court sustain the judgment of the trial court in fixing the value of the good will and for the recovery of the profits realized thereon as capital stock of the new bank."

Advantages that give value to the good will of a business developed along the lines of the business in question are readily appreciated in the business world, and their value is capable of being measured in money. This is evidenced by the frequency with which good will is made the subject of contract negotiation. Advantages attaching to the privilege of continuing a business like that in the case before us are well summarized by the Supreme Court of New York in the case of *In re Silkman et al.*, 121 App. Div. 202, 105 N. Y. Supp. 872, where it is said:

"The great part of the sales were upon mail orders, or upon orders obtained by salesmen. The salesmen used cards bearing the name of *Thurston & Braidich*, and scoured the country, keeping in touch as much as possible with the old customers, while seeking for new. As the business dealt with articles more or less used in food products, it was important that the goods were pure. Is there no difference between a business in such products, established for 20 years in substantially the same place, with a list of 1,100 to 2,000 customers, and bearing the same name, and a new business, started under a different name, having to make its way? The very fact that the business did not depend upon a display of goods emphasizes the importance of the repute and standing of the name. Was there no advantage in a traveling salesman

visiting a customer in Denver and carrying the card of Thurston & Braidich, instead of that of an unknown firm? Was there no advantage in possessing a list of 1,000 consumers who had dealt in the past with Thurston & Braidich, and in seeking a continuance thereof, when the customer knew nothing more than that the same firm sought to sell goods to him? If the writers of mail orders or the foreign customers of Thurston & Braidich did not depend upon the display of goods or on personal contact with the firm in New York, what drew their custom to that business house? Thurston & Braidich certainly had, in the words of Vann, J., *supra*, 'a name known to the trade.'"

So here the name was known to the trade. To establish its standing in the business world and to acquire its extensive patronage must have required the expenditure of considerable money and effort. This does not come to naught upon the expiration of the charter. Its value belongs to those at whose instance it was created—the stockholders of the old corporation. It can no more be appropriated without compensation than can the value attaching to tangible assets. The expiration of a corporate charter does not make the good will of the business a legitimate subject of appropriation by the most vigilant.

The defendants contend that a distinction must be made which will differentiate the holding in the Wisconsin case of *Rusk v. Lindemann*, *supra*, and the Iowa case of *Rossing v. State Bank*, *supra*, to the contrary, and that the distinguishing feature is that, under a statute like that existing in Wisconsin, the corporation continues its corporate character for a given time after the expiration of the charter, whereas under § 4567, C. L., N. D., continuing corporate character is not recognized or provided for. It is clear to us that there is no ground for such a distinction. The statute of Iowa likewise recognized the continuance of the corporation (Code Iowa 1897, § 1629), but yet it was there held, as pointed out above and contrary to the Wisconsin decision, that there is no good will to be accounted for upon the expiration of the charter of a bank. It seems obvious to us that the value attaching to the good will of the corporate business at dissolution does not depend in the least for its realization upon statutory recognition or nonrecognition of the continuance of the corporation for the limited purpose of liquidation. Such recognition is only a brief and convenient mode of authorizing or validating transactions which can most readily be conducted in the corporate name. Even under § 4567, C. L., N. D. permission is given to use

the corporate name for certain purposes. The duty of liquidation is the same, in our opinion, under both forms of statutes, and the obligations of directors as trustees are identical. In our opinion, the right of the majority stockholders—much less of the defendants as trustees—to appropriate to themselves the good will or other assets of a corporate business is no greater than the right of the minority to do so. *Mason v. Pewabic Mining Co.*, 133 U. S. 50, 10 Sup. Ct. 224, 33 L. ed. 524. Our conclusion is that neither has such right, but that the directors are chargeable as trustees for the proper disposition of all of the assets, including the good will. Being chargeable as trustees and having in that capacity disposed of the assets, including the good will, to a new corporation of which they are directors, the law holds them to strict accountability, and places upon them the burden of showing fairness and the full adequacy of the consideration. *Geddes v. Anaconda Copper Mining Co. et al.*, 254 U. S. 590, 41 Sup. Ct. 209, 65 L. ed. —, *Advance Opinions U. S. Supreme Court*, February, 1921, p. 227. They have not sustained that burden in this case. It goes without saying that the defendants had no right to acquire the interest of the plaintiffs in the old corporation at a valuation fixed by themselves, or by appraisers selected by them without notice to the plaintiffs. *Mason v. Pewabic Mining Co.*, *supra*.

Since under the law the defendants are accountable to the plaintiffs for the value of the good will of the business to the same extent that they are accountable for the other assets of the corporation, we are confronted with the necessity of ascertaining that value. We must confess that the task is difficult beyond that usually experienced in ascertaining facts of a more tangible character. But this difficulty does not render the duty any the less imperative nor, in a case of this character, should it obscure the point of view from which the valuation is to be made. Manifestly, a value estimated according to what the good will would bring if subjected to forced sale would be altogether inequitable. The good will in the instant case has not been subjected to forced sale. On the contrary, it has been so dealt with that those who enjoy it reap the fullest measure of value attaching to it. There was no interruption in the business, and the patrons were not aware that a change had taken place. In view of this, it cannot properly be valued according to what would have been realized under less favorable circumstances. The right viewpoint, we think, in these circumstances is that suggested by Sir John Romilly, Master of

the Rolls, in *Mellersh v. Keen*, 28 Beav. 453-455, 54 Eng. Reprint, 440-441, when he said:

"The difficulty of ascertaining the value of the good will of a business is very great; it is of a shadowy character, and a very slight thing will increase or diminish its value. I have no doubt that the evidence of the eight or nine bankers, who have said that it was worth nothing, may be perfectly true, in one sense, that nothing could have been more easy than to have sold in such a way that nobody would have given a penny for it. But the court is bound to look at it in this point of view: What would it have produced, if it had been sold in the most advantageous manner and under such circumstances that it would have produced the largest sum for all the parties interested?"

Follett, in the instant case, testified that the business was worth a great deal more than the selling value of the visible property. But the record does not afford a reliable, direct indication of the value. It presents, however, strong circumstantial proof that it had a very substantial value. Among these circumstances we may mention the following: The business was successful and prosperous from the beginning, paying a dividend the first year of 8 per cent. Dividends were paid every year, increasing in amount during the later years. The capital stock was increased from time to time until it reached \$250,000. All, or nearly all, this increased capital was paid in from profits through stock dividends. During the later years the corporation had shown ability to earn better than 25 per cent. upon its entire capitalization. For the last seven years prior to January 1, 1918, the net earnings averaged 25 per cent., and for the last five years of the period over 26 per cent. of the capital. The business also showed a steady increase in volume, partly due, no doubt, to the advancing price level; but a well-organized business such as this is able to maintain a fairly certain ratio of net profit on the gross volume of business done. On the whole record, we are impressed that the business was built upon a substantial foundation, and that it possessed such elements of stability as would impart great value to it as a going concern.

The law recognizes certain standards by which to determine the value of the good will as a matter of fact, which standards vary with the elements tending to reflect stability or the lack of it. These will be found discussed and applied in the following cases: *In re Silkman*, supra; *Mellersh v. Keen*, supra; *Von Au v. Magenheimer et al.*, 115

App. Div. 84, 100 N. Y. Supp. 659, 126 App. Div. 257, 110 N. Y. Supp. 629; *Seach v. Mason-Seaman Transp. Co.*, 170 App. Div. 686, 156 N. Y. Supp. 579. In this case, we are of the opinion that it is neither necessary nor helpful to apply any arbitrary formula. The interest of the plaintiffs must be valued as of the time they elected to take a money judgment. The attempted sale of that interest in the manner hereinbefore indicated was voidable as to them, and they, having elected to avoid it, may follow their interest into the new corporation, disregarding the indirect attempt of Follett to purchase it. The plaintiffs, in the beginning, offered to take in settlement of their liquidation claims a proportionate amount of stock in the new corporation, which would have placed them in the same position with respect to the new corporation that the other stockholders occupied. Since the sale was invalid as to them, this proposition offered an entirely equitable solution of the difficulty, and the plaintiffs in asserting it as their right were wholly justified on principles applicable to trust obligations.

While it is true, as asserted by counsel for the defendants, that those who organize a new corporation have a right to select whom they will as stockholders, this right, where liquidation and reorganization are involved, presupposes the legal adjustment of liquidation claims in such a manner that the property of no claimant is used to the advantage of those who form the new corporation. The failure thus to effect a valid settlement of the trust obligation and the resulting use of trust property to pay for the stock in the new corporation, leave the beneficiary of the trust, who is the claimant in liquidation, free to follow the res into its converted form. Hence his equity is measured, if he choose, by the value of a proportionate interest in the new corporation. From this certain conclusions follow with respect to the valuation of the assets: First, the Lyon-Gearey appraisalment is not applicable, for the assets, as far as these plaintiffs are concerned, were not, in law, sold. The 25 per cent. discount of the bills and accounts receivable upon the theory of a sale of these assets en bloc is not permissible, therefore, as the record shows that the bills and accounts receivable, in connection with the operation of the going business, were worth upwards of 97 per cent. of their face. It also follows that the plaintiffs are entitled to a proportionate share of the earnings until the date of the election to take the money judgment, and from this time forward to the legal rate of interest. They have not participated in the earnings subsequent to

January 1, 1918. In addition, the record shows that the real property, carried on the books at \$62,273.54, is, in fact, worth from \$30,000 to \$40,000 more than its book value. The equitable principles applicable in themselves necessitate the rejection of the defendants' theory of values. Since liquidation was not in fact had, the plaintiffs are not bound by a "liquidation value," but are entitled to follow their property into the more favorable investment.

On the whole record, we are impressed that the stock is not worth as much as plaintiffs contend. Our composite judgment of the value does not vary greatly from that arrived at by the trial court. We have concluded, therefore, that the judgment below should stand.

From the memorandum agreement entered into by Quirk, Follett, and Croil Hunter immediately after the discovery of the expiration of the charter, it is, indeed, reasonably to be inferred that a purpose was entertained by them to fully protect all of the stockholders through the organization of the new corporation, for the portions of the agreement hereinbefore quoted recite their obligations as trustees, the fact that some sacrifice and considerable expense would be incurred by liquidation through the ordinary process, and that to avoid this sacrifice, not only for themselves, but for "all other stockholders," they proposed to form the new corporation "for the protection of such stockholders as are not parties to this instrument." This original purpose was apparently departed from, however, before the trial of this action, for the record discloses an attempt on the part of the defendants to value the assets for purposes of satisfying the plaintiffs' claims on a liquidation basis involving the very sacrifices that the carrying out of the agreement was designed to prevent, not only on behalf of those signing it, but on behalf of all other stockholders. This agreement, made before the self interest of some of the defendants was brought into conflict with the equities of the plaintiffs, is a virtual recognition of their rights as we find them to be.

In regard to the plaintiff's contention that they should be allowed to recover, as part of the costs, the fees paid to the certified accountant, we are of the opinion that the contention must be denied. His services were principally valuable to the plaintiffs; the material assembled by him being already within the knowledge and ready grasp of the defendants. As far as this record shows, this information would have been readily available to the plaintiffs had they possessed the requisite

familiarity with the records of the corporation. As stockholders the books were always open to them. The books are not shown to have been complex. We are of the opinion that substantial justice is reflected in the judgment appealed from, and it is in all things affirmed. Both parties having appealed, the order will be "without costs."

CHRISTIANSON, J., concurs.

BRONSON, J., not participating.

GRACE, C. J. (specially concurring). The principles of law applicable to trustees in dealing with property, as well as the legal principles dealing with the subject of the "Good will" of a business, its nature, value, sale, etc., were at great length set forth and fully analyzed in the case of *Macfadden v. Jenkins*, 40 N. D. 422, 169 N. W. 151, and two provisions of our Code relative to trusts (§§ 6282 and 6283) were there fully analyzed. Also §§ 5465 and 5466 relative to "good will" of a business were thoroughly considered, and a thorough and extended analysis of the subject of good will there made.

Mr. Justice BIRDZELL in his opinion of the case at bar has adduced no different principle of law relative to trusts or the duties of trustees dealing with trust property, nor with reference to the subject of the "good will" than that heretofore announced in the case of *Macfadden v. Jenkins*, supra.

ROBINSON, J. (dissenting in part.) Without attempting to swell the record by arguing either the law or the facts, I hold that plaintiffs are not entitled to recover for their stock and good will more than \$200 a share, with interest from August 13, 1918. That was the full value of the stock, including the good will of the business when the transfer was made to the new company. Assuredly it could not have been sold for a greater amount. If the managers of the new corporation by their work, skill, and personal credit happened to realize a greater profit, it was their own good fortune. They did all the work, took all the risk of loss, while the plaintiffs did nothing and took no risk whatever. As they did not risk any loss, 6 per cent. on their capital is a fair and legal compensation for the use of their money. The defendants could easily have borrowed money at that rate. There is a gross wrong in allowing the plaintiffs to stand by and speculate on the profits of the new com-

pany without incurring any risk of loss. "He who takes the benefit must bear the burden." Code (Comp. Laws) § 7255.

STATE OF NORTH DAKOTA, Respondent, v. HIRAM J. STEPP,
Appellant.

(185 N. W. 812.)

Criminal law — appointment of special counsel to assist prosecution held not error.

1. For reasons stated in the opinion the trial court did not err in making an order appointing special counsel to assist the state's attorney in the prosecution of this case.

Criminal law — plea of not guilty held not withdrawn by subsequent motion to quash information.

2. Where a defendant enters a plea of not guilty to a criminal information the issue framed by such plea remains until disposed of in some proper manner. Such plea is not deemed withdrawn because the defendant subsequently moves to quash the information on the ground that it does not state facts sufficient to constitute a public offense.

Criminal law — grant of new trial for newly discovered evidence in discretion of trial court.

3. Whether a new trial shall be granted on the ground of newly discovered evidence is primarily a question for the trial court. The function of the appellate court is merely to review the ruling of the trial court to ascertain whether in ruling as it did the trial court abused the sound, judicial discretion with which it is vested. In the instant case the appellate court, for reasons stated in the opinion, is unable to ascertain, upon the record before it, what the trial court actually found upon the controlling facts, and for that reason the order denying a new trial is set aside and the cause remanded with directions that the trial court hear and determine anew the motion for a new trial.

Opinion filed Dec. 5, 1921.

Appeal from the District Court of Ramsey County, *Buttz*, J.

Defendant appeals from a judgment and from an order denying a new trial.

Order denying new trial reversed, and cause remanded with directions to hear and determine such motion anew.

G. Grimson, State's Attorney, *Fred J. Traynor*, special Ass't. State's Attorney, *Wm. Lemke*, Attorney General, for respondent.

J. F. T. O'Connor and *C. F. Peterson*, for appellant.

An unofficial member of the bar may not assist in the prosecution for a fee paid by private persons. *Beimel v. State*, 71 Wis. 444, 37 N. W. 244; *Bird v. State*, 77 Wis. 276, 45 N. W. 1126.

It is the policy of the criminal law that the prosecuting attorney have active superintendence of the management of criminal trials. He should see that it does not degenerate into a private persecution or prosecution. *People v. Blackwell*, 27 Cal. 66; *Hayner v. People*, 72 N. E. 782; *Comm. v. Knapp*, 20 Amer. Dec. 534; *Comm. v. Webster*, 52 Amer. Dec. 711.

The court erred in not arraigning the defendant, in not giving defendant an opportunity to plea, or enter a plea. § 10746, 1913 N. D. Comp. Laws; *State of Oregon v. Walton*, 91 Pac. 490, 13 L. R. A. N. S. 811; see note 13 L. R. A. N. S. at p. 812 and cases cited; see note 13 L. R. A. N. S. at p. 813 and cases cited.

It is the function of this court to review the ruling of the trial court on the motion, and to determine whether, in denying a new trial, the trial court abused its discretion, and thereby effected an injustice. *State v. Gray*, 31 N. D. 67, at p. 81, 153 N. W. 452; *Aylmer v. Adams*, 30 N. D. 514, 153 N. W. 419; *State v. Gray*, 31 N. D. 67, 153 N. W. 452.

If it is clear that the new evidence would not change the result the motion should be denied, but if it is doubtful how it would affect the verdict, the motion should be granted. *Lindley v. State*, 11 Tex. App. 284; *State v. Laper*, 128 N. W. 476; *Aylmer v. Adams*, 153 N. W. 422; *State v. Fleming*, 17 Idaho 471, 106 Pac. 305.

CHRISTIANSON, J. The defendant was convicted of the crime of rape in the first degree in the district court of Ramsey county, on a change of venue from the district court of Cavalier county, and sentenced to 2½ years' imprisonment in the state's penitentiary. After sentence had been

imposed, defendant moved for a new trial, which was denied, and he has appealed from the judgment and from the order denying a new trial.

The first assignment of error is to the effect that the court erred in appointing and permitting Fred J. Traynor to act as special assistant state's attorney in the prosecution of the case over the objection of the defendant. This question was considered upon a former appeal in this case. See *State v. Stepp*, 45 N. D. 516; 178 N. W. 951-953. As appears from the opinion in that case, Mr. Traynor was appointed by the district court as assistant state's attorney and assisted in the prosecution upon the first trial of the case. After the case was remanded by this court for a new trial, Mr. Traynor was appointed an assistant attorney general for the purpose of assisting in the prosecution of this case, such appointment being made by the Governor under chap. 20, Laws Special Session 1919. The record also shows that the judge who presided upon the trial of this case heard both the state's attorney and the counsel for the defendant before he made the order appointing Mr. Traynor to assist the state's attorney in the prosecution of this action. We are entirely agreed that in the circumstances the trial court did not err in making such order.

It is next contended that the conviction should be set aside for the reason that the defendant did not enter any plea to the information before the commencement of the trial, and was not afforded an opportunity to do so. In support of this contention the defendant points out that the record on this trial of the action does not show that the defendant either entered a plea or was afforded an opportunity to do so; also, that the record shows that upon this trial defendant's counsel made an oral motion to quash the information on the ground that it did not state facts sufficient to constitute a public offense, or any offense, under the statute. It is contended that when the defendant moved to quash the information, he in effect withdrew any plea formerly entered; and that the consideration and denial of this motion by the trial court, in effect, amounted to a recognition of such withdrawal. In our opinion these contentions are not well founded. The record shows that prior to the commencement of the first trial, namely, on June 17, 1919, the defendant entered a plea of not guilty to the information. By such plea an issue of fact was framed, which was tried at that time. On appeal to this court the conviction was set aside because of certain errors in the conduct of that trial, and the cause was remanded for a new trial in order that the defendant might be afforded a fair trial. The issue raised by the plea of

not guilty was not disposed of. The new trial was ordered that that issue might be determined in the manner provided by our laws. Under our statute the failure of an information to state facts sufficient to constitute a public offense is not a ground for setting aside the information upon motion (§ 10728, C. L. 1913), although it is a ground for demurrer (§ 10737, C. L. 1913). Both a motion to set aside an information and a demurrer must be in writing, and subscribed by the defendant or his attorney (§§ 10729, 10738, C. L. 1913). A motion to set aside an information lies only for the grounds specified in the statute (§ 10728, C. L. 1913), "and said motion must be made before the defendant demurs or pleads, or the objection is waived" (§ 10729, C. L. 1913). The trial court may, in its discretion, permit a plea to be withdrawn and a different plea or a demurrer to be interposed (§ 10749, C. L. 1913).

We are entirely satisfied that the trial court was correct in proceeding on the theory that the plea of not guilty interposed before the commencement of the first trial, and the issue thereby framed, remained until the defendant asked that the plea be withdrawn. And, in view of the statutory provisions above referred to, we do not believe it can be said that the defendant ever withdrew his plea of not guilty and that the case was tried without being at issue. The fact that the trial court ruled upon the motion to set aside the information cannot, we think, be construed as permission by the court that the plea of not guilty be withdrawn; nor can the making of such motion be deemed a withdrawal by the defendant of his plea of not guilty. The motion having been made, it was, of course, incumbent upon the trial judge to make some ruling. This he did. He denied the motion and that ruling was, in our opinion, a correct one.

In no event can it be said that any substantial right of the defendant was affected adversely by not affording him an opportunity to plead anew before the second trial commenced. That trial proceeded and was had upon the theory that the plea of not guilty, which had originally been entered, remained in full force and effect. The defendant, upon the witness stand, positively denied the charge against him, and in his instructions to the jury the trial judge said:

"When arraigned upon that information the defendant pleaded not guilty to that charge, and that puts in issue or denies every material allegation contained in the information and makes it necessary for the state to prove the defendant guilty to your satisfaction, beyond a reason-

able doubt, before you would be justified in returning a verdict of guilty against this defendant."

Under our laws, it is the duty of this court, after hearing an appeal in a criminal action, to "give judgment without regard to technical errors or defects or exceptions, which do not affect the substantial rights of the parties" (§ 11013, C. L. 1913).

The third assignment of error is that the trial court erred in denying defendant's motion for a new trial on the ground of newly discovered evidence. When this case came on for trial the state offered as a witness one Mrs. Manning, who did not testify upon the first trial. Upon this trial of the action, the defendant was represented by counsel who did not appear for him upon the former trial, although he appeared for him on the appeal to this court. Mrs. Manning testified that she came to the home of the complaining witness on one occasion at or about the time that the crime charged against the defendant is alleged to have been committed; that she knocked on the door, but that no one responded; that she thereupon entered the house, and on opening the door into the kitchen saw the plaintiff and the complaining witness in a compromising position on the floor. Mrs. Manning was the only witness claiming to have witnessed the commission of the crime. In support of the motion for a new trial the defendant submitted certain affidavits tending to show that the witness Manning had made certain statements wholly inconsistent with or contradictory to the testimony which she gave upon the trial of the action. In denying the motion for a new trial the trial court filed a memorandum opinion wherein he stated:

"While I am not satisfied with all of the evidence in this case, there is evidence in the case which, if believed, is amply sufficient to sustain the verdict. As I understand it, the credit to be given a witness, and the weight of the evidence, is for the jury, and the court is not justified in setting aside the verdict simply because he could not have arrived at the same conclusion as did the jury."

In the certificate of probable cause made by the trial judge upon this appeal he said:

"There is probable cause for an appeal on the part of the defendant. Mrs. Manning's name did not appear on the information, and the first information that the defendant had was when the case was called for trial that the state would call Mrs. Manning and, the attorneys for the defendant promptly objected to Mrs. Manning testifying, for the reason

that her name was not on the information and on the ground of surprise, and the court reserved its ruling and, when Mrs. Manning was called, permitted her to testify, and if her evidence was believed by the jury this was the strongest testimony the state had, and one of the jury men so expressed himself to me; however, for the reason stated in the order denying a new trial, a new trial was denied."

The question as to the granting of a new trial on the ground of newly discovered evidence and the functions exercised by the trial court and by the Supreme Court on such motion were fully considered by this court in *Aylmer v. Adams*, 30 N. D. 514, 153 N. W. 419, and *State v. Cray*, 31 N. D. 67, 153 N. W. 425, and little can be added to the discussion contained in those two decisions. As therein stated, the question whether a new trial shall be granted on the ground of newly discovered evidence is primarily one for the trial court, and the function of the appellate court is merely to review the ruling of the trial court on such motion, and this review is limited to a determination of the question whether in denying a new trial the trial court abused its discretion and thereby effected an injustice. 31 N. D. 81, 153 N. W. 425. The function of courts is to dispense justice, and the discretion vested in the trial court should always be exercised in the interests of justice. The presumption, of course, is that it has been so exercised. 31 N. D. 81, 153 N. W. 425. The rules governing the consideration of motions for a new trial on the ground of newly discovered evidence have been formulated to aid in the administration of justice, and to prevent a miscarriage of justice. Hence, where it is shown to the satisfaction of the trial court that since the trial at which he was convicted, a defendant has discovered certain new and material evidence, which he could not with reasonable diligence have discovered and produced at the trial; and the newly discovered evidence is of such probative force and character that, if considered with all the evidence adduced at the trial, it is likely to raise in the minds of reasonable men a reasonable doubt as to the guilt of the defendant, that is, that such newly discovered evidence is likely to produce a different result upon another trial of the action—then it is the duty of the trial court, however unpleasant that duty may be, to grant a new trial.

"The general rule on the subject, the same being unquestionably correct as an abstract legal proposition, may be briefly stated thus: A new trial, where the motion is based upon newly discovered evidence,

may be properly refused if such evidence, being admitted, would not change the result. The same principle has been sometimes expressed in different language, but the meaning is usually that above conveyed. The foregoing expression is equivalent to saying that the motion should not be granted, unless the court can see from the showing made that a different verdict will probably result from a retrial with the new evidence added. In other words, in order to warrant a denial of the motion the court must be of the opinion that the admission of the new evidence would not cause a different result. * * *

"As in all cases where the matter rests almost absolutely within the discretion of individual men, no specific rule of any value, subordinate to and definitive of the leading rule, and applicable generally, can be laid down. * * * The following is suggested as * * * the * * * rule in criminal cases: It is not required that the new evidence shall be so important or conclusive of the point upon which it is offered as to create, with the evidence introduced at the trial, a preponderance in favor of the defendant's innocence, but only that it create a reasonable doubt of his guilt." Spelling's New Tr. & App. Pr. § 221.

The difficulty which confronts us in this case is one of interpreting the actual findings of the trial judge.

It is true he denied the motion for a new trial, but according to his memorandum opinion he was not satisfied with the evidence on which the verdict was based, and apparently the controlling reason for denying the motion for a new trial was that there was sufficient evidence to sustain the verdict. In the certificate of probable cause certain language is used, which seems to imply that the trial judge believed that the conviction of the defendant was due, largely if not wholly, to the testimony of the witness Mrs. Manning. He was not justified in denying the motion for a new trial here merely because he was of the opinion that there was substantial evidence tending to support the verdict. If he was of the opinion that the proposed evidence was newly discovered, and could not with reasonable diligence have been discovered and produced by the defendant upon the trial of the action; and if he further was of the opinion that the newly discovered evidence probably would, and ought to, bring about a different result upon another trial—in other words, if the trial judge was of the belief that the new evidence was of such character that, considered in connection with the evidence adduced upon the trial, it would be likely to create

in the minds of reasonable men a reasonable doubt as to defendant's guilt—then he should have granted a new trial. Or to state the concrete proposition as it appears in this case, it is our opinion that if the trial court was of the belief that the defendant would not have been convicted except for the testimony given by Mrs. Manning, then he should have granted the motion for a new trial.

The language utilized by the trial judge in the record transmitted to us on this appeal is such that we have some difficulty in understanding exactly what conclusions he did reach so far as the facts are concerned. And it is his judgment, his conclusions as to what the facts are which in the first instance largely, if not wholly, determine whether a new trial should or should not be had. The discretionary power with which trial courts are vested in ruling on motions for a new trial on the ground of newly discovered evidence is primarily applicable to a determination of the facts. The facts being determined, the applicable legal principles readily determine whether a new trial should or should not be had.

In the circumstances it is our opinion that the order denying the motion for a new trial should be set aside, and the cause remanded with directions that the trial court hear such motion anew, and, by application of the principles enunciated in this opinion, determine whether a new trial should or should not be had.

It is so ordered.

BRONSON and BIRDZELL, JJ., concur.

GRACE, C. J. (concurring specially). It is my opinion that the judgment should be reversed and a new trial granted.

ROBINSON, J. (concurring in part). The complaint charges that on February 26, 1918, at Sarles, N. D., defendant committed rape on Florence Day. She was then a full-grown woman nearing sweet 16. He was a bald-headed man in the fifties. He was convicted, and the sentence was $2\frac{3}{4}$ years in the pen. The claim is that at midday he entered the Day kitchen, put his hand on her shoulders, laid her on the floor, and had with her a sexual mating. There is no claim of any fear, intimidation, or resistance.

Defendant moves for a new trial because of errors of law, surprise, and newly discovered evidence. In denying the motion the trial

court failed to consider the newly discovered evidence, a matter of the greatest importance. His memoranda opinion reads thus:

"While I am not satisfied with the evidence in this case, there is evidence which I believe is sufficient to sustain the verdict. As I understand it, the credit to be given a witness, the weight of evidence, is for the jury, and the court is not justified in setting aside a verdict simply because he could not have arrived at the same conclusion as did the jury." C. W. Buttz, Judge.

Now, though the trial judge failed to consider and discuss the newly discovered evidence, that is no good reason for remanding the case that he may reconsider the motion, as it might result in a third appeal to this court and in harassing the life out of defendant. The two appeals, with the lengthy transcripts, must have cost him over \$1,000. On the record the court should not hesitate to order a new trial. On appeal to this court the first conviction was set aside by reason of the misconduct and overzeal of private counsel who conducted the prosecution and swelled the record with matters prejudicial to defendant. On the second trial the same counsel was guilty of similar misconduct. Thus, when several witnesses were called and testified to the good character of the defendant for chastity, he asked each witness questions intimating, and virtually asserting, that defendant had been guilty of gross misconduct with this woman and that woman, thus presenting several issues and poisoning the minds of the jurors. Now, if the overzeal of private counsel did not cause the second conviction, it did cause the second appeal, because on the record it is so manifest that defendant did not have a fair trial, counsel should not have opposed the motion for a new trial. And without some showing of reasonable cause, it was not fair to embarrass the case with private counsel, even though appointed by the Governor and paid \$100 by the state. The prosecution has done defendant a grave wrong and imposed on him the burden of two expensive appeals. On each trial the testimony of the accusing witness was improbable and it was flatly contradicted by the defendant. It was word of one against the other. But on the second trial there was in store for defendant a grave surprise. Without any warning one Mrs. Manning, a person of questionable character for truth, whose name was not on the information, was called and testified that on the eventful day she went to the Day house, rapped three times at the front door, then went to the kitchen door, and to frighten

the children she pushed the door ajar and saw the show. Then she closed the door, went off, and never spoke of it to any one except her husband. Of course, her testimony fell as lightning from a clear sky. There was no means of refuting it, and it turned the scales against the defendant. But after the conviction the refutation became ample: Mrs. George Anderson met Mrs. Manning on the train and heard her story, and she asserted that "when she got to the kitchen door there was no one there, so she went to the dining room door, and there saw Stepp and Florence on the floor." Then, as she swears, this Mrs. Manning was living with her son on land rented from the Days. And that is of importance. It gives us the missing link and the motive. Thomas B. Wood, of Sarles, made affidavit that for 15 years he had known Mrs. Manning, and during that time she had changed her name several times; that her reputation for truth is bad; and that he would not believe her under oath.

Lizzie Lurton, of Sarles, made affidavit that for 15 years she had known Mrs. Manning; that her reputation was not good; and that she would not believe her under oath, and added: "I believe she would swear false for money."

A. L. Wheeler makes a similar affidavit.

William Winfield swears: "I have known Mrs. Manning 15 years, and I would not believe her under oath." Julia Welcome swears that in the summer of 1919 Mrs. Manning visited at her home in Sarles and said to her: "I don't believe Hiram Stepp is guilty, do you?" "The reputation of Mrs. Manning for truth and veracity is bad, and I would not believe her under oath."

Guy L. Welcome swears: "I reside at Sarles. I have known Mrs. Manning for 20 years"; that during the summer of 1919 she stayed at the home of himself and his wife, and she said: "I don't believe Hiram Stepp is guilty; do you?" The witness says:

"Mrs. Manning is a sister of my father, and that for two years her husband has been in Colorado, and she keeps company with other men; that her reputation for truth and veracity is bad, and I would not believe her under oath, and that she is a trouble maker and does not get along with her neighbors. And that she lives with her son, Henry Aldrich, who rents land owned by Mr. Day, the father of Florence."

With such testimony given on a third trial, the chances are that a

jury would not give much credit to the very improbable testimony of Mrs. Manning.

As I wrote on the first appeal:

"The first trial was in June, 1919. The transcript covers 274 pages, and a large part of it consists of irrelevant and prejudicial matter. The prosecution was represented by Mr. Grimson, state's attorney, Mr. Nichols, Assistant Attorney General, and Mr. Fred Traynor, special counsel retained by the father.

"Florence Day was between 15 and 16 years. She is the eldest of six children. From the age of 7 she had gone to the village school at Sarles, yet, according to her story, she had not heard how children come into the world, and believed her good mother, who said the doctor brought them. Yet she is no simpleton. She was entirely competent to go into her father's field and to take charge of the plow and binder. Florence, as the special counsel familiarly calls her on most every page of the long transcript, was far from being malicious or a bad girl. She never told on her several lovers, never thought of blackmailing them; but, according to her own testimony, she was of rather easy virtue and entirely too familiar with her father's help and one or two young rascals. The result was she had a child and learned how children came into the world. Then, for the first time, she told Mama that defendant was the father. He was a married man of 53 years and had some property. The young rascals had nothing, and so a special counsel was employed to aid in giving defendant a special prosecution.

"There is no claim that by any word or act Miss Florence ever made the least resistance to any of her lovers. The testimony is in some respects self-impeaching. Defendant swears positively that all she says of him is wholly untrue, and that he never took any liberties with her. Thus there is a direct conflict of testimony and there is no corroboration on one side or the other. Hence, to turn the scales the special counsel must have thought it necessary to drag in a lot of prejudicial matter."

As it was on the first trial, so it was on the second, and for those reasons the judgment should be reversed and a new trial granted.

BEN HANSON, Respondent, v. CHAS. H. HOUSKA and A. L. MARTIN, Appellants.

(186 N. W. 256)

Followed case. See *Nasset v. Houska, et al.* post, 186 N. W. 255.

GRACE, C. J. The questions presented on appeal in this case are similar to those presented in the case of Karoline Nasset, Plaintiff and Respondent, v. Chas. H. Houska and A. L. Martin, Defendants and Appellants, recently decided by this court, post, 668, 186 N. W. 255 and is ruled by the decision in that case.

Opinion filed Dec. 12, 1921.

The judgment appealed from is affirmed. The respondent is entitled to his costs and disbursements on appeal.

Kehoe & Moseley, for appellants.

Sinness & Duffy, for respondent.

GRACE, C. J. and CHRISTIANSON, BIRDZELL, ROBINSON, BRONSON, JJ., concur.

THE JOHNSON CONSTRUCTION COMPANY, a corporation, Respondent, v. MELVIN A. HILDRETH, Appellant.

(185 N. W. 811.)

Contracts — verdict for compensation for construction of cement basement wall sustained.

For the construction of a cement basement wall under the house of defendant on Eighth Street, in the City of Fargo, the jury found a verdict

against him for \$243.44 and interest. Held, that the verdict is clearly right and the judgment is affirmed.

Opinion filed Nov. 18, 1921. Rehearing denied Dec. 10, 1921.

Appeal from the District Court of Cass County; *Cole, J.*
Affirmed.

Melvin A. Hildreth, Defendant and Attorney in pro. per., and *S. L. Nuchols*, for appellant.

"Testimony collateral to the issues which would merely tend to prejudice the jury should be rejected." Jones Commentaries on Evidence, Vol. 1, citing more than a hundred cases.

It must be first shown that there was substantial similarity of conditions, citing the following authorities. *Metropolitan W. S. R. R. Co. v. Dickinson*, 47 N. E. 706; *Ramsey v. Rushville & M. Gravel Road Co.* 81 Ind. 394; *Louisville Water Co. v. Weis*, (Ky.) 76 S. W. 356; *Hughes v. General Electric L. & P. Co.* (Ky.) 54 S. W. 723; 25 Am. St. Rep. 782; 57 Am. St. Rep. 810; 21 Am. St. Rep. 262; 110 Mass. 134; 50 S. W. 84; *Western Ins. Co. v. Tobin*, 32 Ohio, St. 77; *Barrett v. Hammond*, 87 Wis. 654; 58 N. W. 1053.

In *Louisville Water Co. v. Weis*, 76 S. W. 356 it was held: "That evidence to show that other cellars were flooded by a leaking meter was properly excluded."

In *Clark v. Water Power Co.*, 52 Me. 75 it was held: "In an action for diverting a stream, injuries to another mill-owner were rejected on the facts, because "There were no elements of comparison offered which could afford any safe or reliable data for the judgment of a jury. Wigmore on Evidence, Vol. 1, p. 526 to 540.

In *Sugar C. C. M. Co. v. Peterson*, 177 Ill. 324, it was held: That evidence should be rejected of the felling of mine-roof in another place. Such evidence being collateral.

In the case of *Fitzsimons & Connell Co. v. Braun*, 65 N. E. 249, it was held, in a suit to recover damages for an injury to a building by dynamite blasts near by; the fact that adjacent buildings were or were not injured by the same blasting, was excluded, as not within the issue.

Taylor Crum, for respondent.

ROBINSON J. The complaint avers that in November, 1914, in the city of Fargo, the plaintiff performed services for the defendant, at his

request, in rebuilding a basement wall and furnishing materials; that the same was reasonably worth \$343.44; that no payment has been made except \$100 on December 4, 1914. The answer is that the work was done under a written contract whereby the plaintiff agreed to do the same for \$250 and 10 per cent.; that plaintiff did the work so unskillfully that the basement wall cracked and broke and was of no value, to the damage of defendant \$1,000. The verdict is for the plaintiff, \$243.44, with interest from December 1, 1914, at 6 per cent. The written contract mentioned in the answer consists of two letters. Mr. Hildreth wrote the plaintiff on October 3, 1914: "I would like to have you look at the crack in my basement wall and give me an idea of the expense of rebuilding it." The answer was this:

"October 10, 1914.

"Mr. Hildreth: In compliance with your request we have made an examination of the basement walls of your house on Eighth Street South, and in our judgment it will cost you about \$250 to do the necessary repairs. We will gladly do it on a ten per cent. basis."

Clearly that was not a contract to do the work and furnish the materials for a definite sum. It was an offer to do it for what it was reasonably worth, or for the cost of labor and material with ten per cent. profit. When the work was done an account was rendered showing the cost of the labor and of the materials.

The amount was	\$312.22
The 10 per cent. was	31.22

The total amount was\$343.44

As the evidence clearly shows, the charges were correct and the work was well done and the basement wall put down to the level directed by Mr. Hildreth. But the wall did crack by reason of the fact that the house was built on the brow of the hill adjacent to a big slough, and the earth under the wall gradually sagged and settled down, and for the same reason there occurred a similar crack in the cement basement walls of all houses on the brow of that sagging hill. But that was not the fault of the contractors. The crack might possibly have been prevented by reinforcing the basement wall with numerous iron rods or by putting the wall to a much greater depth, but that would have greatly increased the expense, and it was not within the contemplation or thought of either party. The sinking of the earth under the wall is a misfortune for which

no party is in any way responsible. As the verdict is clearly right, there is no occasion for a discussion of the testimony or the assignment of errors.

Judgment affirmed.

GRACE, C. J. and CHRISTIANSON and BIRDZELL, JJ., concur.

BRONSON, J., concurs in result.

F. H. MULLVAIN, Respondent, v. CHARLES HIDDEN, Appellant.

(185 N. W. 1010.)

Joint adventures — evidence held to support judgment for plaintiff in action for accounting.

In an action for an accounting, the evidence is examined and it is *held* that the judgment appealed from is properly supported.

Opinion filed Dec. 14, 1921.

Appeal from the district court of Stutsman County, *Nuessle*, J.
Affirmed.

John W. Carr, for appellant.

C. S. Buck, for respondent.

BIRDZELL, J. This is an action for an accounting. From a judgment in favor of the plaintiff for \$302.24, and interest and costs, the defendant has appealed. The case is here for a trial de novo. The case arises upon the following facts:

The defendant, a bachelor, was the owner of a farm, consisting of 480 acres of land near Eldridge in Stutsman county. In 1916 he hired the plaintiff and his wife to work for him at an agreed compensation per year. In 1917, the plaintiff and defendant purchased jointly, on contract, an adjoining quarter section of land under an arrangement whereby they would farm it together and make the deferred payments out of the crops raised. The purchase price was \$35 per acre, and the initial payment, \$1,000. The defendant made the first payment and took the plaintiff's note for \$500, representing one-half of it. This quarter section of land was farmed by them in 1917 and enough realized

to pay interest and expenses. The following year, a good crop was raised and a substantial amount was applied on the principal. The amount so applied on behalf of the plaintiff was at least \$550. The plaintiff continued to work for the defendant by the year during 1917 and 1918; but in 1919 an arrangement was made between them whereby they would farm the defendant's three quarter sections in equal partnership. To equalize the ownership of the live stock the plaintiff purchased of the defendant an interest in the defendant's stock for \$500, giving his note for that amount. The farm was operated by the partnership during that season, but in October the parties agreed to dissolve. At that time the crops had not all been sold and the expenses not all adjusted. They could not readily dispose of the land which they had jointly purchased, and it was not anticipated that the plaintiff could readily dispose of some items of personal property that he owned individually. So an arrangement was made, whereby the plaintiff would assign to the defendant his interest in the land contract and the defendant surrender the note representing the plaintiff's share of the initial payment; that the plaintiff would give to the defendant a bill of sale for the personal property which the defendant had transferred to him to equalize their interest in the live stock, the defendant returning the plaintiff's note for the purchase price; that the plaintiff would leave his personal property on the place for the defendant to sell and credit the amount to be received to the plaintiff. The defendant kept all of the accounts that were kept. He did not sell the personal property promptly. The following spring, when the plaintiff requested a settlement, the defendant maintained that the plaintiff was indebted to him, whereupon this action was brought.

Upon this appeal both parties contend that the judgment is wrong. The principal objections of the defendant and appellant are:

(1) He contends it was agreed that the interest on his investment in the three quarter sections of land at \$35 per acre and the taxes on this land were to be considered as expenses. The plaintiff contends that there was no such agreement. The trial court found with the defendant upon this feature of the contract and allowed three-fourths of the amount claimed, because the partnership continued for only three-fourths of the year. The appellant contends that a full year's interest and taxes should have been allowed.

(2) The appellant claims that the trial court allowed the plaintiff

an excessive amount for the personal property which was left with the defendant for sale. This item was allowed by the trial court at \$363. It is claimed that it should have been allowed at \$227, the amount that was actually realized when the property was sold. The added amount was allowed by the trial court as the reasonable value at the time when the defendant should have returned the property or credited the plaintiff with its value. He found that the sale was not made within a reasonable time and in the best market.

(3) It is contended that the trial court should have allowed the defendant to recover interest on the \$500 personal property note that was returned to the plaintiff.

(4) That the court erred in fixing plaintiff's interest in the land at the amount paid on the land by the plaintiff together with his portion of the interest and taxes while the land was jointly owned.

The respondent contends:

(1) That the court erred in allowing the defendant to charge interest and taxes as expenses of the farming operations on the three quarter sections in 1919.

(2) That the plaintiff should have a credit for a quantity of hay put up in 1919, for which no credit was allowed.

We have stated only the principal contentions. There are other minor matters of difference between the parties. A careful review of the record leaves us with the impression that any alterations we might make in the judgment would not be likely to effect a better adjustment of the accounts than that represented by the judgment of the trial court. The evidence is conflicting as to the agreement to consider interest and taxes on the defendant's land as expenses to be allowed, but we are not disposed to disturb the finding of the trial court. The record, as a whole, is quite inconclusive for the reason, principally, that the defendant kept the books and his testimony, on a number of subjects, is most confusing. Apparently this is not due to any attempt to take advantage, as the trial court remarked in the memorandum opinion that both parties had evidenced a desire to be fair and reasonable.

The judgment is affirmed.

GRACE, C. J., and BRONSON, ROBINSON, and CHRISTIANSON, JJ., concur.

MERCHANTS' STATE BANK OF VELVA, NORTH DAKOTA, a corporation, Respondent, v. S. S. STREEPER, Appellant.

(186 N. W. 98.)

Bills and notes — judgment — verdict for defendant held not supported by evidence; judgment notwithstanding verdict held proper, although no motion for directed verdict previously made.

This is an action on a promissory note. The defense was want of consideration. The case was tried to a jury. No motion for a directed verdict was made by either party. The jury returned a verdict in favor of the defendant. Thereafter the plaintiff moved in the alternative for judgment notwithstanding the verdict or for a new trial. The trial court ordered judgment notwithstanding the verdict in plaintiff's favor. The evidence is examined and it is *held* that the verdict in favor of the defendant was not supported by the evidence and that the trial court was correct in setting the verdict aside and in ordering judgment notwithstanding the verdict.

Opinion filed Dec. 15, 1921.

From a judgment of the district court of Ward County entered pursuant to an order for judgment notwithstanding the verdict, defendant appeals.

Affirmed.

Nestos & Herrigstad, for appellant.

The court erred in ordering that judgment in favor of the defendant be vacated and set aside and that the plaintiff have judgment notwithstanding the verdict since no motion for a directed verdict was made at any time during the trial of the action. 12 N. D. 74; 17 N. D. 310.

The court also erred in holding, as the court must have done, that there was not sufficient evidence to sustain the verdict rendered by the jury. *Marquardt v. Huebner*, 80 N. W. 616; *Bragg v. Railway Co.* 83 N. W. 511; *Merritt v. Railway Co.* 84 N. W. 321; 11 N. D. 456; *Nelson v. Grundahl* 12 N. D. 130; *Richmore v. Andrews & Gage Elev. Co.* 11 N. D. 453.

The court erred in failing to deny plaintiff's motion for a new trial and for judgment notwithstanding the verdict. *Jones v. Ruff*, 12 N. D.

74; Landis Mach. Co. (a corp.) v. Konantz Saddlery Co. 17 N. D. 310; Fiurt v. Ford, 41 L. R. A. 823.

"A motion for judgment notwithstanding the verdict must be made before judgment for the other party, and the granting of such motion is without right and will leave the first judgment unimpaired even though it is coupled with a motion to vacate the first judgment. *Ex Parte Dean Jones*, 154 Ala. 265; 45 So. 152; (See 4 L. R. A. N. S., 348).

Fisk, Murphy & Nash, for respondent.

CHRISTIANSON, J. This is an action on a promissory note in the sum of \$500, dated October 25, 1916, payable January 1, 1918. The defense is that there was no consideration for the note. There was no motion for a directed verdict. The jury returned a verdict in favor of the defendant. Plaintiff thereafter moved in the alternative for a judgment notwithstanding the verdict or for a new trial. The trial court gave judgment notwithstanding the verdict. Judgment was entered accordingly, and the defendant has appealed from such judgment.

It appears from the evidence that the defendant was instrumental in procuring a purchaser for a tract of land belonging to the plaintiff bank. During the negotiations another tract was substituted, and it was definitely agreed that the commission to be paid to the defendant for obtaining such purchaser should be \$500 and no more. In evidence of such agreement the bank executed and delivered to the defendant the following written instrument:

Velva, North Dakota, October 25, 1916.

"This certifies that Mr. S. S. Streeper of Sawyer, North Dakota, holds an equity in that certain contract for a deed between the Merchants' State Bank of Velva, North Dakota, and Mr. Frank S. Dom and his wife covering the west half (W. $\frac{1}{2}$) of section eight (8) township one hundred fifty-two (152) range eighty (80), said equity being in the sum of five hundred (\$500.00) dollars to be paid out of the crops to be raised the fall of 1917 on said land, providing said crops are sufficient, above interest due on the contract and taxes. If such crops are not sufficient then this equity shall be paid out of subsequent crops.

"And the Merchants' State Bank is this day accepting a note from

Mr. S. S. Streeper in the sum of five hundred (\$500.00) dollars to be secured by his equity in the above-mentioned contract for a deed, to be paid when this equity in the contract is paid."

"Merchants' State Bank,

"By A. E. Sevaried, Cashier."

At the same time this instrument was delivered the defendant executed and delivered to the plaintiff the note in suit; and the cashier of the plaintiff bank delivered to the defendant a note, which he owed to the bank, in the sum of \$100, and a cashier's check for \$400, which the defendant subsequently cashed. So far as there is any dispute as to the facts, it relates to what was said and done at the time these instruments were executed and delivered. With respect to this, Mr. Sevaried, the cashier of the defendant bank, testified:

"After we had made up this contract Mr. Dom made a settlement, as I remember it. It was getting toward evening. One of them suggested they better go, because it was getting late. They were going out to some supper that evening. They went out of the bank, and Mr. Streeper made some pretense to Mr. Dom that he had to see me about something else, and he came in and said, 'How are going to fix up for my commission?' I said, 'Mr. Streeper, of course, you realize all the time that your proposition was this amount to be \$500 to pay on the contract,' and that was considered a small amount on a contract of \$12,000, and I said, 'You realize further that I can't pay you in cash on your proposition, because it is only \$500 that is paid in.' 'Well,' he says, 'I am badly in need of money, and I ought to have this money to use,' and I thought around awhile. I have always had very agreeable terms with Mr. Streeper before in our business transactions, and I said to Mr. Streeper: 'Well, we can fix it this way: I will let you have this money, and you give me your note, and this contract will stand as security to your note, and I will furthermore make that note draw the same rate of interest as your contract is drawing, so that you will be out nothing, not even the interest, when Mr. Dom pays on the contract.'

"Q. In other words, you loaned him the \$500? A. Yes, sir.

"Q. And at that time he gave you the note Exhibit 1? A. Yes, sir.

"* * * A. Yes, sir.

"Q. I will show you Exhibit A, and ask you if you drew that

agreement and turned it over to Mr. Streeper? A. Yes, sir; I did.

"Q. How did you come to do that? A. It came about this way: When I said to him, 'I will loan you \$500, and you give me your note,' I said, 'I will give you a specific receipt that will show that you have an equity in this contract so that when Mr. Dom pays \$500 on his contract, we will not retain the \$500.'

"Q. That is the way you would protect Mr. Streeper? A. Yes, sir."

The defendant on his direct examination testified as follows:

"Q. Now, isn't it a fact that you and Mr. Sevaried had that express understanding that he was selling that land with only \$500 paid down? He told you expressly that in view of the fact that there was only \$500 paid, that you would have to take your commission out of the contract as it was paid in money; didn't he tell you that in substance, and didn't you agree to it in substance? A. I signed that article.

"Q. You signed that order? A. What order?

"Q. Signed this note. A. What note?

"Q. I asked you this, is it not a fact that Mr. Sevaried said to you in substance this, that, 'Your man will only pay a small amount in cash; a great bulk of the price has got to be taken out in crop contract, and you must take your chance on commission, the same as we are taking chances on the land; didn't he tell you that? A. He told me that, yes, sir.

"Q. And you agreed to it? A. Not in that way.

"Q. Did you or did you not agree to it? Didn't you agree to accept that commission in that way? A. With the understanding it should be paid out of that crop.

"Q. Yes. A. Certainly it should be paid out of the crop.

"Q. Yes; your \$500 was to be paid out of the crop to you. A. To him.

"Q. Through him, but you were to get the \$500 out of the crop. A. He advanced me \$500 on that note."

The undisputed evidence shows that the purchaser, Dom, abandoned the contract shortly after making it, and never produced a crop on the land at all. It is true the evidence shows that there never was a formal cancellation by service of a notice as provided by statute for the cancellation of such contracts. But the undisputed evidence also shows that Dom notified the bank of his intention to abandon the contract.

"Of course, the fact that the contract has not been canceled does not adversely affect the defendant in this case. He still has a \$500 equity

in the contract. This equity is held by the plaintiff bank as security for the note in suit; and, when the note is paid, of course the defendant becomes fully reinvested with all rights in and to said equity free and clear of all claims on the bank. The note in suit by its terms became payable at a specified date. If the purchaser of the land had gone ahead with the contract, put in the crop, and been successful in raising it, there might have been sufficient moneys realized therefrom so that the share coming to the defendant for his commission would have been fully paid, and thereby in turn the note in suit been discharged. That was doubtless what was anticipated by the defendant and the cashier of the bank. It will be noted, however, that the defendant expressly admits in his testimony that he agreed to take chances on his commission the same as the bank took on the purchase price stipulated to be paid by the purchaser for the land.

The note in suit was made payable at a time which would make it possible to utilize any moneys paid by the purchaser (Dom) upon the land contract, and in turn payable to the defendant as commission for obtaining such purchaser, to pay off the note in suit. This, however, did not affect the note. As we construe the evidence, it establishes, without any actual conflict therein, that the note in suit was given for a sum of money loaned by the bank to the defendant. The note was made payable at a definite time. It has not been paid according to its terms, or at all. In our opinion there was in this case no room for different conclusions as to the material facts. And there was, we think, no basis in the evidence for the verdict absolving the defendant from liability upon the note. We are therefore agreed that the trial court was entirely correct in ordering the verdict to be set aside; and inasmuch as the evidence affirmatively discloses that the defendant has no defense to plaintiff's cause of action, it would be an idle ceremony to remand the cause for a new trial, and it is therefore ordered that the order and judgment appealed from be, and the same hereby are, affirmed.

BRONSON, BIRDZELL, and ROBINSON, JJ., concur.

ROBINSON, J. (concurring). This case merits little consideration or discussion. The facts are not in dispute. The defense is clearly false and grossly unconscionable. On a worthless and abandoned con-

tract for the sale of a half section of land in township 152 of range 80—a contract on which the plaintiff never received and never will receive one dollar—defendant claims a commission of \$1,000. He received the total cash payment of \$500 with a written interest in the land contract for \$500. Then he borrowed from the bank \$500, and gave his note for the same, trusting that it might be paid from money received on the land contract. Now he claims that the money loaned to him was in reality a payment of commission on the worthless deal, and that there was no consideration for the note. That is in effect his answer. Yet the defendant himself testified it was agreed between him and the bank that he should take his chance of getting the second \$500 commission from the land contract, inasmuch as the bank had received nothing and took the chance of receiving anything on the contract. His own testimony clearly shows that the bank is entitled to recover on the note \$500 and interest. The jury found a verdict in favor of the defendant; the court very properly gave judgment against him for the amount of the note and interest.

Now the point is made that, according to some old decisions by this court, that judgment notwithstanding the verdict was irregular, because the plaintiff did not move for judgment at the close of the testimony. That is a tweedledum and tweedledee objection. It is high time for this court to disregard errors so technical and arbitrary. The case presents only one single question: Is the judgment right; is it just; on the facts conceded and established beyond a peradventure is the plaintiff entitled to recover on the note \$500 and interest?

Judgment affirmed.

GRACE, C. J. (dissenting). This action was brought to recover on a promissory note in the sum of \$500. The defense is that there was no consideration for the note. The action was tried to a jury, and a verdict returned in favor of the defendant. Subsequently to the entry of judgment by defendant in his favor plaintiff made a motion for judgment non obstante or for a new trial, and this without any motion for a directed verdict having been made at any time before the close of the entire case. The motion was granted, the judgment in favor of defendant vacated and set aside, and judgment entered in favor of plaintiff, from which and the order granting judgment non obstante this appeal is taken.

The material facts are substantially as follows: The defendant produced a prospective purchaser of land to respondent's cashier. Defendant was to have as his commission in case of sale, \$1 per acre and all received above \$35 per acre. The purchaser was willing to pay \$37.50 per acre. Therefore the commission on the sale was \$3.50 per acre. On October 18, 1916, the plaintiff sold to one Frank S. Dom, the proposed purchaser, the west half of section 8, township 152, range 80, and drew what may be termed a preliminary unilateral contract, signed by the bank only, in which were stated the terms of sale. It seems the bank did not own the southwest quarter of section 8, and in this contract stated as follows:

"It is further stipulated that if the said Merchants' State Bank does not secure the consent to this agreement by the owner of the southwest quarter (SW $\frac{1}{4}$) section eight (8), township one hundred fifty-two (152), range eighty (80), and no contract is executed, the sum of one hundred (\$100.00) dollars received for this receipt shall be returned to the said Frank S. Dom, and in that event only shall it be returned."

On the 24th day of October the bank entered into a formal crop contract for the sale of the land with Dom. The consideration was \$12,000, to be paid by the purchaser by his assuming two mortgages against the land due January 1, 1925, aggregating \$6,000, and drawing 7 per cent. interest per annum, and by further paying the sum of \$500 on the date of the contract; \$500 on the 1st day of January, 1918; \$1,000 on the 1st day of January, 1919, and \$1,000 on the 1st day of January each year thereafter until balance aside from the mortgages assumed was paid. The first \$500 payment was made. The defendant, however, had agreed to accept \$500 in full for his commission, for the reason that the bank, not owning the southwest quarter, and not being able to purchase it at a price as cheap as it expected, it was agreed that defendant's commission should be only \$500. Defendant received the \$500 due him as commission by receiving credit for a \$100 note held by the bank against him, and by receiving a cashier's check for \$400. Prior to the time that this adjustment for the commission was made an arrangement was made between defendant and plaintiff whereby the former gave his note for \$500 to the bank. The defendant claims he gave the note to the bank to make the transaction appear regular in the bank's business. The plaintiff denies this, and claims it was a loan of that amount. It would seem the plaintiff did not desire to turn over

all the cash received on the transaction to pay defendant's commission. Defendant claims there was never to be any liability on his part for having signed the note. In connection with the giving of the note the bank gave to the defendant the following writing, which was duly signed by its cashier:

"Merchants' State Bank, Velva, North Dakota.

"Exhibit A—L. M. D.

October 25, 1916.

"This certifies that Mr. S. S. Streeper, of Sawyer, North Dakota, holds an equity in that certain contract for a deed between the Merchants' State Bank of Velva, North Dakota, and Mr. Frank S. Dom and his wife covering the west half (W. $\frac{1}{2}$) of section eight (8), township one hundred fifty-two (152), range eighty (80), said equity being in the sum of five hundred (\$500.00) dollars, to be paid out of the crops to be raised the fall of 1917 on said land, providing said crops are sufficient, above interest due on the contract and taxes. If such crops are not sufficient then this equity shall be paid out of subsequent crops.

"And the Merchants' State Bank is this day accepting a note from Mr. S. S. Streeper in the sum of five hundred (\$500.00) dollars to be secured by his equity in the above-mentioned contract for a deed, to be paid when this equity in the contract is paid.

"Merchants' State Bank,

"By A. E. Sevaried, Cashier."

Aside from the mortgages assumed at the time the contract was made, plaintiff took a promissory note from the purchaser for the remainder of the respective payments. The purchaser never made any further payment on the contract, and never farmed the land, except during 1917, and the crops that year were lost by hail. The bank still holds his note, and has never legally canceled the contract.

There would seem to be no doubt that the defendant had earned his commission, for the plaintiff entered into a valid contract for the sale of the land with the defendant's prospective purchaser, and that such contract had ever since remained in full force and effect so far as this record shows. The purchaser took possession of the land, and

had executed his notes for the balance of the purchase price after assuming the mortgages as above stated. There seems to be no real controversy in this case relative to the commission. It seems to be conceded that it was earned.

The first serious question is whether defendant incurred personal liability by signing and delivering to plaintiff the \$500 note. In view of the terms of the agreement with reference thereto given him by the bank, we are of the opinion he was not personally liable, and this by reason of the provision in the agreement to the effect that the note was "to be paid when this equity in the contract is paid." It would seem to follow that if his equity in the contract was never paid, he would never be under any liability to pay the note. Dom has never made any further payments on the contract than those above mentioned, and the evidence fairly shows that he has abandoned it. In these conditions we are of the opinion there was no liability on the note.

The second serious question here presented is: Did the court err in granting plaintiff's motion for judgment non obstante where there was no motion for a directed verdict at the close of the testimony? It has been in substance held by this court that a motion for judgment non obstante is not proper, where no motion for a directed verdict was made at the close of the testimony or at the close of the testimony of either party as the case may be. *Johns v. Ruff*, 12 N. D. 74, 95 N. W. 440; *Landis Co. v. Konantz Co.*, 17 N. D. 310, 116 N. W. 333.

We think there was sufficient evidence to sustain the verdict, and that the court erred in granting plaintiff's motion for judgment non obstante. We think it unnecessary to discuss plaintiff's point that the appeal from the order was too late. The judgment appealed from should be reversed, and the case remanded, and the trial court directed to reinstate the judgment in favor of plaintiff.

HAMMID HASSEN, Respondent, v. SIDE SALEM, SOLOMON HODGE, et al., Appellants.

(185 N. W. 969.)

Mortgages — plaintiff held to have equitable interest, and to be entitled to conveyance from vendor and from payment of amount due.

1. In an action to determine adverse claims and to recover the value of the use and occupation of certain premises wherein the plaintiff claims that he had an equitable interest in, and was entitled to conveyance of, the premises in suit by the defendant Hodge, by virtue of a certain arrangement and contract; that he has paid the full amount due the defendant, and has for some time been entitled to a conveyance of the premises, it is *held*:

That the plaintiff has an equitable interest in the premises and is entitled to conveyance by the defendant Hodge upon the payment of the amount due Hodge.

Mortgages — finding that purchaser had made full payment held contrary to evidence.

2. That findings of the trial court to the effect that the plaintiff has paid Hodge the full amount due him and that no further sum is due to Hodge are not supported by, but are contrary to the weight of, the evidence.

Appeal and error — case held subject to remanding for determination of amount due defendant from plaintiff.

3. For reasons stated in the opinion the case is remanded for a determination of the amount due to the defendant, Hodge, from the plaintiff.

Opinion filed Dec. 1st, 1921. Rehearing denied Dec. 16, 1921.

From a judgment of the district Court of Mountrail County, *Leighton*, J., defendant, Solomon Hodge, appeals.
Remanded for retrial.

F. F. Wyckoff and *F. W. Medberry*, for appellants.

"The general rule is that the certificate of acknowledgement will be held as valid against the unsupported evidence of the person certified to have executed it." *McCardia v. Billings*, 10 N. D. 379; *Patnode v. Deschenes*, 15 N. D. 100; Citing 1 Cyc. 623; 2 *Jones on Conveyancing*, § 1196; *McCardia v. Billings*, supra; *Young v. Engdahl*, 18 N. D. 166, at p. 175.

Even though the testimony of the grantor is slightly corroborated it

is usually held insufficient to overcome the certificate. *N. W. Loan & Panking Co. v. Johnson* (S. D.) 79 N. W. 840.

John J. Coyle and *T. M. Koegan*, for respondent.

"The grantor in a deed, absolute on its face, but delivered with the oral understanding that it was to be held as security for a debt, has no title or interest to convey which will give his subsequent grantee any standing as against a purchaser from the grantee under the former deed without notice of the oral defeasance." *Grigsby v. Verch*, 34 S. D. 39; *Mintz v. Soule*, Mich. L. R. A. 1916B, 397 and annotations.

"At common law, in the absence of statute, any permanent improvement placed upon the land of another, by one having no interest or title therein, without the owner's consent, prima facie becomes a part of the realty and belongs to the owner." See 22 Cyc. p. 7, and cases cited under note 9.

"As a general rule, if the occupant has notice or knowledge of an adverse title or claim in another he is not a possessor in good faith and cannot recover compensation for improvements made thereafter, although he in good faith believes his own title to be the better in point of law." See 22 Cyc. p. 18 and cases cited under note 85; *Wood v. Conrad*, (S. D.) 50 N. W. 95; *West v. Middlesex Bk. Co.* (S. D.) 146 N. W. 598; See *McKenzie v. Gussner*, 22 N. D. 445.

CHRISTIANSON, J. Plaintiff brought this action to determine adverse claims to 160 acres of land situated in Mountrail county, in this state, and to recover from the defendants the value of the use and occupation of said premises during the years 1914, 1915, 1916, 1917, 1918, and 1919. Plaintiff acquired title to said tract of land under the laws of the United States of America relating to homesteads. Patent therefor was issued to the plaintiff by the United States government on May 23, 1906. Subsequently the plaintiff gave several mortgages on the land. One of the mortgages was foreclosed, and certificate of sale issued to the Citizens' State Bank of Stanley on July 8, 1911. Prior thereto, namely, on February 15, 1910, the plaintiff had conveyed the premises to the Citizens' State Bank of Stanley by warranty deed. On July 8, 1912, the last day provided for making redemption, the Citizens' State Bank of Stanley made redemption from the foreclosure by serving and filing the required notice, and making payment of the required amount, and the sheriff of

Mountrail county executed and delivered to said bank a certificate of redemption in due form. Later, and apparently under some arrangement with the plaintiff, one A. J. Ghusm, took over the interest of the Citizens' State Bank of Stanley in said premises; and on July 10, 1912, said bank executed and delivered to said Ghusm a warranty deed for said premises, which deed recites that it is given for the sole purpose of reconveying the land therein described as per a certain agreement made between Hammid Hassen and said Citizens' State Bank of Stanley at the time deed was given to the said bank by said Hassen.

Later the plaintiff had certain difficulty or misunderstanding with Ghusm—i. e., Ghusm refused to give him a contract for deed. Thereupon, in the fall of 1912, the plaintiff went down to Ft. Ransom, in Ransom county, in this state, where the defendant Solomon Hodge was located, and solicited said Hodge to take over the interest of Ghusm in the land. The defendant Hodge informed the plaintiff that he would come to Stanley later in the fall to visit a sister, and while there would look into the proposition. In December, 1912, the defendant Hodge came to Stanley and, on December 27, 1912, he paid Ghusm the amount of money Ghusm had put into the deal, and Ghusm executed and delivered a warranty deed to Hodge. Later, Hodge paid off a first mortgage, making a total amount of \$2,300 invested by Hodge in the premises at that time. One of the few undisputed facts in the record is that Hodge actually did pay out \$2,300 in cash at or about the time he received the deed from Ghusm. Another undisputed fact is that since that time the defendant Hodge has paid all the taxes assessed against the premises. There is, however, a square conflict in the testimony as to the arrangement made between the plaintiff and the defendant Hodge at the time Hodge received the deed from Ghusm. The plaintiff claims that Hodge at that time gave him a contract for a deed, whereby Hodge agreed to convey the premises to the plaintiff, upon the payment of \$2,300 and interest. Hodge on the other hand claims that he did not want to go into the deal unless the plaintiff got his (plaintiff's) brother-in-law, one Abdel Hadey, to join the plaintiff in the agreement to purchase the premises from Hodge. Hodge gives this version of the conversation then had:

"I say, 'How long you been living here?' He say, 'About 12 years.' I say, 'How much you broke on that land?' 'About 12 acres.' I say, 'If you been on that land 12 years and only break 12 acres, how you going to

expect pay me that \$2,300?' 'Well,' he says, 'I have brother-in-law here, Hadey.' 'Well,' I say, 'You better go and talk to your brother-in-law.' He went out and talked to his brother-in-law, and soon then make a bargain with his brother-in-law, and I know his brother-in-law is a man you can depend on, and I make a contract and give each one-half interest and take the land from Ghusm."

The defendant Hodge claims that thereupon, on December 27, 1912, pursuant to the arrangement then made, contracts were executed whereby he (Hodge) agreed to convey respectively to the plaintiff and to Hadey an undivided one-half interest in and to said premises on payment by each of them of the sum of \$1,150 (\$2,300 in all) on or before January 1, 1918, with interest at 8 per cent. per annum. And upon the trial of the action Hodge produced contracts properly acknowledged before a notary public, evidencing the arrangement testified to by him. The plaintiff, however, claims that he never signed the contracts, and that his signature thereto (written in Assyrian) is a forgery.

The plaintiff also testified that in the fall of 1914 the defendant Hodge approached him and suggested that the land ought to be put under cultivation in order to enable the plaintiff to realize some profit therefrom, so that he might be able to pay him (Hodge) what he had coming; that the defendant Hodge proposed that he (Hodge) would advance the necessary money to pay for removing stone, breaking the land, and seeding it to flax; that Hodge would pay all expenses incidental to such cropping, and that the crop should be utilized first in paying the expenses thus incurred, and that the balance, if any, should be applied upon the indebtedness due to the defendant Hodge. The plaintiff further testified that on or about the time this arrangement was made the defendant, Hodge, forcibly took away from him the contract for a deed which he gave to him in December, 1912; and that hence plaintiff could not produce this contract upon the trial. The defendant Hodge, on the other hand, testified that prior to 1915 both the plaintiff and Hadey surrendered their contracts, and in effect stated to him that they had no desire or intention to carry out the provisions thereof or make payment thereunder, and that thereafter he, supposing that he was the owner of the premises, proceeded to put the land under cultivation and did put in and raise a crop thereon in 1915, and has rented it during subsequent years.

There is no dispute but that the defendant Hodge cropped the land

in 1915; he caused some 100 acres to be broken and put into flax; he paid for digging and removing the stone from the premises, for the breaking thereof, for the seed utilized, and in general paid all expenses incidental to putting the land under cultivation, putting in, caring for, harvesting, and threshing the crop. There was also some ground which had been cultivated in prior years (the testimony is in conflict as to the exact amount of such ground) which was put into oats. The evidence shows that the 1915 crop was not threshed in the fall of 1915, but that it lay out on the ground during the winter, and was threshed in the spring of 1916.

It is the contention of the plaintiff that a sufficient crop was produced in the year 1915 so that the proceeds thereof, in addition to paying all expenses advanced in preparing the land for crop, putting in, harvesting, and threshing the crop were sufficient to pay all of the \$2,300 advanced by the defendant Hodge in 1912, together with interest on such sum and all taxes subsequently paid on the premises. The trial court made findings in favor of the plaintiff, finding, among other things, that the original arrangement was as testified to by the plaintiff, and that the contracts produced by the defendant Hodge upon the trial had never been executed by the plaintiff, and that his purported signatures thereto were forged. The trial court further found that the defendant Hodge forcibly took the contract for a deed away from the plaintiff; also that the agreement with respect to breaking and cropping the premises was made as testified to by the plaintiff. The trial court further found:

"That said (1915) crop of grains consisted of 1890 bushels of flax, of the value of \$2.07 per bushel, and 600 bushels of oats of the value of 50c per bushel, making a total crop of \$4,202.30. That the expense of the defendant Solomon Hodge in breaking, removing stone, and seeding said crop and threshing same were \$954.15, leaving a balance to be credited to the plaintiff of \$3,247.85. That the last of said crop was sold on August 5, 1916. That the indebtedness of plaintiff to said Hodge, in April, 1916, after deducting the costs of the 1915 crop, breaking, etc., was \$2,900.04. That the defendant Solomon Hodge received from the proceeds of said 1915 crop the sum of \$341.87 in excess of all demands against the plaintiff herein, and said plaintiff was, on April 1, 1916, entitled to a deed of said premises from said Solomon Hodge, clear of all incumbrances, and the sum of \$341.87, less the amount of taxes paid on said premises for the 1913, 1914, 1915, 1916, 1917, 1918, and 1919

taxes levied against said land, and which were paid by said Hodge."

It is undisputed that a transaction took place between the plaintiff and the defendant Hodge, at the office of Attorney H. J. Linde in Stanley in Mountrail county in the latter part of December, 1912, and that at that time and place some written agreement, relative to the land, was made between them. The evidence shows that at that time the defendant Hodge paid the money to Ghusm, and received a warranty deed from him. The execution of that deed was acknowledged before H. J. Linde, as notary public, on December 27, 1912. Both the plaintiff and the defendant Hodge admitted that at that time and place a contract for deed was prepared and signed by them, but, as already stated, they differ as to the terms and as to the parties who signed the contract. The plaintiff claims that a contract was executed and signed by the plaintiff and the defendant Hodge alone. The defendant Hodge, on the other hand, claims that the contract then made was executed not only by the plaintiff and Hodge, but also by Abdel Hadey (plaintiff's brother-in-law), and that by the terms thereof the defendant Hodge agreed to sell and convey an undivided one-half interest in the premises to the said plaintiff and to said Hadey, respectively. It is not denied that the contract then executed was acknowledged by the parties thereto before Linde as notary public; and, as already stated, it is admitted that some contract was prepared and signed by the parties at that time. The contracts produced and offered in evidence by defendant Hodge on the trial are dated on the same day as the deed from Ghusm to Hodge is dated, and these contracts, like the deed, were acknowledged before the said Linde as notary public. Linde was dead before this suit was tried, so his testimony could not be produced; but upon the trial it was stipulated that the signature attached to the certificate of acknowledgment is the genuine signature of Linde; also, that said Linde was at the time of the certificate a duly authorized notary public. The plaintiff says that he neither signed nor acknowledged this contract, and that his signature thereto is a forgery. He admits, however, that at the time and place the contract in evidence purports to have been executed he did sign some contract. He accounts for the failure to produce the contract which he says was executed (and of which he received a duplicate) by saying that at some subsequent date the defendant forcibly took away from him the contract which he had received.

Hodge positively testified that plaintiff signed the contract offered in evidence, and he denies that he, at any time, took any contract away

from the plaintiff. According to the evidence, Linde, the notary public, was well acquainted with the plaintiff, so there is no reason to believe that a mistake was made by the notary public; and not the slightest reason has been shown why the notary should have made a false certificate. Upon a careful consideration of the evidence bearing on this feature of the case, we are entirely satisfied that the plaintiff has wholly failed to establish that his signature to the contract produced in evidence is a forgery, and that the notarial certificate is false. And, in our opinion, the findings of the trial court to that effect are incorrect. We do not, however, deem this of controlling importance so far as the rights of the parties in this action are concerned. The defendant Hodge does not contend that he put up his money with the intention of acquiring the premises in controversy for himself. On the contrary, he disclaims any such intention. He says that all he wanted and wants was and is, his money and interest thereon. And it is quite apparent from his testimony that his real purpose in going into the deal was to aid the plaintiff and save to him whatever equity or interest he had in the land. And it is further apparent that the only reason he had for wanting plaintiff's brother-in-law, Al del Hadey, to join as a purchaser was to insure that the contract of purchase would be carried out, and the money invested by Hodge repaid to him. In other words, Hodge desired to have Hadey act in a sense as a surety. There is no contention that the contract of purchase has been canceled in the manner provided by statute. And, construing the evidence as a whole, we are not prepared to say that the plaintiff has abandoned or surrendered whatever interest or claim he had in the land by virtue of the arrangement made at the time Hodge took over the interest of Ghusm in the premises. In other words, we are of the opinion that the plaintiff still has an equitable interest in the premises, and is entitled to an opportunity to pay the defendant Hodge whatever is due him, and that, upon such payment being made, the plaintiff is entitled to a reconveyance by Hodge.

Upon the record before us, however, we do not feel justified in attempting to decide the controversy with respect to the 1915 crop. The evidence upon this part of the controversy is, as a whole, so unsatisfactory that we find it difficult, if not impossible, to arrive at any satisfactory conclusion. We are entirely satisfied, however, that the findings of the trial court as to the amount of grain raised and the proceeds derived by the defendant Hodge thereon, and the expenses incurred by

him incident to putting the land under cultivation, raising, gathering, and marketing the crop are not in accord with the preponderance of the evidence. We are also very much in doubt as to what the facts are with respect to the arrangement, if any, under which the 1915 crop was produced. The evidence also is not as clear as it probably can be made as to the sums expended by the defendant Hodge in making permanent improvements on the premises. These matters, of course, all relate to the amount still due to the defendant Hodge, and to be paid by the plaintiff in order to entitle him to have premises conveyed to him. Hence, so far as this feature of the case is concerned, we have reached the conclusion that the ends of justice will be best subserved by remanding the case for a retrial in accordance with the precedents set by former decisions of this court. See *King v. Tallmadge et al.*, 178 N. W. 280.

It is therefore ordered that the case be remanded for a retrial upon the question as to what amount still remains due to the defendant Hodge from the plaintiff. The trial court, upon ascertaining such amount, will allow the plaintiff a reasonable time in which to make payment, and enter judgment that, upon such payment being made, the defendant Hodge convey to the plaintiff all his right, interest, and title to the premises. The appellant will recover the costs of this appeal. Costs of the action in the district court will abide the result of the final judgment.

GRACE, C. J., and ROBINSON, BRONSON, and BIRDZELL, JJ., concur.

ALEX CURRIE, et. al., Respondents, v. LYNN J. FRAZIER, et al.,
Appellants.

(186 N. W. 244.)

States — officers held not authorized to sell bonds at a discount, or pay commissions reducing amount received to less than par.

1. Where a statute authorizes officers of the state to sell certain bonds at not less than par and for cash, they may not contract to sell the bonds at a discount or to pay a commission to the purchaser which will reduce the amount received for the bonds to less than par.

States — evidence held not to show that bank purchased bonds, but that it held them as custodian.

2. The evidence showing the capacity in which the Bank of North Dakota held and attempted to dispose of the bonds, the sale of which is in question, is examined and it is held that the bank did not become a purchaser of the bonds from the Industrial Commission, but that it held them as custodian for safe keeping.

Appeal from District Court of Burleigh County, *Cole*, Special, J.

Affirmed.

Wm. Lemke, Attorney General, for appellants.

The Bank of North Dakota is authorized to purchase bonds of the State of North Dakota. Chap. 148, Laws of 1919, § 4; chap. 153, Laws of 1919, § 7; chap. 154, Laws of 1919, § 6; chap. 24, Laws Special Session, 1919, § 5.

The Bank of North Dakota, as an agency of the sovereign power, has a distinct status separate and apart from that of the state itself. Its contracts are not the direct contracts of the state. *Sargent County v. State*, doing business as the Bank of North Dakota, 47 N. D. 561, 182 N. W. 270, 275; chap. 147, Laws of 1919.

A state agency may pay commission. *Church v. Hadley*, 240 Mo. 680, 145 S. W. 8, 39 L. R. A. (N. S.) 248; *Miller v. Park City*, 126 Tenn. 427, 150 S. W. 90, Ann. Cas. 1913 E. 83; *State v. West Duluth Land Co.* 75 Minn., 456, 78 N. W. 115.

J. J. Kehoe and *A. E. Wheeler*, for respondents.

The par value of a bond at any given time is the principal and interest then due on it. Accordingly the accrued interest on a bond at the time of

its sale must be included in the purchase price, or the bond will be sold at less than par. Foot note to *Miller v. Park City*, 30 A. & E. Ann. Cases. 85, and the cases therein cited; *State v. Delafield*, 8 Paiges Ch. 523, appearing in 4 N. Y. Ch. Rep. 529; *State v. Delafield*, 26 Wendell (N. Y.) 192, appearing in 32 N. Y. Common Law Repts. 192; *State v. Delafield*, 2 Hill (N. Y.) 159, appearing in 33 N. Y. Common Law Reports, 159; 135 L. R. A. N. S. 789.

BIRDZELL, J. This is an action to enjoin the defendants from carrying out the provisions of a certain purported contract for the sale of bonds of the state of North Dakota. From a judgment entered in the district court of Burleigh county, enjoining the defendants from delivering any further bonds under the contract and from selling any bonds of the state at less than par and except for cash, the defendants have appealed. All of the facts necessary to a decision of the questions presented on appeal are stipulated, and are, in substance, as follows:

The agreement arrived at is evidenced by certain letters. The first and principal one, dated September 21, 1921, to Spitzer, Rorick & Co., of Toledo, Ohio, reads:

"September 21, 1921.

"Spitzer, Rorick & Co., Toledo, Ohio—Dear Sirs: We hereby sell you the following bonds of the state of North Dakota real estate series: \$140,000 due in 1941, without prior option; \$525,000 due in 1946, without prior option; \$715,000 due in 1948, without prior option; \$3,900,000 due at date mutually agreed upon.

"The bonds due in 1941 are in denominations of \$500 each, and the balance are in denominations of \$1,000 each and are to be made payable, by indorsement thereon of an undertaking in which the Bank of North Dakota agrees to pay said bonds, both principal and interest, at the Empire Trust Company in the city of New York and state of New York. These bonds are the direct and general obligation of the state, and they are also secured by the deposit with the state treasurer of a like amount of real estate first mortgages on farms in North Dakota. All of said bonds bear interest at $5\frac{3}{4}$ per centum per annum, payable semiannually, both principal and interest payable in gold coin of the present standard of weight and fineness, and are to be unqualifiedly approved by Mr. Chas. B. Wood of Chicago as the direct and general obligation of the state and as to the security and sufficiency of the taxing power back of these bonds to pay them.

"Said bonds are to be delivered to you in New York or Toledo, at your option, as follows: \$500,000 on September 26, 1921; \$500,000 on October 26, 1921; \$500,000 on November 26, 1921; and \$300,000 on the 26th day of each month thereafter up to and including August 26, 1922, and the remainder on September 10, 1922, but you have the right to take up all or any part of said bonds earlier than the dates specified.

"We will make arrangements with the Spitzer, Rorick Trust & Savings Bank of Toledo to act as our fiscal agent to deliver these bonds to your firm from time to time according to the terms of this agreement.

"The purchase price of the foregoing bonds to be par and accrued interest.

"The state of North Dakota has authorized an issue of \$1,000,000 of 6 per centum bonds, mill and elevator series, dated July 1, 1921, due one-half on July 1, 1941, and one-half on July 1, 1946, denominations of \$1,000 of which are unsold approximately \$590,000. We have made arrangements to secure these bonds and in consideration of the above purchase, you are given an exclusive option on the said \$590,000 bonds at par and accrued interest, said option to expire on December 26, 1921, unless exercised by you.

"The state of North Dakota contemplates the issuance during the year of 1922 not exceeding \$1,500,000 additional bonds, mill and elevator series, to bear $5\frac{3}{4}$ per centum interest per annum, payable semiannually. We have made arrangements to secure these bonds when issued and agree that you are to have the exclusive right to purchase said bonds at par and accrued interest. It is agreed that when said bonds are ready for issuance from time to time that we shall notify you in writing to that effect, and you must exercise your option to purchase at the price within 30 days from the date when you receive written notice from us.

"The state of North Dakota contemplates the issuance during the year 1922 of bonds, home building series, in amounts not exceeding \$1,000,000; said bonds are to be in denominations of \$1,000 each bearing interest at $5\frac{3}{4}$ per centum per annum, payable semiannually. We have made arrangements to secure these bonds when issued and agree that you are to have the exclusive option to purchase the same or any part thereof which are issued, at par and accrued interest, at any time within 60 days from the time when you receive a written notice from us that said bonds are ready for delivery.

"The above option given in consideration of your having this day

made an absolute purchase from us of \$5,280,000 real estate series bonds.

"It is agreed that Charles B. Wood of Chicago has already approved part of the above-described bonds of the real estate series sold to you and that on the remaining bonds above described, which are all of said bonds of the state of North Dakota that will be authorized or issued for any purpose prior to September 10, 1922, we will furnish you with the unqualified approving opinion of Charles B. Wood, or at your option permit you to secure such opinion at our expense.

"It is further understood and agreed that each of the said bonds optioned herein are to be made payable by indorsement thereon of an undertaking in which the Bank of North Dakota agrees to pay said bonds both principal and interest, at the Empire Trust Company, in the city of New York and state of New York.

"We recognize your need for market protection and as a further consideration hereby agree not to sell or offer to sell directly or indirectly any bonds of the state of North Dakota from this date until September 10, 1922, and in case of litigation or other adverse conditions arising which in your opinion affects the salability of these bonds you are to have the right to cancel all or any part of the uncompleted portion of this contract, after you have taken up and paid for \$1,800,000 par value of bonds.

"It is agreed that notice shall not be given you until the bonds are ready for delivery in full compliance with the Constitution and laws of the state, together with Charles B. Wood's approving opinion, and we hereby agree to deliver to you in New York or Toledo at your option, as directed from time to time, any and all of said bonds within 30 days from the date when we receive a written notice from you of your determination to exercise your option or purchase. All of the bonds above mentioned shall mature at specific dates without prior option.

"Respectfully submitted,

"The Bank of North Dakota,

"By F. W. Cathro."

"Sept. 21, 1921.

"We hereby confirm the foregoing purchase and contract in all respects and hereby agree to faithfully carry out the same.

"Spitzer, Rorick & Co.,

"By A. V. Foster."

Additional letters, dated the same as the above, and which are referred to as "riders" to the contract evidenced by the above letter, are as follows:

"September 21, 1921.

"Spitzer, Rorick & Co., Toledo, Ohio—Dear Sirs: In consideration of the contract of sale this day entered into by us, wherein we sell you bonds of North Dakota real estate series, and option to you bonds of North Dakota, mill and elevator series and home building series, noted in said contract, we hereby agree to pay you at the time of each consignment of said bonds is taken up and paid for by you, including these on which you may exercise your option three points (three per cent. on par) on bonds real estate series sold in said contract, amounting to approximately five million two hundred eighty thousand dollars (\$5,280,000) and two points (two per cent. on par) on all bonds optioned in said contract except the six per cent. mill and elevator series, amounting to approximately five hundred ninety thousand dollars (\$590,000).

"This agreement is attached to and made a part of the original contract referred to herein between the parties hereto.

"Bank of North Dakota,
"By F. W. Cathro, Manager."

"September 21, 1921.

"We hereby confirm the foregoing agreement in all respects and hereby faithfully agree to carry out the same.

"Spitzer, Rorick & Co.,
"By A. V. Foster."

"September 21, 1921.

"Spitzer, Rorick & Company, Toledo, Ohio—Dear Sirs: In consideration of the contract of sale this day entered into by us, wherein we sell and option to you the bonds of North Dakota noted in said contract, we hereby agree to pay you at the time each consignment of bonds is taken up and paid for by you, including those on which you may exercise your option, two points (two per cent. on par) on all bonds delivered to you during the life of said contract, said two points to be in addition to the payments specified in that certain rider contract which, together with this agreement, is attached to and made a part and a portion of

the original contract for the sale and option of the bonds of North Dakota as referred to herein.

"Bank of North Dakota,
"By F. W. Cathro, Manager."

"September 21, 1921.

"We hereby confirm the foregoing agreement in all respects and hereby faithfully agree to carry out the same.

"Spitzer, Rorick & Company,
"By A. V. Foster."

Under the above contract, \$1,486,500 of North Dakota bonds, real estate series, were sold and delivered to Spitzer, Rorick & Co. between September 26, 1921, and November 5, 1921, for which the latter paid \$1,486,500. On November 2d and 8th, the Bank of North Dakota paid to the Industrial Commission the amount paid to the Bank by Spitzer, Rorick & Co. on account of the bonds sold, less \$25,000. It also paid to the commission \$491,000, which it had received through the sale of other bonds of the real estate series to other purchasers.

As the bonds of the real estate series were delivered from time to time by the state treasurer, they were placed in the Bank of North Dakota for safe-keeping, and their receipt for this purpose by the bank was specifically acknowledged. As evidence of the capacity in which the bank held and disposed of the bonds, on November 2d, by its manager and director general, it advised the Industrial Commission that it (the commission) had, prior thereto, delivered to the bank as "custodian and for safe-keeping" bonds of the real estate series aggregating \$2,000,000; that under the direction of the Industrial Commission and at its expense, the bank had conducted a campaign for the sale of the bonds, resulting in the sale of \$1,712,800. Cashier's check was inclosed for this amount to cover all of the bonds so sold. This check was indorsed back to the bank by the Industrial Commission and paid. On November 8th the bank further advised the Industrial Commission that it had sold additional bonds of the same series amounting to \$239,100, under the same circumstances as indicated in the previous letter of November 2d. Cashier's check was inclosed for this amount, which was paid in the same manner. Certain bonds of the mill and elevator series were likewise delivered to the Industrial Commission, and in turn receipted for

by the bank for safe-keeping. On the real estate bonds thus sold to Spitzer, Rorick & Co. the bank advanced in commissions, \$74,325, or 5 per cent. upon the total of such bonds sold to Spitzer, Rorick & Co.

The principal contentions advanced by the plaintiffs and respondents in support of the claim that the contract in question is illegal are: First, that the legislative acts authorizing the issuance of the bonds embraced in the contract required their sale at not less than par and for cash (chap. 153, § 7, and chap. 154, § 6, Session Laws of 1919); second, that the limitation of sale for cash and at not less than par qualifies the authority of the Industrial Commission, and that hence, the commission, being the directors of the bank, cannot evade the limitations by first having the bank invest its funds in the bonds and then making a resale to third parties; third, that the record fails to show a sale to the bank; but, on the other hand, shows affirmatively that the bank did not buy the bonds from the Industrial Commission, and as a consequence that their attempted disposition under this contract is an attempt by the Industrial Commission to sell the bonds for less than par; fourth, that the contract is not binding because not executed in the manner required by § 21 of the Bank Act (Laws 1919, chap. 147), which says:

“Written instruments shall be executed in the name of the state of North Dakota, signed by any two members of the Industrial Commission, of whom the Governor shall be one, or by the manager of the Bank of North Dakota within the scope of his authority so to do as defined by the Industrial Commission.”

The stipulated facts, in our opinion, show beyond a doubt that the bank never became the purchaser of the bonds which it attempted to sell to Spitzer, Rorick & Co. It had them merely for safe-keeping, as its own receipts indicated. It was not carrying the bonds as assets. As it sold them, it remitted the proceeds to the Industrial Commission. In its letters of advice it expressly acknowledged that it had held the bonds merely for safe-keeping, and that the sale had resulted partly through the activities of the bank incurring expenses under the direction of the Industrial Commission, which expenses were charged to the appropriation of the commission. The bank never at any time pretended to be the owner of the bonds. The attempted sale therefore must be considered as having been made by the Industrial Commission. In view of the facts, it is not necessary to consider whether or not the bank, under the

direction of the Industrial Commission, could in fact purchase at par and resell at a discount.

Can the Industrial Commission sell at a discount to the purchaser, bonds which the statute requires to be sold at par and for cash? We are clearly of the opinion that it cannot. The Attorney General argues that if the sale by the bank is in reality a sale by the Industrial Commission, as we hold it to be, payment of expenses and such commissions as were paid and contracted to be paid to Spitzer, Rorick & Co. is not in contravention of the statute prohibiting the sale at less than par. We have examined all of the authorities cited in this connection, and find that, while they support the payment of a reasonable commission to an agent or broker, where one is employed, they do not countenance the allowance of a commission to a purchaser. To do so in a case where the commission must be subtracted from the par value would result in a sale at less than par—the thing the statute prohibits. This is not an instance where the state has attempted to employ Spitzer, Rorick & Co. as an agent or broker to sell its bonds and to pay them a commission for their services. But Spitzer, Rorick & Co. purport to be the purchasers. None of the authorities relied upon by the Attorney General goes so far as to support a discount to the purchaser under the guise of a commission. On the contrary, they declare that a purchaser may not thus secure the bonds at less than par. See *Appeal of Whelen et al.*, 108 Pa. 162, 1 Atl. 88; *Hunt v. Fawcett*, 8 Wash. 396, 36 Pac. 318; *Miller et al. v. Park City et al.*, 126 Tenn. 427, 150 S. W. 90, Ann. Cas. 1913E, 83; *Smith v. State ex rel. McNeil*, 99 Miss. 859, 56 So. 179, 35 L. R. A. (N. S.) 789, and note; *Church v. Hadley*, 240 Mo. 680, 145 S. W. 8, 39 L. R. A. (N. S.) 248; *Armstrong v. Village of Fort Edward*, 159 N. Y. 315, 53 N. E. 1116; *Davis v. City of San Antonio et al.* (Tex. Civ. App.) 160 S. W. 1161; *State v. West Duluth Land Co.*, 75 Minn. 456, 78 N. W. 115.

Since this cause was submitted there has been a change in the personnel of the Industrial Commission, and there have been statements in the press to the effect that one or more contracts have been entered into involving the sale of the bonds covered by the contract in question. This court is not advised of the terms of any such contract or contracts. The only reference thereto in the record in this case is that made in the motion of the present Attorney General on December 16th, in which he moves that the case be remanded to the trial court "for the reason that a new contract has been entered into involving the subject-matter of this

appeal." Counsel for the respondent does not consent to the granting of the motion to remand, and the facts with reference to any new contract or contracts that might exist are not a matter of record herein. The present Attorney General has specifically refused to move for a dismissal of the appeal, and asks that the case be either remanded or determined on its merits. In view of our opinion on the merits a remand could serve no useful purpose. The motion to remand, however, does not indicate that the cause is moot. Unless this court is disposed to prosecute an inquiry upon its own initiative to determine whether the case is in fact moot, it seems that there is no option other than to determine the merits of the appeal.

For the foregoing reasons the motion for substitution is granted, and the judgment is affirmed.

CHRISTIANSON and ROBINSON, JJ., concur.

BRONSON, J. (specially concurring). I express no opinion upon the merits. The trial court enjoined the defendants, as members of the Industrial Commission, from selling or delivering bonds of the state pursuant to the contract made with Spitzer, Rorick & Co. The defendants, while members of the Industrial Commission, appealed. Since that time, pursuant to the recall election held October 28, 1921, such defendants have ceased to be members of the Industrial Commission. On December 16, 1921, the Attorney General, Hon. Sveinbjorn Johnson, appeared before this court, and made the following motion:

"I move that the names of R. A. Nestos, as Governor of the state of North Dakota, Joseph A. Kitchen as Commissioner of Agriculture and Labor, and Sveinbjorn Johnson, as Attorney General, be substituted for Lynn J. Frazier, John N. Hagan, and William Lemke, as Governor, Commissioner of Agriculture and Labor, and Attorney General, respectively, constituting the former Industrial Commission. . . .

"I further move that the case be remanded to the trial court upon the suggestion of the Attorney General for the reason that a new contract has been entered into involving the subject-matter of this appeal for further action by the trial court."

It is apparent that the motion of the Attorney General to substitute, as parties defendant, the present Industrial Commission must be granted.

This court has so ordered. Any injunction, to be of any force, necessarily must be against the new Industrial Commission. Upon the motion made by the new Attorney General it is further apparent that a new contract has been made, involving the subject-matter of this appeal, namely, a new contract superseding the old contract. The cause, therefore, from the viewpoint of the Attorney General, representing the present defendants, the appellants in this action, and, as it now appears to this court therefrom, is moot. The respondent, though given notice, has filed no objections to the motion or showing of the Attorney General. The appeal therefore should be simply dismissed. *Tubbs v. Sather*, 29 N. D. 84, 149 N. W. 567; *Thompson v. Vold*, 38 N. D. 569, 165 N. W. 1076. See note Ann. Cas. 1912C, 247. This will be in effect an affirmation of the judgment. *Stimson v. Stimson*, 30 N. D. 78, 83, 152 N. W. 132. This will operate accordingly to permit the judgment entered by the trial court to stand as such, and will not serve in any manner to embarrass the new Industrial Commission, concerning the new contract, or by any determination upon the merits with such new Industrial Commission as defendants.

GRACE, C. J., concurs.

JOHN KUPFER and HARLAND KUPFER, Appellants, v. JAMES McCONVILLE, Respondent.

(185 N. W. 1005.)

Work and labor — where plaintiffs abandoned their contract they could not recover under quantum meruit.

Plaintiffs contracted to construct a well under a special contract. They failed to substantially perform the contract, and voluntarily abandoned it, over the protest of the owner, before they had constructed a well at all. It is *held*, for reasons stated in the opinion, that no recovery can be had on quantum meruit for the value of the labor furnished and the pipe put into the ground.

Opinion filed Nov. 18, 1921. Rehearing denied Dec. 23, 1921.

From a judgment of the District Court of Dickey County, *McKenna*, J., plaintiffs appeal.

Affirmed.

F. J. Graham, and *E. E. Cassels*, for appellants.

Where an action for the foreclosure of a mechanic's lien fails the plaintiff may sue upon a quantum meruit. *Anderson v. Todd*, 8 N. D. 158, 77 N. W. 599; *Marchand v. Perrin*, 19 N. D. 794, 124 N. W. 1114.

The measure of such recovery is the contract price less compensation for imperfections of work or materials. *Lighthall v. Colwell*, 56 Ill. 108; *Fuller v. Rice*, 52 Mich. 436, 18 N. W. 204; *Mosaic Tile Co. v. Chiera*, 133 Mich. 498, 95 N. W. 537; *Sheldon v. Lealy*, 111, Mich. 39, 69 N. W. 76; *Mathews v. Farrell*, 140 Ala. 298, 37 So. 325; *Higgins Mfg. Co. v. Pearson*, 146 Ala. 528, 40 So. 579; *Barnwell v. Kempton*, 22 Kan. 314; *McKnight v. Bertram Hear & Plumbing Co.* 65 Kan. 859, 70 Pac. 345; *Walsh v. Jenvey*, 85 Md. 240, 36 Atl. 817, 38 Atl. 938.

The disclosure of a special contract at the trial of an action on quantum meruit will not defeat the action, but will merely limit the amount of recovery. *Henderson v. Mace*, 64 Mo. App. 393; *Scott v. Congdon*, 106 Ind. 268, 6 N. E. 625.

Even though such a contract was not substantially performed, the contractor still has the right of action on quantum meruit. If the property derives any benefit from the services done and materials furnished by the contractor, he must pay for their value, not exceeding the contract price. 15 Am. & Eng. Enc. Law 1903; *Katz v. Bedford*, 77 Cal. 319, 1 L. R. A. 826, 18 Pac. 523; *Blakeslee v. Holt*, 42 Conn. 226; *Smith v. Scott's Ridge School Dist.* 20 Conn. 312; *Eldridge v. Rowe*, 7 Ill. 92, 43 Am. Dec. 41.

The former judgment between these parties, which is a dismissal of the action, cannot be pleaded as *res judicata* this action. *Bray v. Bocker*, 6 N. D. 530, 72 N. W. 933, 24 Am. & Eng. Enc. Law 775; *Arnold v. Grimes*, 2 Iowa 1.

W. S. Lauder, for respondent.

CHRISTIANSON, J. Plaintiffs seek in this action to recover upon the quantum meruit for the labor and materials furnished to the defendant in drilling a well on his farm in Dickey county, in this state. The case

was tried to a jury, and resulted in a directed verdict in defendant's favor; and plaintiffs have appealed from the judgment entered upon the verdict.

The case before us is a sequel to *Kupfer et al. v. McConville*, 161 N. W. 283. In that action the plaintiffs sought to foreclose a mechanic's lien filed by them for the construction of the well in controversy here. As stated in the opinion in that case, the well was constructed under a specific contract. And it was there held that the plaintiffs had not performed their contract so as to entitle them to compensation according to its terms.

In this case the defendant pleaded the judgment in the former action as a bar. The judgment roll in the former action, including the findings of the district court, was offered in evidence upon the trial of this case, and the court was requested to take judicial notice of the decision of this court in the former case. And it was contended by the defendant that the facts found in the former case upon the issues there presented cannot be relitigated in this case; and that these facts, together with the undisputed testimony in this case, precludes a recovery on the part of the plaintiffs in this action. The trial court agreed with these contentions, and directed a verdict in favor of the defendant for a dismissal of the action.

On this appeal appellants contend: (1) That the judgment in the action to foreclose the mechanic's lien is not *res judicata* in this action; and, (2) that under the rule announced by this court in *Horton v. Emerson*, 30 N. D. 258, 152 N. W. 529, they are entitled to recover on the quantum meruit for the reasonable value to the owner, not exceeding the contract price, of the labor and materials which they furnished in drilling the well in controversy.

1. There is no question but that a judgment rendered in an action to foreclose a mechanic's lien is not necessarily a bar to an action brought to recover on the quantum meruit. See *Horton v. Emerson*, 30 N. D. 258, 152 N. W. 529, and authorities cited therein.

"When the second action between the same parties is upon a different claim or demand or cause of action, it is well settled that the judgment in the first suit operates as an estoppel only as to the point or question actually litigated and determined, and not as to other matters which might have been litigated and determined. This rule holds true whether the

judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive *per se*. In all cases it should appear that the first judgment determined the actual question at issue between the parties, and that the precise question was raised and determined in the former suit. On the other hand, it is equally well settled that a fact which has been directly tried and decided by a court of competent jurisdiction cannot be contested again between the same parties in the same or any other court; and that where some controlling fact or question material to the determination of both actions has been determined in a former suit, and the same fact or question is again at issue between the same parties, its adjudication in the first will if properly presented be conclusive of the same question in the latter suit, without regard to whether the cause of action is the same or not, or whether the second suit involves the same or a different subject-matter, or whether or not it is in the same form of proceeding. In such cases it is also immaterial that the two actions were based on different grounds, or tried on different theories, or are instituted for different purposes, and seek different relief. A matter, whether consisting of one or many questions, which has been solemnly adjudicated by a court of competent jurisdiction, must, in any subsequent litigation between the same parties, where the same question or questions arise, be deemed to have been finally and conclusively settled, except where the litigation is a direct proceeding for the purpose of reversing or setting aside such adjudication." 15 R. C. L. pp. 973-975.

These principles were recognized in *Horton v. Emerson*, *supra*. In the opinion in that case it was pointed out that the trial judge, in deciding the action to foreclose a mechanic's lien, had expressly refused to find bad faith and intentional and wilful departure from the terms of the contract by the contractor; that he had merely held "that no recovery could be had by plaintiffs on the contract," and that he had "studiously avoided making any finding or conclusion which would in the least hamper or interfere with plaintiff's right to recover upon the quantum meruit." 30 N. D. 264, 152 N. W. 531. There can, we think, be no doubt but that the findings of fact made in the former action are binding upon the parties in this case. In that case there was an issue as to the terms of the contract between the parties. There was also an issue as to what plaintiffs had done; that is, as to what kind of a well they had drilled. In that case the plaintiffs claimed that they had in fact

drilled a well having adequate water. The defendant claimed, not only that they had failed to construct a well of the kind agreed upon, but that they had not in fact constructed a well at all. The trial court found that the agreement between the parties was that plaintiffs should sink the well "to the level of a well then owned by one McGannon, a neighbor of the defendant and that the whole agreement between the parties, including both the writing and the oral agreement, was to the effect that in consideration of the payment of \$700 plaintiffs should furnish to defendant a flow well, providing such well could be obtained by sinking the well 50 feet deeper than the said well belonging to the said McGannon, and that if a flow well could not be obtained by going to the depth as stated, then plaintiffs should furnish to defendant a pump well that would furnish water suitable for stock and domestic purposes and in reasonable quantities; that the said McGannon well is of a depth of about 1,400 feet, and the well sunk by plaintiffs for defendant was only 1,315 feet; that plaintiffs did not furnish defendant a flow well; that by the terms of the contract plaintiffs guaranteed the well for one year; that plaintiffs did not furnish defendant any kind of a well that furnished suitable water for stock and domestic purposes for one year."

These findings were specifically approved by this court. 161 N. W. 287. There is no contention, and no evidence tending to show, that the defendant either actually or impliedly accepted the well or consented that the plaintiffs might cease to drill at the depth they had reached. On the contrary, the plaintiffs themselves specifically testified that the defendant was angry when they stopped drilling, and insisted that they drill to a greater depth. They admit that he never accepted the well. They also admit that they made no further attempt, or offer, to complete the work in accordance with the terms of the contract, as that contract was determined to be by the former decision of this court. It appears from the testimony that the land in controversy is situated in a basin where artesian water is obtained at a certain depth. While it is impossible to say under the evidence before us whether an artesian well would or would not have been obtained if the plaintiffs had drilled to the depth agreed upon, the evidence is to the effect that it could not possibly have been obtained at the depth reached by the plaintiffs, but that it might have been obtained if the plaintiffs had drilled to the depth stipulated in their contract. There was no evidence adduced at all as to

what the well, as constructed by the plaintiffs was worth. Nor was there any evidence as to what it would cost to complete the well by drilling to the depth stipulated in the contract. The only evidence adduced by the plaintiffs was as to the value of the material utilized and services performed in drilling. Hence the following facts stand undisputed: That the plaintiffs agreed to furnish to the defendant a flowing well, provided such well could be obtained by drilling to a depth of 1,450 feet; that if a flowing well could not be obtained by going to that depth then the plaintiff should furnish to the defendant a pump well that would furnish water suitable for stock and domestic purposes in reasonable quantities; that the plaintiffs abandoned the work when they had drilled to a depth of 1,315 feet, without having produced a well at all; that such abandonment was in no manner acquiesced in by the defendant, but took place over his protest; that the plaintiffs have at no time completed, attempted to complete, or even offered to complete, the work in accordance with the contract, as that contract was determined to be by the former decision of this court; that the plaintiffs have failed to show that the well, as constructed by them, added to the value of defendant's land, or what, if any, value the well had as the same was constructed by them. In these circumstances can it be said that the plaintiffs have brought themselves within the rule enunciated in *Horton v. Emerson*, *supra*, so as to permit them to recover on quantum meruit? After a careful consideration of this question we have arrived at the conclusion that it must be answered in the negative.

It will be noted that in *Horton v. Emerson*, *supra*, this court quoted with approval the rule laid down by Sutherland in his work on Damages, which reads, in part, as follows:

"The contractor must have intended in good faith to fulfill the terms of the contract; its spirit must be faithfully observed, though the very letter of it fail. A voluntary abandonment or a wilful departure from its stipulations is not allowed." 3 Sutherland on Damages (3d ed.) § 711; 30 N. D. 270, 152 N. W. 529.

Among the authorities cited in the last edition of Sutherland (see 3 Sutherland on Damages 4th ed. § 711, p. 2677) in support of the proposition thus stated in *Bowen v. Kimbell*, 203 Mass. 364, 89 N. E. 542, 133 Am. St. Rep. 302. In the decision in that case the Supreme Court of Massachusetts said:

"It has always been held that he (the contractor) cannot recover upon

2. quantum meruit unless he has acted in good faith under the contract, in an endeavor to perform it. *Burke v. Coyne*, 188 Mass. 401, 74 N. E. 94; *Sipley v. Stickney*, 190 Mass. 43, 112 Am. St. Rep. 309, 75 N. E. 226, 5 L. R. A. (N. S.) 469, 5 Ann. Cas. 611. If he abandons the contract without excuse when he has only half performed it, he has no remedy. *Homer v. Shaw*, 177 Mass. 1, 58 N. E. 160. In both these particulars the contractor is governed by the same rules as those which are adopted generally in other states." 203 Mass. 371, 89 N. E. 544, 133 Am. St. 306.

In this case it is established, either by conclusive or by undisputed evidence, that the plaintiffs failed to comply with the terms of their contract with the defendant; that they, in fact, failed to construct a well at all; that they ceased drilling, and took away their outfit, and left the well in the condition found by the trial court in the findings in the former suit, over and in spite of the protest of the defendant; that even after the terms of the contract had been definitely and conclusively established by the decision of this court, not even an offer was made by the plaintiffs to comply with the terms of such contract. It will also be noted that the plaintiffs failed to show the value of the well as constructed by them, or that it in fact had any value as such or that it added to the value of defendant's land. In other words, plaintiffs failed to make out a prima facie case, and there was no evidence on which the jury could base a verdict in favor of the plaintiffs. In the quotation from *Sutherland on Damages*, approved and adopted in *Horton v. Emerson*, it is said:

"The sole ground upon which a contractor is entitled to anything under this rule is that if he were not paid something the defendant would profit at his expense, although his claim is without merit as far as rights under the contract are concerned. Hence the amount which may be recovered is the amount by which, were no payment made, the defendant would profit at the plaintiff's expense; that is to say, the amount which represents the fair market value of the structure which, against the wishes of the defendant, has been put upon his land. This value the plaintiff must prove before he can recover. If the contract is a beneficial one to the landowner the contractor is not entitled to recover any margin of the benefit which the former secured by the making of the contract; but the contractor is entitled to the value of the building as it is in the light of the landowner's right to have the building built, and properly built, for the contract price. If, for example, the

landowner secured by his contract the erection for \$2,000 of a building worth \$3,000, and the plaintiff, in erecting the building, fails to comply with the contract in matters going to the essence of the contract, and the building, erected as it is erected, is worth \$2,500, the plaintiff is not entitled to recover \$2,500; all that he is entitled to recover is 25/30 of \$2,000."

In support of the rule so stated, Sutherland (*Sutherland on Damages* 3d ed. § 711) cites *Gillis v. Cobe*, 177 Mass. 584, 59 N. E. 455. That action was one for work done and materials furnished in the construction of a building which the plaintiff had contracted to build, but failed to construct to the satisfaction of the architect, whose approval was required by his contract, which also required the plaintiff to ram the cinder filling on which the concrete floor of the building was laid. When certain heavy tanks for which the building had been designed were put in place there was so great a sinking of the floor that the damage caused thereby was greater than the value of the work and materials furnished by the plaintiff. The cause of the sinking of the floor was not shown. It was held that in order to recover the plaintiff must show that the building as it existed had a market value and added to the value of the defendant's land; that the burden was not upon the defendant to show that the sinking of the floor was due to the failure of the plaintiff to perform this contract, and that the plaintiff could not recover the value of his work and materials diminished by such damages as the defendant could prove in recoupment. In the opinion in the case the Massachusetts court said:

"It is plain, therefore, that the plaintiff who seeks a recovery under the principle of *Hayward v. Leonard* for work done under a special contract does not recover on the same ground as that on which a plaintiff recovers who has done work as he has been requested to do. So far as his case travels on that ground, he is out of court; his sole claim to be paid anything is that if he is not paid the defendant will profit at his expense; until he has proved that the defendant will in that case profit at his expense, he has not made out a prima facie case to be paid anything, and until he has proved how much that profit will be his prima facie case is not complete. When the fact appears in evidence that the work for which money is sought was done under a special contract, and that the plaintiff cannot recover under the special contract, but still seeks a recovery, there is no question of the value of his work and materials, proved

in the usual way, and he does not make out a prima facie case by proving their value according to regular rules. To make out a case for recovery for such work and materials so furnished, he must prove how much the result of his work had benefited the defendant; he must prove what the fair market value of the thing produced by his misdirected work is; and, until he has done that, he has not made out even a prima facie case on which he is entitled to recover anything." 177 Mass. 594, 59 N. E. 455.

The language of the Massachusetts court is directly applicable here. It follows from what has been said that the plaintiffs failed to establish a cause of action. There was no issue of fact to submit to the jury, and the trial court was correct in directing a verdict in favor of the defendant for a dismissal of the action.

ROBINSON, BRONSON, and BIRDZELL JJ., concur.

GRACE, C. J. (specially concurring). I concur in the opinion of Mr. Justice CHRISTIANSON on the ground that plaintiffs wholly failed to comply with the terms of the contract for the construction of the well made with the defendant. They wholly and entirely failed to construct a well. A hole in the ground which contains practically no water is not a well.

The alleged well was valueless in the condition in which plaintiffs left it. It was not a well. The history of the case would seem to indicate that plaintiffs have not acted in good faith under the contract, nor with an earnest endeavor to perform it, and have wholly and entirely failed to construct a well such as by the terms of the contract they agreed to construct.

JOHN R. JONES et al., Appellants, v. THE CITY OF HANKINSON,
in Richland County, North Dakota, a municipal corporation, et al.,
Respondents.

(186 N. W. 276.)

Municipal corporations — in a suit to enjoin officers from constructing water works and sewer systems, the burden of proving irregularities is on complainants.

1. In an action brought by certain tax-payers of the City of Hankinson to enjoin the officers of that city from proceeding further with the construction of certain waterworks, and sewer systems, it is *held*:

That the plaintiffs have the burden of proving the irregularities alleged in their complaint.

Municipal corporations — in action to enjoin officers from proceeding to construct improvements, evidence held not to show that a majority of owners affected signed protest.

2. That the evidence does not establish that the alleged protests were signed by the owners of a majority of the property liable to be specially assessed for the improvements.

Municipal corporations — in proceedings to enjoin officers from proceeding with construction of waterworks and sewer systems, evidence held not to show that officers acted fraudulently.

3. That the evidence does not establish that the officers of the city acted fraudulently.

Opinion filed Dec. 30, 1921.

From a judgment of the District Court of Richland County, *Cooley*, Special J., plaintiffs appeal.

Affirmed.

J. A. Dwyer, and *W. S. Lauder*, for appellants.

It is well settled that when a municipal corporation seeks to impose upon the citizens the burden of making public improvements and to hold the property of the citizens liable therefor the statutes authorizing such improvements must be strictly construed. *Mason v. City of Sioux Falls*, S. D. 51 N. W. 770; *McLaren v. City of Grand Forks*, N. D. 6 Dak. 397.

43 N. W. 710; *Watkins v. Griffith*, 59 Ark. 344, 27 S. W. 234; *White v. Stevens*, Mich., 34 N. W. 255; *Pound v. Chippewa Co.*, Wis. 43 N. W. 63; *Merritt v. Village of Portchester*, 71 N. Y. 309; *Hewes v. Reis*, 40 Cal. 255; *Desty on Taxation*, 1241; *Dill on Municipal Corporations*, 759; *Western Town Lot Co. v. City of Salem*, S. D. 172 N. W. 503.

Newton, Dullam & Young, and *Lawrence, Murphy & Nilles*, for respondents.

"A statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others is directory, unless the nature of the act to be performed, or the phraseology of the statute is such that the designation of them must be considered as a limitation of the power of the officer." *Lewis Sutherland Statutory Construction*, Vol. 2, §§ 611 and 213, second ed.

"Statutory prescriptions in regard to the time, form and mode of proceeding by public functionaries are generally directory as they are not of the essence of the thing to be done but are given simply to secure system, uniformity and dispatch in the conduct of the public business." *Emmons County v. Lands of First National Bank*, 9 N. D. 589, 84 N. W. 379; *Johnson v. Day*, 2 N. D. 295, 50 N. W. 703; *Cooley Constitutional Limitations* 77.

It is well settled that the determination of the council upon the question of necessity is final and conclusive in the absence of fraud. *State v. Fisk*, 15 N. D. 219-226; 107 N. W. 191.

The court in the same opinion holds that the board acts judicially in assessing benefits and necessarily it would act thus in other special assessment proceedings. *Erickson v. Cass County*, 11 N. D. 494, 507; 92 N. W. 841; *Alstad v. Sim*, 15 N. D. 529, 109 N. W. 66; *Ellison v. La-Moure*, 30 N. D. 43, 151 N. W. 988; *Bergen Township v. Nelson County*, 33 N. D. 247, 156 N. W. 559.

"Council are the sole judges of the necessity of sewers and their judgment is conclusive. If in every instance of special taxation the question of benefits could be thrown into the jury box, this situation would be intollerable." *Diamond v. Mankato*, 61 L. R. A. 488; *Speer v. Athens*, 9 L. R. A. 402-405.

There being no question of fraud the action of the city council can not be reviewed. *State v. Fisk*, supra; *Page & Jones, Special Assessments*, § 1430; *Flickinger v. Fay*, 119 Calif. 590.

CHRISTIANSON, J. This is an action brought by certain taxpayers of the city of Hankinson to enjoin the officers of that city from proceeding further with the construction of certain waterworks and sewer systems in that city. The trial court made findings and conclusions, and directed judgment to be entered in favor of the defendants. The plaintiffs have appealed from the judgment, and demanded a trial de novo in this court.

The evidence shows, and the trial court found, that the city council of the city of Hankinson, by ordinance duly enacted, created and established certain waterworks, water main, and sewer districts within the corporate limits of said city; also that the city council directed the city engineer to prepare plans, specifications, and estimates of the probable cost of such waterworks, water main, and sewer systems; and that at a meeting held on the 21st day of July, 1920, the city council duly approved the plans, specifications, and estimates for such improvements which had theretofore been prepared by the city engineer; and that thereupon, on the same day, the said city council, by resolutions duly adopted, declared that a necessity existed for the construction of such waterworks, water main, and sewer systems, which said resolutions referred intelligently to the plans, specifications, and estimates therefor, and which said resolutions were thereupon published twice, once each week for two consecutive weeks in the official newspaper of said city, namely, on the 22d and 29th days of July, 1920. On the 4th day of August, 1920, a protest against the construction of said waterworks and sewer systems was filed. Such protest was signed in all by some 176 persons, and read, in part:

"We, the undersigned citizens of the state of North Dakota, who own lots and parcels of land which may be or will be assessed for such heretofore mentioned and proposed improvements, so called, do hereby give notice to the city council of the city of Hankinson, N. D., that we do protest against any further action whatever at the present time towards building waterworks system, water mains, or sewers as proposed by such council in said published notice, and that the said city council do therefore discontinue any further action as proposed; that this protest is filed as permitted by the laws and statutes of the state of North Dakota, because we do not want the same established at this time because of the present high price of materials, labor, etc.; and, further, that the proposed costs, as a whole, as now proposed, will be too high."

Thereafter, on the 10th day of August, 1920, at a meeting of the city council, at which all members were present, the following proceedings were had:

"Auditor read a protest presented by property owners protesting against the creation of and building of sewers, water mains, pumping stations, or anything and everything connected therewith, in the city of Hankinson. Richland county, N. D.

"Motion made by Alderman Peitz and seconded by Alderman Hoffman that protests be approved as read. Roll call on the motion resulted as follows: First ward, Brown voting No; Burfening voting No. Second ward, Solsrud voting No; Schuett voting No. Third ward, Peitz voting Yes; Hoffman voting Yes. Motion declared not carried.

"Alderman Burfening introduced the following resolution and moved its adoption; Alderman Schuett seconded the motion:

"Whereas, petitions supposedly under and in accordance with § 3704 of the Compiled Laws of North Dakota 1913, having on the 4th day of August, 1920, been filed with the city auditor, protesting against the construction of a waterworks and sewer system, and whereas, many of the lots represented by the signature to such protests are subject only to indirect or secondary assessments, and such signatures do not represent the majority of the property liable to be directly assessed, and whereas, independent protests were not filed against the waterworks and against the sewer systems, though many of the signers are known to be favorable to one system while opposed to the other, and the petitions do not therefore represent the true wishes of all the signers, and whereas, it is the opinion of the council that the construction of a waterworks and sewer system is necessary for the convenience, health, fire protection, and general welfare of the citizens of Hankinson and their property:

"Now, therefore, be it resolved by the city council of the city of Hankinson, N. D., that the city council having heard and fully considered said protests, do find and determine at this, the first regular meeting after the time set for filing protests against such improvements, that the protests are insufficient and not well taken, and that the petitions be denied.

"Roll call on the resolution resulted as follows: First ward, Brown voting Yes; Burfening voting Yes, Second ward, Solsrud voting Yes; Schuett voting Yes. Third ward, Peitz voting No; Hoffman voting No. Resolution declared carried."

Subsequently contracts were made with W. D. Lovell for the construction of the waterworks system and with the John O'Connor Company for the construction of the sewer system; and prior to the trial said Lovell had completed all excavation work on the waterworks system and had completed the greater part of the waterworks system, and the city council had approved the estimates of the city engineer and had issued warrants to the said Lovell in the sum of \$79,923.53. The city, by condemnation suit, had procured title to a tract of land for the outlet of the sewer. The trial court found, as a fact, that the city of Hankinson had no adequate fire protection, and:

"That the only means of sanitation and disposition of sewage and refuse is by private privies and cesspools; that by reason of the condition of the soil and the general location of said cesspools citizens of Hankinson are in constant jeopardy of spread of typhoid fever and other infection and disease; that there is now in the course of construction in said city of Hankinson a large, modern, fully equipped sanitary school building, the plans of which provide for a system of sanitation, water supply, fire protection, and sewage which can be made available and useful only by the establishment of such waterworks and sewer systems provided herein."

The court further found:

"That there is no evidence to sustain the allegations of fraud and collusion set forth in the complaint, and that there is no evidence except that the defendants have each acted in the utmost good faith."

The first, and principal, contention of the plaintiffs is that the proceedings had subsequent to the filing of protests are invalid. It is pointed out that § 3704, C. L. 1913, provides that such protests must be considered at the next regular meeting of the city council after the expiration of the time for filing a protest; that the first publication of the resolutions of necessity here was made on July 22d; that the time for filing protests expired August 6th; that on August 4th—two days before the expiration of the time in which protests might be filed—a protest signed by some 176 persons was filed; that the statute provides that the regular meetings of a city council shall be held on the first Monday of each month; that the next regular meeting of the city council after August 6th would be on the first Monday of September; that the city council here did not take action upon the protests at such meeting, but took action thereon at a meeting held August 10th.

As already stated, the evidence shows that all the members of the city council were present at, and participated in, the meeting held August 10th. The evidence also shows that all the plaintiffs were present at such meeting. There is no contention that any of the protestants, or any other person interested, was in any manner misled, or deprived of an opportunity to be heard, on account of the protests being considered at the meeting held August 10th. It does appear that there was present at that meeting such a large number of persons that it became necessary to adjourn the meeting to some public hall in order to accommodate the crowd. Of course, the contention of the plaintiffs that the proceedings of the city council are irregular and invalid because no proper action was taken on the protests is predicated upon the premise that there was in fact a sufficient protest filed, viz. a protest signed by the owners of a majority of the property liable to be specially assessed for the proposed improvement. For the statute provides:

"If the owners of the majority of the property liable to be specially assessed for such proposed improvement shall not, within fifteen days after the first publication of such resolution, file with the city auditor a written protest against such improvement, then the majority of such owners shall be deemed to have consented thereto." § 3704, C. L. 1913.

In the complaint in this case it is alleged that the protests filed were signed by a sufficient number. In the answer it is denied that sufficient protests were filed, and it is alleged that the protests filed were, as a matter of fact, not signed by the owners of a majority of the property liable to be specially assessed for the improvement. Upon the trial the sufficiency of the protests became an issue. Both parties introduced some evidence upon the question. The defendants offered the testimony of the city engineer, who testified that at, and immediately prior to, the time the protests were acted on, he examined the tax lists to ascertain what real property in the city was owned by the protestants, and that he found that the protestants were not the owners of a majority of the property liable to be specially assessed. And upon the trial there was introduced in evidence a certain plat prepared by the city engineer, showing the property owned by the protestants and the property owned by others who did not protest. The city engineer testified that this plat showed the ownership of such property as it appeared on the last tax list on August 10, 1920. The only evidence adduced by the plaintiffs was that of the plaintiff Peitz, one of the aldermen, who testified that he had been a

resident of the city for some 35 years and that he knew that the plat, in certain particulars, was incorrect; that other tracts besides those shown thereon as belonging to the protestants did, in fact, belong to the protestants. This was the only evidence adduced upon this proposition. Leaving all questions as to the competency of the testimony of Peitz wholly on one side, and assuming without deciding that the ownership of the property might be proven in this manner, Peitz's testimony does not prove that the protests were in fact signed by the owners of a majority of the property liable to be specially assessed for the improvement. The plaintiffs' action is predicated upon alleged irregularities in the proceedings before the city council. As already indicated, the principal irregularity averred is that the city council proceeded in disregard of a valid protest. Manifestly the plaintiffs had the burden of establishing that a sufficient protest was filed. Hamilton, Special Assessments, §§ 694, 736, 569, 558, 432; McQuillin, Municipal Corporations, §§ 2117, 2010. That burden has not been sustained. And while the evidence is not satisfactory, the only deduction that can reasonably be made from the evidence in this case is that the protests were not signed by the owners of a majority of the property liable to be specially assessed for the improvement.

It is next contended that there is evidence tending to establish that the city council acted fraudulently. There is no contention, however, that there is any direct evidence of fraud. But it is asserted that the city engineer was largely responsible for the action of the council; and it is said that—

“Usually the engineer has some friend contractor with whom he is dealing or in whose business he has a direct interest, and instead of representing the city and guarding its interests he is really in ‘cahoots’ with the contractor.”

The evidence does not, however, establish any such condition. There is, in our opinion, no evidence of fraud, and we fully agree with the findings by the trial court on this question.

It is said that the improvements are too expensive, and are of doubtful value. These, of course, are administrative or legislative, and not judicial, questions. 25 R. C. L. p. 99; McQuillin, Mun. Corp. § 2004. There are few, if any, municipal improvements constructed but that some one questions the necessity or reasonableness thereof. The power to determine these questions is conferred upon the city council. The court

may inquire into the acts of the council to ascertain whether they have acted according to law, but the court may not substitute its judgment for the judgment of the city council as to the wisdom or expediency of the improvement.

Judgment affirmed.

BRONSON and BIRDZELL, JJ., concur.

GRACE, C. J., concurs in the result.

ROBINSON, J., dissents.

THE STATE OF NORTH DAKOTA, upon the relation of O. B. Herigstad, State's Attorney of Ward County, North Dakota, Respondent, v. WALTER McCRAY, MALINDA McCRAY, LILLIE DOE, True Name Unknown, and JOHN B. GROWE, Appellants.

(186 N. W. 280.)

Constitutional law — nuisance — statute authorizing injunction to abate bawdy-house nuisance held constitutional.

1. Section 9645 of the Compiled Laws of 1913, which provides for the granting of a temporary injunction at the commencement of an action to abate a bawdyhouse nuisance, is not unconstitutional as depriving a person of life, liberty or property, without due process of law.

Nuisance — human habitation not a nuisance per se.

2. A human habitation is not a nuisance per se and, to be a nuisance, it must have become inherently dangerous or subjected to some harmful or unlawful use.

Nuisance — property not a nuisance per se may not be destroyed summarily without notice.

3. Property which is not a nuisance per se may not be summarily and without notice or hearing, taken or destroyed in order to abate a

nuisance. It can be treated as a nuisance only after it is adjudicated to be such.

Nuisance — searches and seizures — statute directing seizure of property alleged a bawdyhouse nuisance held unconstitutional and to authorize unreasonable seizure.

4. Section 9646 of the Compiled Laws of 1913, which directs the seizure and retention of property alleged to be used as a bawdyhouse, which seizure is without notice and without a hearing to determine whether such place be a nuisance in fact, is unconstitutional in that it directs the taking of property without due process of law and violates the security of persons in their houses by directing an unreasonable seizure of the same.

Opinion filed Dec. 30, 1921.

Appeal from the District Court of Ward County, *Moellring, J.*

Reversed in part.

E. R. Sinkler, for appellant.

O. B. Herigstad, for respondent.

BIRDZELL, J. This is an action brought to abate a nuisance. The appeal is from an order entered denying the motion of the defendants to vacate a temporary restraining order and to discharge a writ of seizure.

The action was instituted by the state's attorney of Ward county, who filed a complaint on information and belief alleging that the defendants occupied certain described real property, and had occupied the same for two years past, maintaining thereon a bawdyhouse, and that, unless restrained, they would continue to maintain such common nuisance. The prayer for relief is:

(1) That the place be adjudged and decreed to be a common nuisance, and that an order may issue to abate it.

(2) That the defendants be perpetually enjoined from using the place as a bawdyhouse.

(3) That a temporary injunction be issued enjoining the defendants, until the further order of the court, from occupying and keeping open the premises as such common nuisance.

(4) That a warrant of search of the premises be issued and an in-

ventory of the property therein made, and that there be ordered a seizure of the place and a restraint of the defendants from engaging in prostitution or conducting a house of prostitution within the state.

(5) That the plaintiff have judgment for costs, attorney's fees, and general relief.

The complaint was verified by the state's attorney upon information and belief and was accompanied by affidavits of four qualified persons, each swearing to different occasions when he had been upon the premises and there solicited by one or more of the defendants. Those occasions range from November, 1920, to September 9, 1921. Upon motion of the state's attorney, the district court, on September 23, 1921, ordered that the defendants be enjoined from maintaining a common nuisance upon the premises, and that they be especially restrained during the pendency of the action from using the premises as a bawdyhouse. An order of seizure was also issued directed to the sheriff, commanding him to take possession of the premises and safely lock and hold the same to abide the final judgment in the action. On September 29, 1921, the defendants moved for a dissolution of the temporary injunctive order and for the discharge of the writ of seizure, and the following day an order was entered denying the motion. This appeal is from that order.

The appellants contended that the bawdyhouse statute (chap. 41 of the Penal Code) is unconstitutional and void in that it directs the taking of property and property rights, without due process of law. It is said that the statute authorizes the property of the defendants to be taken without notice, and without an opportunity to be heard, or to cross-examine the witnesses.

The injunctive order was issued in pursuance of § 9645, Compiled Laws of 1913. It is temporary in character, and does not prevent the defendants from using the property in any lawful manner. It only prevents them from maintaining a nuisance or engaging in a course of unlawful conduct pending the final judgment. A bawdyhouse is a nuisance at common law, and is consequently subject to the equitable jurisdiction of courts to abate, even in the absence of statute. A statute that is merely declaratory of the principles upon which equitable interference in such matters proceeds is not unconstitutional. *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. ed. 205, and authorities cited in note L. R. A. 1917B, 1078. In our opinion there can be no serious question of the right of the Legislature to provide for the

issuance of temporary injunctions in such cases. See authorities *supra*. Without further discussion we hold that the statute in question is clearly valid in so far as it authorizes an action to be maintained by the state's attorney and a temporary injunction to be issued at the commencement of the action which will prevent the continued maintenance of the nuisance pending the final judgment.

But that portion of the order which directs the seizure of the premises stands upon a different legal foundation. It is based upon a separate section of the statute, namely, § 9646, which reads as follows:

"If, at the time of granting the temporary injunction described in § 9645, an affidavit shall be presented to the court or judge stating or showing that any of the offenses mentioned in § 9644 are transpiring or being carried on upon the premises mentioned in the affidavit, particularly describing the said premises where said nuisances are located contrary to law, the court or judge must, at the time of granting the injunction, issue his warrant commanding the officer serving said writ of injunction at the time of such service to take possession of said room, building or place and take the same into his custody and securely lock and hold the same to abide the final judgment in the action. The expenses for such holding to be taxed as a part of the costs in the action; and such officer shall also take and hold possession of all personal property found on such premises, and shall take and hold the possession of such premises and keep the same closed until final judgment is entered, or until the possession of the same shall be disposed of by an order of the court or judge upon a hearing had before it for such purpose."

It is contended that the above statute is unconstitutional in that it directs the taking of property without due process of law. It is urged that under this statute, without any prior adjudication whatsoever of unlawful use, a person may be dispossessed of his home, and thus deprived of his property until his right to continue possession can be determined. It is well settled that the constitutionality of a statute does not depend upon what is done under it, nor how it has been applied in a particular case, but upon what may be done under its authority. *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 35 Sup. Ct. 625, 59 L. ed. 1027. Nor is it permissible to show that, if due process were in fact observed in the particular case, the same result would have been reached in the long run. *Coe v. Armour Fertilizer Works*, *supra*.

It will be noticed that the statute provides for no hearing of any sort

in advance of the seizure by the officer. All of the anterior proceedings are wholly *ex parte*. The mere presentation of an affidavit sworn to by any person stating that certain offenses are transpiring upon the premises creates a mandatory duty on the part of the judge to issue a warrant commanding the officer to take and hold possession to abide the final judgment in the action. In our opinion this statute is clearly unconstitutional in that it directs the taking of property without due process of law in violation of both the state and federal Constitutions, and the eighteenth section of the state Constitution, which says that—

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.”

There is no higher property right known to the law than the right of the individual to the possession of his home, and the deprivation of this right, even temporarily, is not to be sanctioned unless ample legal cause be first shown to exist. The home of an individual, high or low, saint or sinner, does not become a nuisance *per se* upon a complaint signed upon information and belief, accompanied by an affidavit of some person that it is being used as a bawdyhouse. The information may not be well founded, and the affidavit may not be true. Prior to the dispossession commanded by the statute there is no opportunity to determine whether the one is ill-founded and the other false.

A structure fit for the habitation of human beings cannot be a nuisance *per se*. It can only become a nuisance by virtue of inherent unsafety or through some harmful or illegal use. Where illegal use is relied upon to establish it to be a nuisance, that use must be adjudicated as a fact. When an appropriate judgment is entered to that effect, it may then be promptly abated or otherwise dealt with according to law. Not being a nuisance *per se*, however, it cannot be treated as such for purposes of abatement prior to such adjudication. By way of emphasis, we may repeat that the property itself is not alleged to be harmful, and it must therefore be presumed to be harmless. It is only the use that is harmful, and such use is promptly enjoined by a temporary injunction. This remedy should be efficacious to put a speedy end to the nuisance without taking the further, and apparently useless, step of seizing the premises without notice to the occupants and without regard to whether

the security of a home be thereby violated.

The distinction between the summary abatement of a nuisance per se through the destruction of the instrumentality in which the nuisance inheres and the like abatement of a nuisance where property capable of lawful use is involved, is well expressed in Freund on Police Power, §§ 525 and 526. The author says:

"525. The power of summary abatement does not extend to property in itself harmless and which may be lawfully used, but which is actually put to unlawful use or is otherwise kept in the condition contrary to law. So, if a certain kind of transportation is a nuisance, this does not justify the tearing up of railroad tracks. A house of ill fame may not be torn down summarily; a building where liquor is kept unlawfully for sale may not be destroyed; and a canal may not be destroyed because not kept in a clean condition. The unlawful use may, however, be punished, and the punishment may include a forfeiture of property used to commit the unlawful act. While in many cases this would be an extreme measure, it is subject to no express constitutional restraint except where the constitution provides that every penalty must be proportionate to the offense. * * *

"526. Such forfeiture is not an exercise of the police power, but of the judicial power; i. e., the taking of property does not directly subserve the public welfare, but is intended as punishment for an unlawful act. Hence forfeiture requires judicial proceedings, either personal notice to the owner, or at least a proceeding in rem with notice by publication."

The statute in question directs that the owner or occupant be dispossessed without any hearing whatsoever. In addition to the authorities cited by Freund, the principles stated will be found to be well illustrated in the recent decision of the Supreme Court of Illinois in *People v. Marquis*, 291 Ill. 121, 125 N. E. 757, 8 A. L. R. 874.

In view of our conclusion that the statute is unconstitutional in that it directs the taking of property without due process of law and violates the security of persons in their houses by authorizing an unreasonable seizure thereof, we deem it proper to say that through our researches we have been unable to find any bawdyhouse statute going to the extreme lengths of the one in question. This court has previously held that this statute does not authorize the destruction of useful personal property found on the premises. *State ex rel. McCurdy v. Bennett et al.*, 37 N. D. 465, 163 N. W. 1063, L. R. A. 1917F, 1076. It follows

from what has been said that the writ of seizure must be discharged. To this extent, the order appealed from is reversed.

CHRISTIANSON and BRONSON, JJ., concur.

ROBINSON, J. (concurring specially). In this case it appears that each of three detectives subscribed to a paper in the form of an affidavit purporting to be sworn to before another detective. The chances are that the papers were not sworn to, and that they were merely subscribed. Three of the affidavits charge that at a certain time and place Lillie Doe made improper advances to them, and so they characterized the place in which she lived as a bawdyhouse. On the affidavits, without any finding of facts or any adjudication, the defendants were enjoined from continuing to do wrong. They were told not to do it again, and that was all right. The judge likewise issued an order for the sheriff to take possession of their home and to lock and hold the same; that is, to throw the defendants out of their home onto the street without a moment's notice. That was dead wrong. If a bad person can be thrown out of his home in that way, a good person—a judge of the Supreme Court—may be thrown out in the same manner. No person has any security. It is said such a procedure has been sanctioned by the United States Supreme Court. *Mugler v. Kansas*, 123 U. S. 623, 7 Sup. Ct. 273, 31 L. Ed. 205. The Kansas case was under a common nuisance act providing that—

“Upon a judgment of any court having jurisdiction finding a place to be a nuisance, the proper officer shall be directed to shut up and abate the same.”

In reasoning the court says:

“Nor is the court required to adjudge any place to be a common nuisance simply because it is charged by the state to be such. It must first find it to be of that character; that is, (the court) must ascertain, in some legal mode, whether * * * the place * * * is being so used, as to make it a common nuisance.”

In this case it does not appear from the warrant of seizure or from any document that the court had made a finding or adjudication as to whether or not the place is a common nuisance. Without first giving defendants an opportunity to be heard, the sheriff is ordered to take

possession of the house and shut it up and throw them onto the street. That is not due process of law, and it is a violation of the constitutional guaranty against unreasonable searches and seizures. Due process of law does not mean that an accused party is granted a trial by jury. It does mean that he cannot be thrown out of his house without some hearing or some form of trial. "In judicial proceedings the law of the land requires a hearing before condemnation." Here is the forceful language of the Supreme Court of the United States:

"That a man is entitled to some notice before he can be deprived of his property is an axiom of law to which no citation or authorities would give additional weight." *Roller v. Holly*, 176 U. S. 398—409, 20 Sup. Ct. 410, 44 L. ed. 520; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Stuart v Palmer*, 74 N. Y. 183, 30 Am. Rep. 289.

Very easy it would have been for the court to have issued an order to show cause and to have given defendants some hearing and to have confronted them with the witnesses against them. But the prosecution is under a statute which does not contemplate or provide for any such hearing. Comp. Laws, § 9646. The statute is to the effect that on ex parte affidavits stating certain things the judge shall issue a warrant to dispossess all the parties of their homes without first giving them any opportunity to be heard. The statute is clearly void, and it is void under the decisions cited in the Kansas case. The court there said:

"Nor is the court required to adjudge any place to be a common nuisance simply because it is charged by the state to be such. It must first find it to be of that character; that is, must ascertain in some legal mode, whether the place in question has been or is used so as to make it a common nuisance."

For those reasons the order of seizure should be reversed.

GRACE, C. J. (specially concurring). As we view § 9645, C. L. of 1913, it merely provides for the issuing of a temporary restraining order to prevent the continuance of an alleged nuisance during the pendency of the action, which was commenced to abate it or to restrain a course of unlawful conduct. The restraining order remains in force only until final judgment.

We see no reason why the above section is not a valid one, and we think it is. It is different, however, with § 9646, which, when a tem-

porary injunction is issued, as provided in § 9645, authorizes the court or judge, at the time he issues the temporary injunction restraining the alleged nuisance, also to issue his warrant to the officer serving the writ of injunction to take possession of the room, building, or place into his custody, and to securely lock and hold the same to abide the final judgment in the action, and likewise to take and hold possession of any personal property found on the premises.

It is thus clear from the latter section that the possession of the property, either real or personal, mentioned in the section, may be taken from one against whom the proceeding is brought before there is any opportunity for a hearing, and before final judgment. This clearly would be taking property without due process of law. I am therefore of the opinion that § 9646 is clearly unconstitutional.

In the case of *State v. Bennett*, 37 N. D. 465, 163 N. W. 1063, L. R. A. 1917F, 1076, it was held that the section last mentioned did not authorize the destruction of useful personal property found on the premises. The writ of seizure should be discharged, and the order appealed from modified accordingly.

W. A. DEXTER (As Executor), Appellant, v. E. B. LICHTENWALTER and RUBY LICHTENWALTER, Respondents.

(186 N. W. 279.)

Mortgages—held that testator's executor could not enforce mortgage taken by testator to prevent loss of land given to a son through the latter's improvidence.

In an action to foreclose a real estate mortgage where it appeared that the land covered by it had been deeded by a father to his son with the understanding that the land was a gift; that the father had taken from the son and his wife the notes and mortgage in question for the purpose of preventing the grantees and mortgagors from losing their homestead through improvidence; that the mortgagee subsequently made a will reciting that he had advanced money or property to the mortgagor amounting, approximately, to \$5000.00, there being no showing that the advancement consisted of money or property other than the land so

mortgaged; and that the son, prior to the conveyance to him, had long been in possession of the land paying taxes but no rent—it is *held*:

The notes and mortgage are not enforceable at the suit of the executor of the mortgagee.

Opinion filed Dec. 30, 1921.

Appeal from the District Court of Foster County, North Dakota,
Coffey, J.

W. E. Hoops, R. C. Morton of counsel, for appellant.

Under the maxim above cited it is the rule of law that equity always refuses to lend its aid in any manner to one seeking its active interposition who has been guilty of unlawful or inequitable conduct in the matter in relation to which he seeks relief. 16 Cyc. Law & Procedure, p. 145 and case there cited.

The right of the executor to bring this action in his own name has been brought into question and bearing upon that we say the authority is so overwhelmingly in support of our contention we offer no argument. 18 Cyc. 23; 18 Cyc. 20; American Soda Fountain v. Hogue, 17 N. D. 375; Barry v. Howard, 127 N. W. 526.

That debt being barred does not extinguish the right to foreclose the mortgage. Jones on Mortgages, § 1204; Wisewell v. Baxter, 20 Wis. 680; Wigerton v. Schneider, 26 Wis. 385; Henry v. Mina Co. 1 N. W. 619; Read v. Edward, 2 N. W. 262.

This property represented by the notes cannot be a gift. To be a gift it must have been executed as such and to execute this gift these notes must have been delivered up to defendant. Donover v. Argo, 44 N. W. 818 (Iowa); Jones, Evid., p. 980, § 781; Carr v. Carr, 101 N. W., p. 550.

C. B. Craven, for respondents.

"Parol evidence is admissible to prove or explain or to impeach the consideration of a negotiable instrument." Enc. of Evid. Vol. II, p. 491, and cases cited; Enc. of Evid. Vol. II, p. 493; Harris v. Harris, 69 Ind. 181.

"Since the question of advancement between father and son is a question of intention, parol evidence was admissible to show that a note

given by a son for the sum furnished him by his father was intended as a memorandum of an advancement." *Gardner v. Taylor*, 58 S. W. 758; *Stoery v. Stoery*, 214 Fed. 973.

"Where a protected party on cross examination goes into new matter not touched upon in the direct examination and as to which the witness is incompetent under the statute, he thereby waives the incompetency as to such new matter." *Enc. of Evi. Vol. XII*, p. 1010 and case cited note 17. This is also the view of the Iowa Court: *Millison v. Ritters*, 118 N. W. 512; *Walkley v. Clark*, 78 N. W. 70.

Our own statutes disqualifying a witness removes the prohibition if the witness is called by the adverse party. 1913 Code § 7871.

"The findings of fact made by a trial court as where a trial by jury has been waived, or findings were made in the Court of trial or proceedings, are on the same footing as a verdict of the jury, unless there has been some statutory provisions to the contrary, and are generally considered conclusive on appeal." 4 C. J. 876 and cases cited, note 78.

This Court has on at least five different occasions so held: *Foster County State Bank v. Hester*, 18 N. D. 135, 119 N. W. 1044; *State v. Banks, et al* 24 N. D. 21; 138 N. W. 973; *Bergh v. John Wyman Land & Loan Co.* 30 N. D. 158; 152 N. W. 281; *Stavens v. Elevator Co.* 161 N. W. 558; *Yocum v. Chrisman*, 168 N. W. 621; *Lark Equity Exchange v. Jones*, 171 N. W. 863.

BIRDZELL, J. This is an appeal from a judgment of dismissal in an action to foreclose a real estate mortgage. Trial de novo. The facts are as follows:

In the fall of 1901, the defendant, E. B. Lichtenwalter, made a homestead entry on a quarter section of land in Foster county. The following year, his father, Solomon R. Lichtenwalter of Toledo, Iowa, purchased a half section of land in the same vicinity for \$3,200. The defendant had possession of this half section from the time his father purchased it paying all the taxes, with the exception of the first year's tax, and no rent. When the defendant had completed the proof on his homestead in 1905, he moved his improvements to the northeast quarter of section 29, township 146, range 64, which was one of the quarter sections that had been purchased by his father. He, the defendant, made other improvements there, and continued to make it his home. In 1910, the

father conveyed his one-half section to the defendant, and at about the same time, June 15, 1910, the defendant and his wife executed four notes for \$1,000 each, payable to the father, which were secured by a real estate mortgage of even date on the northeast quarter, where the defendant was living. This is the mortgage sought to be foreclosed in this action. The following October, the defendant's father made a will which contains the following paragraph:

"I now proceed to make some specific devises and bequests but have already advanced to my daughter Geneve and to my son Bruce B. property or money in value or amount substantially equal to what I now give to my other children, I make no special devise or bequeath to them."

He then gave about \$5,000 to each of the other children. In July of the following year, 1911, the father died. The notes and mortgage in question were inventoried as part of his personal estate, and this action is brought by the executor to collect the notes and foreclose the mortgage.

In our opinion the record presents no doubtful question of law or fact. It is well established by competent evidence that the senior Lichtenwalter had purchased this one-half section of land for his son, the defendant; that he did not have full confidence in the son's ability to take care of his business affairs; that he specifically disapproved of at least one doubtful venture, when the son contracted a large indebtedness in the purchase of a threshing outfit; and that, while he was desirous of transferring the land to the son, he wanted to fix it so that the defendant and his wife could not be deprived of their home through improvidence. The defendant testified without objection that his stepmother had told him that his father had stated that the notes were not to be collected. Upon direct examination the defendant was not asked concerning the transaction between himself and his father. Such evidence was doubtless conceived to be incompetent under § 7871, C. L. of 1913. But upon cross-examination plaintiff's counsel inquired into the transaction exhaustively, as a result of which it appeared that an arrangement existed between the defendant and the father whereby, if the defendant would move his buildings upon the father's land, break it up and improve it, that he, the father, would deed the land to the defendant; also that the only object of the mortgage was to protect the homestead against the possibility of its being taken by creditors or voluntarily frittered away by the defendants. Since the evidence clearly establishes the transaction

to have been of the character stated, it is clear that there was no actual consideration for the notes and the mortgage, and that at the time they were given it was understood that they did not represent an indebtedness, and that the father would not enforce collection. Furthermore, the record is devoid of any evidence tending to establish that the father ever advanced any other moneys or property to the defendants. Thus, in the light of the will, which recites, in effect, that approximately \$5,000 in money or property had been advanced to the defendant Bruce B., it must be found that this one-half section, the value of which was no greater than this, was the property referred to as having been advanced. Clearly, it was not advanced at all if the testator held an enforceable mortgage for approximately its value.

Counsel argue that the principal defendant has practically acknowledged the indebtedness in a letter dated November 1, 1919, which was written to his stepsister, one of the legatees. The letter is typewritten, and apparently was drafted by some one other than the defendant for his signature. It does contain a specific acknowledgement of the indebtedness, and suggests that the addressee and the other heirs give their consent for the executor to withhold foreclosure proceedings and await the collection of the notes and mortgages until final settlement of the father's estate, at which time the amount might be deducted from the defendant's share. The letter in evidence is a carbon copy and is so drawn as to indicate that similar letters were sent to the other heirs and legatees with a view to effecting an amicable adjustment. The complaint alleges that a notice of intention to foreclose had previously been served upon the defendant, and the defendant testified, in substance, that he would rather have given up his interest in the estate of his father than be brought to court in this foreclosure proceeding.

We think that, in the light of the evidence showing the nature of the transaction and of the pressure that was being brought to bear to collect the notes given by the defendant, the effect of the letter as an admission is largely destroyed. We are of the opinion that the judgment is clearly right, and it is affirmed.

GRACE, C. J., and BRONSON, CHRISTIANSON, and ROBINSON, JJ., concur.

D. W. LEONARD, Appellant, v. LOUIS P. ROBERGE, Respondent.

(186 N. W. 252.)

Libel and slander — language held not libelous per se.

The defendant in answering a newspaper article published by the plaintiff of and concerning the defendant said inter alia that the plaintiff "tells falsehoods in that he says he does things in all fairness." *Held* that these words must be construed in connection with the subject to which they relate, and in light of the undisputed facts and circumstances, and that when so construed they are not libelous per se.

Opinion filed Dec. 30, 1921.

From a judgment of the district court of Rolette County, *Kneeshaw, J.*, plaintiff appeals.

Affirmed.

Fred E. Harris, for appellant.

Special damages need not be alleged where article is libelous per se. R. C. L. Vol. 17 p. 264; *Morse v. Times-Republican Printing Co.* 100 N. W. 867.

To publish that a man is a liar or that he utters falsehoods is libelous per se. Cyc. Vol. 25 at p. 255; 17 R. C. L. 289; *Prewitt v. Wilson*, 103 N. W. 365, (Iowa); *Morgan v. Andrews*, 64 N. W. 869, (Mich.); *Sanford v. Rowley*, 52 N. W. 1119, (Mich.); *Trebbly v. Transcript Pub. Co.* 76 N. W. 961, (Minn.); *Munson v. Eathrop et al.*, 71 N. W. 596, (Wis.); *Candrian v. Miller*, 73 N. W. 1004, (Wis.); *Holston v. Boyle et al.*, 49 N. W. 203, (Minn.).

"Publications calculated to expose one to public contempt or ridicule are libelous, although they involve no imputation of crime, and are actionable without a special allegation of damages." *Morse v. Times-Republican Printing Co.* 100 N. W. 867, (Iowa); *Peterson v. Western Union Telegraph Co.* 167 N. W. 646, (Minn.); *Byram v. Aiken, et al.* 67 N. W. 87 (Minn.); *Sheibley v. Huse*, 106 N. W. 1028 (Neb.)

Verret & Stormon, for the respondent.

"In actions of slander for words not in themselves actionable, the right to recover depends upon the question whether they caused special damage, and the special damage must be fully and accurately stated." Sutherland Code Pleading & Practice, Vol. 3 p. 2389, § 3954.

Special damages must be alleged "where the defamation is of such a character that the court cannot see that its tendency and effect would be to defame or degrade the plaintiff or to render him odious or contemptible." 18 Am. & Eng. Enc. of Law, 867; 25 Cyc. 453-454 and 455.

CHRISTIANSON, J. This is an action for libel. The complaint alleges that the plaintiff is and for a long time has been a resident of the village of Rolette, in Rolette county, in this state; that the defendant caused to be published of and concerning the plaintiff the following statements in the Rolette Record, a newspaper of general circulation published in said village of Rolette, to wit: In the January 28, 1921, issue of said newspaper:

"In looking over the bills for hauling gravel that were presented to the board of county commissioners, for their approval, I was surprised to see that Mr. D. W. Leonard was paid at the rate of \$1.50 per yard while on my bill for the same kind of work, it was not stated at what rate I was paid. The fact is that when Mr. Seltum engaged me for this work, I was told that \$1.00 per yard was what he was paying every one for hauling gravel; my loads were hauled further than Mr. Leonard's and still I got \$.50 less a yard. It seems to me that either Mr. Seltum must have 'forgot' when he told me that price, or else he had one price for I. V. A. haulers and another price for N. P. L. haulers; besides there the gravel I hauled for the county was needed, and was put in a grade where it would better the road, there was a great deal hauled in Mr. Seltum's district that did not improve the road—in fact—made it worse for several months to come. What does the average voter think of this way of spending the county funds?

"(Signed)

Louis P. Roberge."

And in the February 25, 1921, issue of said newspaper:

"Oh, the article I put in the paper fit D. W. Leonard because he does all the howling and tells falsehoods in that he says he does things with all fairness; well he must say it himself, because nobody else will. D. W. Leonard is a rich enough man to not farm his own land. Of course

he can raise no more than one crop at a time, but he will drive seven miles from his residence in a cold snowstorm and dig in a gravel pit and throw gravel on a hill where not needed, just to accommodate taxpayers. People are not so foolish as D. W. Leonard thinks, so we will let him howl until John Clark comes to see it. (Signed) Louis P. Roberge."

The complaint further alleges that the words so published were false and defamatory, and were maliciously published of and concerning the plaintiff for the purpose of injuring his good name and reputation, and that by said publication the plaintiff has been damaged in the sum of \$5,000.

The defendant in his answer admitted the publications, but denied the other averments of the complaint. The defendant further alleged that the second statement, namely, the statement published in the February 25, 1921, issue of the Rolette Record was written and caused to be published by the defendant in answer to the following article, which the plaintiff had caused to be published of and concerning the defendant in the February 11, 1921, issue of said newspaper, to wit:

"In an article which appeared in the Rolette Record some time ago, Mr. Louis P. Roberge charges unfairness in payment for hauling gravel. D. W. Leonard and Jake Romanauk hauled gravel with Mr. Roberge. The same amount of gravel Mr. Roberge is charging the county a yard and a half, we are putting on the road for one yard. Why don't Mr. Roberge tell the truth? Should he get paid at all? Mr. Roberge came to us and wanted us to cut down the amount of gravel we were putting on our loads saying Mr. Seltum would never know. How does that sound to the taxpayers? Just because your commissioner could not be in the gravel pit all the time we measured Mr. Roberge's gravel box when he started and told him we were supposed to keep track of the loads and report the amount of gravel hauled which we did with all fairness. Give the devil his dues, and no more. We too pay taxes.

"(Signed)

D. W. Leonard.

"Jake Romanauk."

Upon the trial the defendant objected to the introduction of any evidence under the complaint on the ground that it failed to state facts sufficient to constitute a cause of action. In a memorandum decision made part of the record on this appeal the trial court says:

"This matter came before the court on an objection to any evidence being introduced on the ground that the complaint did not state facts sufficient to constitute a cause of action, and more particularly on the grounds that the article charged as libelous was not actionable or libelous per se, and no special damages were claimed in the complaint, being really a demurrer to evidence. The court, while being of the opinion that the article in question was not on its face actionable per se, decided to overrule the objection and let the case go to trial, so that all the facts could come out on the trial and would then be in a better position to decide the question, and so informed counsel, but plaintiff's counsel stated to the court that if the court later in the trial of the case, after hearing the matter, would finally decide that the article was not actionable per se, that he would prefer that the court pass upon the question on the merits now rather than go to trial and eventually do so. The counsel for plaintiff therefore in open court conceded and stipulated that the first publication was not libelous or actionable per se, and that the second article which he claimed was actionable per se was written by defendant in answer or reply to an article written and published by plaintiff himself, and that the article set forth in the answer was a correct copy of the article written and published by plaintiff, and which the second article was an answer to, and further conceded in open court that, under those circumstances, if the court would later on the merits hold the second article not to be actionable per se, he was out of court, as he had not alleged any special damages and could not prove any, and asked the court that, if he would, under all the facts in the case, hold that the second article was not actionable per se, he would prefer the court to so decide the case without taking up the time of a trial, and the court took plaintiff's counsel at his word, and at his request decided the matter without taking the time to try the case. Therefore the decision was based, not on a demurrer to evidence on the pleadings, but on certain stipulations and conceded facts, and was really a decision on the merits on stipulation and conceded facts."

Hence, for the purpose of testing the sufficiency of the complaint, the statement charged to be libelous must be considered in light of the existing circumstances. In other words, the complaint must be construed as though it averred that the plaintiff had caused to be published of and concerning the defendant the statement set forth in the answer (and hereinabove set forth), and that the last statement published by the

defendant of and concerning the plaintiff was in answer to the statement which the plaintiff had caused to be published of and concerning the defendant. See *Lynch v. Standard Pub. Co. et al.*, 51 Utah, 322, 170 Pac. 770. Does the complaint as so construed state a cause of action? That is the question here.

The complaint contained no inducement or innuendo, and no special damages are claimed. The plaintiff contends that the last statement published contains language which is libelous per se. And he concedes that if the language is not libelous per se, the complaint is insufficient and the ruling of the trial court correct. The sole contention of the plaintiff is that the words in the last statement published by the defendant, to the effect that the plaintiff "tells falsehoods," are libelous per se, and that consequently injury is presumed to have resulted from the publication. "Libel is a false and unprivileged publication by writing, printing, picture, effigy or other fixed representation to the eye which exposes any person to hatred, contempt, ridicule or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." § 4352, C. L. 1913."

It is well settled that in arriving at the sense in which alleged defamatory language is employed, it is proper and necessary to consider the circumstances surrounding its publication and the entire language used. 17 R. C. L. p. 313. And that in determining the actionable quality of words claimed to be libelous, the entire writing, including the title or headlines, must be considered. 18 Am. & Eng. Ency. L. 985; 25 Cyc. 357. And particular words or phrases must be construed in connection with the remainder of the article of which they form a part. 18 Am. & Eng. Ency. L. 985; 25 Cyc. 357. The actionable quality of the words is dependant primarily upon the effect which the language complained of was fairly calculated to produce, and would naturally produce, upon the minds of persons of reasonable understanding, discretion, and candor. 18 Am. & Eng. Ency. L. 977. But in arriving at the sense in which the defamatory language is employed it is proper and necessary to consider the circumstances surrounding the publication and the entire language used. *McCue v. Equity Co-Op. Pub. Co.*, 39 N. D. 190, 167 N. W. 225, 229. There is no contention that the publication in question had any tendency to injure the plaintiff in his occupation. In fact his occupation is not even mentioned in the complaint. The question, therefore, is whether it must be said as a matter of law that the publication neces-

sarily must have had a tendency to expose the defendant to hatred, contempt, ridicule, or obloquy, or cause him to be shunned or avoided. In our opinion the publication is not susceptible of such interpretation. This is not a case wherein the plaintiff has been charged with being a common liar, or with having made false statements in the course of business or in the discharge of official duties. Nor is it a case where the plaintiff has been exposed to ridicule or obloquy as a result of a charge that he has wilfully falsified facts, incidents, and situations. The alleged libelous statement was contained in an article published by the defendant in answer to an article published by the plaintiff of and concerning the defendant. In his article the plaintiff had said that he did certain things "with all fairness." The defendant countered by saying that the plaintiff "tells falsehoods in that he says he does things with all fairness." No case has been cited where a statement, made in words and under circumstances anything like similar to those here, has been held libelous per se. A somewhat similar question was considered by the Supreme Court of Connecticut in *Walker v. Hawley*, 56 Conn. 559, 16 Atl. 674. In that case the defendants published of the plaintiff, in a political journal conducted by them the following:

"This part of the state was especially favored by the Democratic state committee by the wholesale circulation of the remarkable letter of Albert H. Walker, giving his so-called reasons for falsely asserting that Mr. Lounsbury's nomination was secured by corrupt means."

And it was contended that the words "falsely asserted" must be interpreted as imputing to the plaintiff a wilful falsehood. The Supreme Court of Connecticut overruled this contention, and held that the words must be construed in connection with the subject to which they related, namely, the letter which the statement purported to answer, and not as an attack upon the personal veracity of the writer of the letter. In its opinion, the court said, in part:

"A false assertion, in logic, ordinarily has a somewhat modified meaning. To say of a man that he reasons from false premises, or draws false conclusions from correct premises, is not libelous. In such cases the word 'false' means no more than that the premises were not true, or that the conclusion was erroneous. So also, to say of an advocate before a jury that he falsely asserted the guilt or innocence of the accused, that he falsely maintained the affirmative or negative of the issue, is not libelous, inasmuch as it means simply a mistaken view as to the effect of

the evidence. * * * The words 'falsely asserting' then, when taken in connection with the subject-matter to which they relate, mean no more than that the proposition which he attempted to prove was a false one; that is, that the conclusion or inference which he drew was not justified by the facts."

The alleged libelous words in this case were used in the course of a somewhat heated newspaper controversy. They were used, not as an original assertion, but as an answer to a statement made by the plaintiff. This appears from the article itself. All that a person who read the article in question would learn would be that the plaintiff in a former article had stated that he (the plaintiff) did things with all fairness, and that the defendant denied the correctness of that statement. In our opinion the trial court was correct in holding that the article was not libelous per se.

Judgment affirmed.

BRONSON, BIRDZELL, and ROBINSON, JJ., concur.

GRACE, C. J. (specially concurring). It is clear to my mind that the language alleged to be libelous per se cannot, by the greatest stretch of imagination, be said to be libelous.

BERNARD LECHLER, Respondent, v. MONTANA LIFE INSURANCE COMPANY, OF HELENA, MONTANA, a Corporation, Appellant.

(186 N. W. 271.)

Insurance — insurer's agent for soliciting insurance held insurer's and not insured's agent when soliciting reinstatement.

Action upon an insurance policy. The policy had lapsed for non-payment of the second premium. Agents of the insurance company solicited reinstatement and obtained the signature of the policy holder to a reinstatement blank, and a note for the premium, giving him as-

insurance at the time that upon receipt of his application and note the policy would be reinstated by the company. Five weeks later the actuary returned the note to the agent who sent it, stating that it could not be received in payment and suggesting that further attempts be made to secure payment of the premium partly in cash. The policy holder was not notified and the note was not returned to him. About six weeks later, the policy holder died. It is *held*:

An agent of an insurance company with authority to solicit applications for insurance is the agent of the company within § 6632, of the Comp. Laws of 1913 and not of the insured while soliciting an application for reinstatement.

Insurance — insurance policy clause against waiver by agent may be waived.

2. A clause in an insurance policy to the effect that it cannot be altered by an agent or its provisions waived, except by written agreement of the company, is for the benefit of the company and may be waived by it.

Insurance — where insurer's agent led insured to believe that by conforming to stated requirements his policy would be reinstated and he complied, the insurer, by neglecting to notify of rejection, waives nonliability clauses.

3. Where a policy holder is led honestly to believe that by conforming to certain requirements stated by an agent, his policy will be reinstated, and where he complies with the requirements and thereafter the company neglects to notify him that his reinstatement application is rejected, it waives the provisions of the policy under which its non-liability might otherwise be asserted.

Contracts — where offeree is under duty to notify offerer that his proposal is rejected, failure to communicate rejection may result in legal assent.

4. Where the relations between parties are such that an offeree is under duty to notify the offerer that his proposal is rejected, the failure to communicate the rejection may result in legal assent to the terms of the offer.

Opinion filed Dec. 1st, 1921. Rehearing denied Dec. 30, 1921.

O. W. McConnell, Keohane & Jones and G. J. Oppegard, for appellant.

The insured is as a matter of law presumed to know the terms and conditions set forth in his contract of insurance, and that the same are binding upon him. *Clevenger v. Mutual Life Insurance Co.* 2 Dak. 114. 3 N. W. 313; 14 R. C. L. p. 986, § 159.

"A stipulation in the policy that no agent has power to modify the

terms of the contract or waive its conditions is notice to the insured of limited authority of the agent in these respects, and under such a stipulation, insured cannot rely on any actual conduct of the agent as constituting a modification or waiver." 25 Cyc. 861, and cases cited in note 37 thereunder; *Johnson v. Aetna Ins. Co.* 107 Am. St. Rep. (Ga.) 123.

"Estoppel or waiver involves knowledge or notice of that which the company estoppes itself from insisting upon, or waives the right to insist by way of defense, and in absence of knowledge or notice the company is not precluded from asserting the defense." *Lamb v. Prudential Ins. Co.* 22 N. Y. App. Div. 552, 48 N. Y. Suppl. 123; *Northern Assurance Co. v. Grandview Bldg. Ass'n.* 183 U. S. 308 46 L. ed. 213.

Simpson & Mackoff, for respondent.

"Where an insurance company has once manifested an intent to waive a forfeiture, it cannot subsequently withdraw the waiver unless for fraud on the part of the insured." *Beauchamp v. Insurance Company*, 38 N. D. 483.

"An agent clothed with the power of soliciting insurance, delivering policies and collecting premiums is a general agent, and as such has power to waive forfeitures and conditions in the policy, notwithstanding the provision therein that no agent has such power." *Continental Casualty Co. v. Johnson*, 119 Ill. 93, 1 C. J. 406, note 19 (a.)

"An agent may waive payment of premium." *North American Accident Insurance Company v. Bowen*, 102 S. W. 163.

"Where a clerk of a general agent induces the insured to believe that he has paid the premium due from the insured, the company is estopped to deny payment." *Union Casualty Co. v. Bragg*, 63 Kans. 291, 65 Pac. 272.

"General agents have authority to bind the company within the apparent scope of their authority although they act in disregard of instructions not known to the persons contracting with them." 22 Cyc. 1430, § B.

"The acts of the insurance agent are binding on the company." 11 L. R. A. note on p. 342 and cases cited.

In which case it is held:

"A local insurance agent having ostensible general authority to solicit applications and make contracts for insurance and to receive first premiums binds his principal by any acts or contracts within the general

scope of his apparent authority, notwithstanding an actual excess of authority. *Stearns v. Merchants Life & Casualty Company*, 38 N. D. 524.

"A general agent of a company, that is, one empowered to enter into contracts, take risks and receive premiums has general authority to dispense with conditions in policies issued through his agency in the absence of any limitation upon such authority known to the insured, for such acts are within the apparent scope of his authority." *Royal Neighbors of America v. Noman*, 52 N. E. 264, particularly that part of the opinion found on p. 266; 75 Ill. App. 566; *Home Fire Insurance Company v. Kuhlman*, (Neb.) 78 N. W. 936.

BIRDZELL, J. This is an appeal from a judgment in favor of the plaintiff, which was entered on the verdict of a jury. The facts are as follows: The plaintiff is the beneficiary of a life insurance policy issued by the defendant on the life of his uncle, Henry Boerger. The policy was issued on November 17, 1917, in the sum of \$5,000. The premiums were payable on November 17th of each year, with the proviso that, after the policy had been in force a year, 31 days of grace would be allowed. The insured paid the first premium by giving a promissory note. When the second premium became due the insurance company sent an official receipt to the Beach State Bank of Beach, N. D., with instructions to deliver it to the insured upon payment of the premium. The insured had notice that the receipt had been sent, but he did not pay the premium to the bank, nor forward it to the company within the grace period, and the policy lapsed, according to its terms, on December 19, 1918. On the 3rd or 4th of February, 1919, James McGowan, a general agent of the defendant company, and James Haigh, an insurance agent of the same company, called at the farm of Henry Boerger, the insured, for the purpose of obtaining payment or renewal of the first premium note. At this time they also obtained the signature of Boerger to an application for reinstatement of the policy; it being agreed that he should give a note for the renewal premium. Two or three days later, Boerger went to the office of Haigh in Beach, and signed a promissory note for the full amount of the second premium, payable to the order of the Montana Life Insurance Company, and due on or before June 17, 1919. In a letter dated February 6, 1919, Haigh forwarded the application for reinstatement, together with the note, to the defendant company at

Helena, Mont. It seems that this letter was not received by the company until some two or three weeks later. The body of the letter is as follows:

"Find inclosed reinstatement application of Henry Boerger; also a six months' note for the premium. Mr. Boerger wants to carry this insurance. He had almost a total failure of crop last year, and had planted a large acreage. His plans are to put in a big crop this year.

"Mr. Boerger owns an improved 320-acre farm and has a small mortgage on the farm. Trusting with this information before you, you will find it good business, and reinstate him, I am,

Yours very truly, J. A. Haigh."

March 13th the defendant company replied to Haigh's letter as follows:

"We have received the application for reinstatement of policy No. 11949, together with note which is returned herewith.

"I regret to say, Mr. Haigh, that we are not permitted to accept bank form notes for full first renewal premiums. Would it be possible to handle this note in any other way?

"We inclose a company form note which we would be quite willing to consider in this matter if accompanied by a cash deposit of \$109.90.

"The least amount of cash that I am permitted to accept with a note in extension of the first renewal premium is arrived at by taking the short-term rate which you will find in the rate book at the insured's attained age and multiplying the monthly premium per thousand by the number of thousands of insurance and then by the number of months from the due date of premium to due date of note.

"Would it not be possible for Mr. Boerger to borrow locally enough to accept this proposition?

"We also inclose blank application for reinstatement because the one which was sent in was filled out, 'I hereby represent that since the 17th day of November, 1918.' We would like to say that the reinstatement blank must show his condition since the date of the policy, and not merely since the due date of the premium. In this case, for example, he might have had a serious accident or illness in September, 1918, and in that case the question was correctly answered by him, but the company would not be protected. I know that Mr. McGowan would not have witnessed the application and handled the matter had he had any doubts of the ap-

plicant's condition, but the only way we can protect ourselves in case of difficulty and to prevent discrimination is to have every blank properly filled out. A strange examiner coming in would not take Mr. McGowan's signature as meaning what you and I know it does mean.

"I hope that you will let me know what you think of this case. It is evidently fine business, and we want it on the books if there is any possible show to get it.

"With best wishes, we are,

Very truly yours,

"C. E. Herfurth, Actuary."

This letter was received by Haigh in due course of mail, but its contents were never communicated to Boerger, and the note which Boerger had given was not returned to him. About six weeks later, or April 29th, Boerger died, and the beneficiary brings this action, claiming that the policy was reinstated, or that the defendant is precluded from asserting that it was not reinstated.

The policy provides that if any premium is not paid as provided in the policy, it may be reinstated at any time to its original form and amount on payment of arrears of premiums, with interest at the rate of 6 per cent. per annum, and upon evidence of insurability satisfactory to the company. The principal contention of the appellant is that the agency of McGowan and of Haigh was limited to the solicitation of insurance through original application; that neither of them had any authority to alter the terms of the contract in so far as payment of premiums was concerned; and that, as this limitation of authority appears in the policy itself, the insured was not justified in relying upon any representations made at the time the reinstatement application was taken. The policy provides as follows:

"No agent can make, alter or discharge this policy or extend the time for the payment of premiums, nor can the policy be varied or altered or its conditions waived or extended in any respect, except by the written agreement of the company, signed by the president or secretary, whose authority will not be delegated."

The agency contract of McGowan is in evidence. In it he is appointed general agent for six counties in western North Dakota, with authority to secure applications for insurance and forward them to the company for approval or disapproval. Haigh was a local agent, whose authority

to act for the company is presumably more limited than that of McGowan. The evidence tends to establish that at the time McGowan and Haigh were at Boerger's place for the purpose of securing a settlement of the first premium note they solicited him to apply for reinstatement of his policy, and that in that connection they represented to him that if he would give his note for the premium he would be reinstated. McGowan produced a reinstatement application, which he filled out, and which Boerger signed; McGowan witnessing the application.

In our view of the case it is not necessary to determine whether or not McGowan had authority, either actual or ostensible, to waive the provisions of the contract regarding the payment of premiums. We are of the opinion that he was acting within the scope of his agency in soliciting the reinstatement. This he was doing in the interest of the company, and he had apparently been supplied with blanks to the facilitate the transaction of this character of business for it. In transacting it, he was not acting as the agent of Boerger. Our statute provides (§ 6632, C. L. 1913):

"Any person who shall solicit an application for insurance upon the life of another shall, in any controversy between the assured or his beneficiary and the company issuing any policy upon such application, be regarded as the agent of the company and not the agent of the assured."

Ordinarily an insurance company is as much interested in retaining relations with its policy holders as it is in soliciting new business, and to this end applications for reinstatement are regarded with much the same favor as applications for new business. We are of the opinion that the definition of an agent laid down in the statute referred to includes one taking an application for reinstatement as well as one taking an original application. In fact, the counsel for the appellant in the instant case take a position that is entirely consistent with this construction of the statute for it is contended that, as the policy in question had lapsed, it could not be revived except a new contract be entered into by the parties; the new contract being, of course, an agreement to revive the policy.

In holding, however, that McGowan and Haigh were agents of the company in soliciting the reinstatement application, we do not hold that the company was necessarily bound by the representations that they made contrary to the express conditions of the contract which was being revived. But we do hold that their agency was one which lasted until the reinstatement was either effected or rejected, and, while their authority

was subject to such limitations as appear in the policy, that these in turn were capable of being extended by the action or nonaction of the company. The effect of this holding, in connection with the facts in the instant case, is that the note which the company mailed to its agent, Haigh, and which Haigh retained, must be regarded as remaining in its possession, and the failure to Haigh to notify Boerger must be treated as the failure of the company. We may readily assume that the company had the right to reject the application for reinstatement either on account of the nonpayment of the premium in the manner required or on account of a defective showing of insurability, but when it elected to reject the application on either or both of these grounds, it must be held to a knowledge of the transaction between its agents and the insured, and to have assumed the legal consequences of its failure to communicate its rejection to the applicant, provided it was under duty so to do. There is ample evidence in the record that Boerger was led to believe his note would be accepted for the premium, and that the application for reinstatement satisfied the requirements of the company. Certainly this evidence, in conjunction with the complete failure to return the note and to notify the insured that his application was rejected, would justly warrant the inference that the insured believed his reinstatement to have been completed, that he had become liable upon the note given for the premium, and that the company had, in fact, waived payment in cash. It is to be noted here that notwithstanding the return of the note to Haigh, the application, though defective, was retained by the company. Since we are of the opinion that the evidence warrants the inferences suggested as inferences of fact, it remains to determine whether or not these inferences may be effective in law as against the express provisions of the policy.

There is no rule of law or policy that prevents contracting parties from waiving provisions that are inserted for their benefit. As was said by the United States Supreme Court in a case involving policy stipulations similar to those in the instant case (*Knickerbocker Insurance Co. v. Norton*, 96 U. S. 234, L. ed. 689):

"But a party always has the option to waive a condition or stipulation made in his own favor. The company was not bound to insist upon a forfeiture, though incurred, but might waive it. It was not bound to act upon the declaration that its agents had no power to make agreements or waive forfeitures; but might, at any time, at its option, give them

such power. The declaration was only tantamount to a notice to the assured, which the company could waive and disregard at pleasure. In either case, both with regard to the forfeiture and to the powers of its agent, a waiver of the stipulation or notice would not be repugnant to the written agreement, because it would only be the exercise of an option which the agreement left in it. And whether it did exercise such option or not was a fact provable by parol evidence, as well as by writing, for the obvious reason that it could be done without writing."

As to the character of acts that may be construed as a waiver of policy stipulations for the benefit of an insurance company the same court has expressed what appears to us to be the sound doctrine. In *New York Life Insurance Co. v. Eggleston*, 96 U. S. 572, 24 L. ed. 841, it is said:

"Any agreement, declaration, or course of action, on the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract. The company is thereby estopped from enforcing the forfeiture. The representations, declarations, or acts of an agent, contrary to the terms of the policy, of course will not be sufficient, unless sanctioned by the company itself."

The rule is stated in substantially the same language in *Bacon on Life and Accident Insurance* (4th ed.) § 602, where it is stated that the general principle has become well settled. Authorities are cited to show its application to cases where defaulted premiums are paid, or where payment has been made in a different manner than that stipulated, and these acts are accompanied by circumstances indicating that the assured was acting upon an honest belief that the literal terms of the policy would not be enforced against him. The company by its waiver is precluded from asserting its nonliability. See *Mobile Life Ins. Co. v. Pruett*, 74 Ala. 487; *Southern Life Ins. Co. v. Edward L. Kempton*, 56 Ga. 339; *Cotton State Life Ins. Co. v. Lester*, 62 Ga. 247, 35 Am. Rep. 122; *Andrus et al. v. Fidelity Mutual Life Insurance Co. Assoc.*, 168 Mo. 151, 67 S. W. 582; *Wm. Goedecke v. Met. Life Ins. Co.*, 30 Mo. App. 601; *Echols v. Mutual Life Ins. Co. of New York* (Neb.) 184 N. W. 58; *De Frece v. Nat. Life Ins. Co.*, 19 N. Y. Supp. 8.¹ Applying the principle of these

¹ Reported in full in the *New York Supplement*; reported as a memorandum decision without opinion in 64 Hun, 635.

authorities to the facts in the instant case, we are of the opinion that the company could waive the conditions of the policy regarding the lapsing for nonpayment and the reinstatement, and that under the evidence there was ample room for the jury to infer that it had in fact waived these conditions through its failure to properly act upon the application for reinstatement.

To the contention that the lapsed contract could not be revived without entering into a new contract completed by an offer and an acceptance, it need only be stated that there is no principle of law peculiarly applicable to insurance contracts which necessitates an actual communication of an acceptance in every instance. There is a well-defined rule of law, applicable to insurance contracts as well as contracts in general, that where the relations between parties have been such as to justify the offerer in expecting a reply, or where the offeree has come under some duty to communicate either a rejection or acceptance, his failure to communicate his rejection or to perform this duty may result in a legal assent to the terms of the offer. See Williston on Contracts, § 91. Within this principle we think there was a duty to return the note and communicate the rejection in the instant case at the peril of being held to the consequences of an assent to the reinstatement.

In the brief of the appellant some attention is given to the instructions of the court to the jury. As we read these instructions in the light of principles of law which we deem to be determinative of the case and in the light of the evidence, the appellant is not prejudiced by them.

The judgment appealed from is affirmed.

BRONSON, J., *concur*s.

GRACE, C. J. (concurring). The principles of law announced in this case in the opinion of Mr. Justice Birdzell are largely similar and to the same effect as those formerly announced by this court in the case of *Carroll v. New York Life Insurance Co.*, 180 N. W. 523.

CHRISTIANSON, J., *dissent*s.

ROBINSON, J. (dissenting). *In this case neither the complaint as amended, nor the evidence, states facts sufficient to constitute a cause of action.* There is no showing of a contractual obligation to pay the plaintiff \$5,000, or any sum whatever.

On November 17, 1917, the insurance company made to Henry Boerger a \$5,000 life insurance policy, naming as the beneficiary his adult nephew of 35 years. The policy is in evidence, and is made a part of the complaint. The annual premium was \$296.80, payable each year for 20 years, and it was agreed, as is usual in such cases, that, in case of failure to pay the premium of each year within 31 days after it became due, the policy should lapse and become void. Boerger was a man of 55 years, a small German farmer on a half section 20 miles south from Beach, on section 20—137—105. Not having money to make the first payment, he gave his promissory note for \$296.80, but never paid it. He permitted his policy to lapse by failing to pay the premium of the second year within 31 days after it became due. Then, in February, 1919, he made to the company a written application to reinstate his insurance, and offered his note for \$296.80 and interest. He mailed the same to the company through Mr. Haigh, its local agent at Beach, and by letter of March 13, 1919, the company returned the note and denied the application. As the note was sent to the company by Mr. Haigh, it was returned to him, and it was kept by him in his office for several weeks with the expectation doubtless that Boerger would call there, as he had given the note at the office. Boerger did not call. He died without receiving the note into his own hands and without paying, or offering to pay, a dollar on the insurance policy, though the company had several times requested payment. Now the claim is made that the company is estopped from disputing payment, or that it has waived payment by reason of the fact that Haigh did not go and deliver the note to the maker. But Haigh was a mere go-between. He had no interest in the note. He could not eat it or use it any manner. In his hands the note was a mere scrap of waste paper of no use to him or to any living person. Then it is urged that McGowan, a general agent of the company, induced the deceased to make the note with an application for reinstatement or the assurance that it would be accepted. But to speak of McGowan as the general agent of the company is a great mistake, and it is not fair nor honest. His authority is in writing. It is special, narrow, and limited. He was merely authorized in six counties of North Dakota to re-

ceive applications for life insurance, and to send the same to the company for rejection or approval. Exhibit H. Now it should be clear for argument: (1) That plaintiff has no equity, as neither he nor his uncle have paid a dollar or a cent on the insurance policy. (2) There is no waiver. (3) There is no estoppel. There is no showing that the deceased was ever in any way deceived or misled to his prejudice. No showing that he was ever ready or willing to pay a dollar on the insurance or on any insurance, no showing that he was under any obligation to his adult nephew or that he was desirous of scrimping and of burdening himself that the nephew might perchance receive a good lump sum. Boerger complained of poor crops and high insurance rates, and it was with reluctance he offered the note and application to reinstate his policy. The plaintiff testifies that at a certain time McGowan and Haigh called at the house of the deceased; he testified as follows:

"Q. Did not your uncle say to McGowan and Haigh that he did not want to reinstate the policy? A. He talked that way. He said he was hard up, and did not feel that he could pay the premium. He said the poor crops made it hard to pay them big premiums."

In the face of such testimony it cannot be urged that if the note had been put into the hands of the deceased in due time and during his life he would have made any attempt to secure insurance from any other company, or that he would have done anything to reinstate his insurance.

The law of the case is as clear as to the facts. The plaintiff is in no position to claim a waiver or an estoppel, because he has no equity, and because neither he nor his uncle ever paid, or offered to pay, anything on the policy. It is a pure nudum pactum. A party is not estopped when there is no equity, no deception, no injury. To invoke the doctrine of estoppel it must appear: (1) That the party invoking it was misled by the acts or conduct of the other party. (2) That he changed his position, relying thereon, and was justified in so doing. (3) That he was prejudiced thereby, and that the other party was benefited. 21 Corpus Juris, 1205. Here there is no showing of a prejudice to the deceased; no showing of a benefit to the company; no showing that the deceased was deceived, or that he changed his position to his loss.

Waiver.

The doctrine of waiver differs little from estoppel. A party cannot

be waived into a contract without a consideration when there is no element of estoppel.

"Waiver belongs to the family of estoppel, and the doctrine of estoppel lies at the foundation of the law of waiver." 40 Cyc. 255. "They are frequently used in the cases as convertible terms, especially in insurance contracts and in regard to forfeitures." "*Waiver is the voluntary surrender of a right.* Estoppel is the inhibition to assert it from the mischief that has followed." "Waiver depends upon what one himself intends to do. An estoppel depends upon what he causes another to do." 40 Cyc. 256-258. "In order to constitute waiver, the right or privilege must be in existence. There can be no waiver of a nonexistent and lost right." 40 Cyc. 258. "Waiver is a voluntary act. A voluntary choice is the essence of the act, and not mere negligence." 40 Cyc. 259-262.

In writing an opinion it is common for judges to quote the general language of some other judge or court and completely ignore the facts on which the language is based. Thus in this case the general language of a judge is cited as conclusive in favor of the plaintiff without any reference to the facts, while the facts show that the general language has little bearing. In *Knickerbocker Insurance Co. v. Norton*, 96 U. S. 234, the facts presented a strong case of equity, estoppel, and waiver. The policy in suit was dated April 20, 1867. The premium was \$385 a year. The deceased had made annual payments for eight years. He had paid over \$2,000. Norton died on August 3, 1875, and the company refused payment on the ground that his policy was forfeited by a failure to pay the last premium note. The note had been settled on a payment of \$50 in cash, and plaintiff gave for the balance two promissory notes, payable, respectively, in two and three months. The company had been in the habit of allowing their agents to extend payments for that time, and when the company refused to receive payment the deceased made to it a legal tender of the full amount due. The case presents the strongest appeal to equity and conscience and fair dealing. *The wonder is that it should be cited to sustain a case like this, where there was never a payment or offer to pay.*

And so there is cited the general language of the United States Supreme Court in *N. Y. Life Ins. Co. v. Eggeston*, 96 U. S. 572, 24 L. ed. 841. The suit was on a \$5,000 life policy made November 11, 1868. The premium was \$306 a year, payable semiannually, half on November

11th and half on May 11th in each year. The insured died on January 5, 1872. The defense was a forfeiture of the policy by failure to pay the last installment of premiums which fell due November 11, 1871. The insured did not know the agent to whom payments should be made, because the company had been changing its agents, and so he had telegraphed the company for instructions, and he made a legal tender of payment in December, 1871. He had paid over \$1,000, and had made a legal tender of the last installment. Surely that does not apply to a case where a party never paid nor offered to pay a cent. Justice Birdzell gives a reference to several state decisions which are probably no stronger than those of the United States Supreme Court. The general language of a decision means little or nothing until we know the facts on which the general language is based. We challenge any one to cite a decision sustaining a judgment against an insurance company in a case of this kind, a case in which there is no equity, no payment, no attempt to make payment, and no excuse for the default; a case in which the note offered for premium was refused and returned to the party from whom it was received. Surely the case presents no equity, no waiver, no estoppel. There is not a particle of evidence to sustain the verdict. Judgment should be reversed.

D. A. DINNIE, Appellant, v. LAKOTA HOTEL CO., Respondent

(186 N. W. 248.)

Contracts—substantial compliance with building contract may occur through the action of both the contractor and the owner who has completed construction under the contract.

1. Where a building contract provides that the owner may take possession and proceed to complete the contract, and where the owner did take possession of the construction and furnish labor and material pursuant to the contract, substantial compliance with the contract may occur through the action of both the contractor and the owner.

Contracts—in contractor's action against owner, verdict held not to show, as matter of law, a failure to substantially perform.

2. Where a jury found that the contractor had substantially performed the contract, and returned a verdict for the plaintiff less the cost of the labor and materials furnished by the owner and for other omissions and defects not exceeding \$570.00; and where contract price for the construction was \$28,800.00, it is *held* that the verdict as returned by the jury does not show as a matter of law failure to substantially perform.

Contracts — architect's refusal to issue final certificate does not preclude contractor's right of action.

3. Upon the circumstances of the record it is *held* that the failure of the architect to issue a final certificate did not preclude right of action by the contractor.

Opinion filed Dec. 13, 1921. Rehearing denied Jan. 3, 1922.

Action in District court, Nelson county. *Cooley, J.*, upon a building contract: The plaintiff has appealed from a judgment notwithstanding the verdict.

Judgment reversed and verdict ordered re-instated.

Bradford & Nash, for appellant.

The question whether a contract has been substantially performed is generally one of fact. *Pitcairn v. Philip Hiss Co.* 51 C. C. A. 323, 113 Fed. 492; *Elizabeth v. Fitzgerald*, 52 C. C. A. 321, 114 Fed. 547; *Fitzgerald v. LaPorte*, 64 Ark. 34, 40 S. W. 261; *West v. Sunda*, 69 Conn. 60, 36 Atl. 1015; *Bauer v. Hindley*, 222 Ill. 319, 78 N. E. 626; *E. T. Burrowes Co. v. Crittenden*, (Miss.) 37 So. 504.

A substantial performance of a building contract is sufficient. *Fish v. Stubbings*, 65 Ill. 492; *Elizabeth v. Fitzgerald*, 52 C. C. A. 321, 114 Fed. 547; *Concord Apartment House Co. v. O'Brien*, 228 Ill. 360, 81 N. E. 1038; *Ramstedt v. Brooker*, 113 App. Div. 45, 98 N. Y. Supp. 1044; *Hahn v. Bonacum*, 76 Neb. 837, 107 N. W. 1001, 109 N. W. 368; *Rush v. Wagner*, 34 N. Y. S. R. 798, 12 N. Y. Supp. 2; *Mecham v. Baker*, 34 N. Y. S. R. 535, 11 N. Y. Supp. 781, *Walstrom v. Oliver Watts Constr. Co.* (Ala.) 50 So. 46.

In building contracts a literal compliance with the specifications is not necessary to recovery by the contractor. *Keeler v. Herr*, 157 Ill. 57, 41 N. E. 750; *Dugue v. Levy*, 114 La. 21, 37 So. 995; *Block-Pollock Iron Co. v. Cincinnati Corrugating Iron Co.* 10 Ohio S. & C.

P. Dec. 51; Heckman v. Pinkney, 81 N. Y. 211.

Engerud, Divet, Holt & Frame, for respondent.

"To entitle a contractor to recover on a building contract, which has not been fully complied with by him, under the doctrine of substantial performance, it must appear, not only that he endeavored to perform it in good faith, but also that he has done so, except as to unimportant omissions and deviations." *Anderson & Hunter v. Todd*, 8 N. D. 158; *Marchand v. Perrin*, 19 N. D. 794, 799; *Braseth v. Bank*, 12 N. D. 486; *Elliott v. Caldwell (Minn.)* 45 N. W. 845; *Franklin v. Schulz*, 57 Pac. 1037; *Ashley v. Henehan*, 47 N. E. 573; *Manthey v. Stock*, 113 N. W. 443; *Gillespie Tool Co. v. Wilson*, 16 Atl. 36; *Marchant v. Hayes*, 49 Pac. 840; *Hennessey v. Preston*, 106 N. E. 570; *Bush v. Jones*, 144 Fed. 942, (3 C. C. A.).

Statement.

BRONSON, J. This is an action upon a building contract. In the trial court the jury returned a verdict for the plaintiff. Upon motion, judgment notwithstanding the verdict was entered for the defendant. The plaintiff has appealed from the judgment and the order therefor. The facts necessary to be stated are as follows:

Pursuant to a builder's contract and certain plans and specifications, the plaintiff contracted to erect a certain hotel building at Lakota, N. D., for a stated consideration of \$28,800. In his complaint, the plaintiff alleges that he has performed the conditions of the contract, and that there is due thereon \$6,656.83; further, that he furnished certain extras of the value of \$750. In his answer, the defendant alleges, in addition to the assertion of certain payments and existence of certain liens, that plaintiff did not perform the contract according to the terms and conditions thereof; that the plaintiff performed the work in an unworkmanlike manner and left the building unfinished, and employed incompetent and negligent workmen, and failed to properly construct or complete such building, although repeatedly notified by the architect to so do; that plaintiff has failed to produce a certificate from the architect showing compliance with the contract, and the architect has refused so to make a certificate by reason of plaintiff's failure and refusal to complete the contract. In counterclaims, the defendant further alleges

loss of rents and profits in the amount of \$3,000 through failure to complete the building at the time provided in the contract; that the defendant was compelled to pay out for materials and labor, in order to complete the building, \$1,982.72, and that it will cost further to complete the building in accordance with the contract at least \$6,000; that much work must be taken out and replaced in order that the building may comply with the contract, which will cost at least \$3,000; that the building as constructed, even after doing the work possible so as to make the building usable, will be worth at least \$5,000 less than if it had been constructed according to the contract. The defendant accordingly asked for damages in the sum of \$17,000.

The contract is dated June 7, 1917. Among other things, it provides:

"It is understood between the parties hereto that the work included in this contract is to be done under the direction of the said architect, and that his decision as to the true construction and meaning of the drawings and specifications shall be final." "No alterations shall be made in the work except upon written order of the architect; the amount to be paid by the owner or allowed by the contractor by virtue of such alterations to be stated in said order." "Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in the performance of any of the agreements herein contained, such refusal, neglect, or failure being certified by the architect, the owner shall be at liberty, after three days' written notice to the contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract, and if the architect shall certify that such refusal, neglect, or failure is sufficient ground for such action, the owner shall also be at liberty to terminate the employment of the contractor for the said work, and to enter upon the premises and take possession, for the purposes of completing the work included under this contract, of all materials, tools, and appliances thereon, and to employ any other person or persons to finish the work and to provide the materials therefor; and in case of such discontinuance of the employment of the contractor, he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the con-

tractor, but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner. The expense incurred by the owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified to by the architect, whose certificate thereof shall be conclusive upon the parties."

The contract also provides for payment of the contract price in current payments and a final payment upon the certificate of the architect. During the course of the work the plaintiff had a foreman on the job; the architect also had a superintendent. In September, 1917, the architect complained of unsatisfactory work, due to incompetent workmen, principally concerning plaster work, lintels, coping on the east and south walls, failure to waterproof cistern in accordance with specifications, and other particular items; also, in another letter in September, the architect complained of the work of the painter, subcontractors, of the ventilators not being installed according to specifications, and the omission of an angle. Again, on October 4, 1917, the architect in a letter advised the plaintiff that some of the work was unsatisfactory; that the ventilators on the roof were not pursuant to specifications; that the brickwork over the window in the lobby and a brick pier had not been reset. Again, on October 20, 1917, the architect advised the plaintiff that the temporary roof on the building had been cut up and roof boards were buckling, and the plaster was damaged, necessitating resetting the roof boards and removing damaged plaster; that the plaster work was irregular and crooked and had cracked; that some brickwork had not been relaid; that the lathing in the basement was not being done properly. On November 8, 1917, the architect wrote Parsons, an employee of the plaintiff, that the roof was not laid pursuant to plans and specifications and that part of the roof over the kitchen was leaking; that the painting of the fire escapes would not be accepted; and that attention should be given to the screens lying about. Again, on December 17, 1917, he wrote Parsons to advise the painter not to do any more work, for the reason that he noticed that the floors were cross-scraped in a number of places and left very rough and irregular. In January, 1918, the architect made a list of the defects in the construction of the building and mailed the same to the plaintiff. In the list 43 items were specified; summarizing the same, they may be stated as follows:

Coping on south and east wall to be removed and new coping

installed; roof to be given another layer of felt and two layers of asphalt; certain brickwork to be removed and reset; railings around areas not secured to the brick walls by expansion bolts; rubbish not removed from the site; plaster beams not finished; coal chute doors not properly set; window frames not properly caulked; stair stringers loose; fire escapes to be painted; fills around the walls not soaked and tamped; broken glass to be replaced; all glass to be cleaned; certain plastering to be replastered, and certain varnishing to be done.

On February 6, 1918, the contractor advised the plaintiff that his men had left a large pile of debris on the west side of the building; that it must be removed immediately or he would instruct the owners to remove it; that the hotel committee had employed a man to heat the building at \$50 per month, and had directed the expense thereof to be charged to the contractor. On February 15, 1918, plaintiff wrote the architect and the defendant that the hotel job was completed and that he would not further heat the building. It appears that later the plaintiff had a conference with the hotel committee, and the defects in the construction of the building were considered and an inspection trip made by the parties through the construction. Thereafter, in May, 1918, plaintiff did further work on the building, and later advised the architect that the hotel building was complete. After the building was left by the plaintiff, the defendant heated the building and hired a foreman. It had certain work done on the construction, for which it paid out various sums of money, such as for redecorating, for lumber bills, for coal and labor, carpenter work, and such other items. These amount to approximately \$1,900.

On the part of the defense, testimony was adduced that the plaintiff had incompetent workmen; that the work was performed in a careless, hasty, and unworkmanlike manner, of which the contractor had notice; that, in particular, the cistern walls were not waterproofed according to specifications, although the plaintiff did the work twice; that the work would have to be done again and would cost \$800 to replace; that a concrete coping was put on the wall not in accordance with the plans and specifications; that this coping cracked or fell off; that it was ordered off, and the plaintiff installed another and this was likewise defective; that it endangered the walls in its present shape; that the roof job was poor; that roof boards were installed when wet and upon drying they curled; that in reinstalling the coping the roof was damaged and

pierced; that the roof leaked and stained the walls beneath so that they could not be finished in white; that the brick in the walls were not cleaned in accordance with specifications; that the fire escapes were given only one coat of paint instead of two, as required; that the area walls were improperly built; that the defendant was compelled to rebuild one of them; that the iron guards were not fastened with expansion bolts as required; that the plaintiff failed to soak and tamp the fills around the walls as required; that he failed to remove a large pile of rubbish at the rear of building; that the floors were improperly laid and were in bad condition; that they had valleys in them, were not drawn tight, and the carpenters used too large nails; that the floors were improperly varnished; that the varnishing was done at a time when the building was dusty, through carpenters and other workmen about, so as to occasion the varnish to be filled with dust and dirt; that the stucco work in the vestibule was put on wrong, the tile floor left unclean, the plastering was uneven, and the doorframes and doors were improperly fitted; that the chute doors in the basement were too small and were not fitted; that the metal windows were too small for the brick openings; that much glass was broken; that the canopy had a roof that leaked like a sieve; that the cistern leaked when the plaintiff left the job; that the cement floor in the basement was crumbly and uneven; that there is a bulge in the partition between the dining room and the lobby; and that there is no way in which the building may be made to appear as the plans and specifications require.

In behalf of the plaintiff, evidence was adduced, through an architect and a contractor, both of many years' experience, that they examined the building in May, 1918 that its construction is in substantial compliance with the plans and specifications, with minor exceptions and small minor defects; that the roof was all right and the brickwork was done in a good and workmanlike manner; that the warping of the doors was unavoidable through the kind used; that the doors fitted well and the flooring was good; that no stains were noticed on the walls and ceilings; that there was nothing wrong with the vestibule; that the swelling in the floor may have been caused by dampness; that it was improper to use oakum for caulking window frames; that no doorframes were found not set according to the plans; that the roof did not show any buckling of the roof boards; that there is a deviation in the wall between the lobby and the dining room, but it is not a deviation from the plans and specifi-

cations; that the floor in one of the rooms, kept by the defendants for purposes of showing how the floor was laid and finished, is not the same as when they examined it, but has been tampered with; that the right material was not used for waterproofing the cistern; that, concerning the windows, the jamb is too light and could be easily corrected by taking the moulding off and the oakum out and setting them down on the brick.

The plaintiff testified that the architect made a change in the plans and specifications concerning a concrete coping instead of a terra cotta coping; that he received revised details therefor, which had been prepared by the architect and were left by the plaintiff in the building. There is a letter in the evidence, July 5, 1917, to such effect. The defendant's architect denies submitting such revised details for concrete work and that the letter therefor was probably sent out by some one in his office. The plaintiff further testified that the first coping was placed under the direction of the architect's superintendent; that he afterwards replaced it with another coping, as directed; that he did not think the criticisms concerning the roof were just, but he was willing to have the company who manufactured such roof replace it and to make allowance so to do; that the architect directed him to clean the brick, although he knew it could not be done with water and acid; that he caulked the windows, as the architect suggested, with oakum, although there is a regular caulking paste for such purpose; that he intended to put in expansion bolts in the areaway and it would cost only \$5 or \$6 so to do; that he used the J. M. material specified for waterproofing the cistern; that the transoms were not loose; that the walls and ceilings were not stained; that there were no doorsteps not nailed nor irregular plaster; that the fire escapes were painted twice; that he tamped the fills around the walls, but did not soak them; that it was unnecessary to do both; that there was a big pile of rubbish on the site when he commenced the construction of the building. Plaintiff conceded that the amount due him would not exceed \$5,792.17.

The trial court, denying a motion of the defendant for a directed verdict, submitted the cause to the jury upon instructions requiring the jury to find a substantial compliance with the contract in order to permit plaintiff's recovery, and that the jury upon so finding might then determine the amount due and owing the plaintiff under the contract. He charged the jury that where it appears that the contractor has endeavored to perform his contract in

good faith and according to its terms, and has done so except as to unimportant omissions or deviations which are the result of mistake, oversight, or inadvertence, and were not wilful and intentional and are susceptible to remedy, so that the owner will get substantially the building he has contracted for, then the contractor is said to have substantially performed his contract.

The jury returned a verdict of \$3,541.46 in favor of the plaintiff. Before rendition of the verdict, the jury came before the court and asked certain questions. One juror stated that—

“We cannot agree as to what the figures were for the repairs—what the repairs cost—and we are wondering if we could get these figures from the testimony.”

The court advised them that the bills were not introduced in evidence, and that, if it was the purpose of the jury to allow certain items for repairing certain defects which would be found to be only minor defects, the jury would have to do the best it could to remember them. A juror asked if the plaintiff had allowed in his testimony the full amount of the claim for the cistern. The court advised the jury that they would have to remember the testimony the best they could.

The plaintiff maintains that the question of substantial compliance was for the jury, and that it was error for the trial court to reverse its findings.

The respondent contends that the verdict of the jury disclosed lack of substantial compliance with the contract; that, deducting interest allowed in the verdict, there remains the sum of \$2,488.49 as the amount awarded by the jury for omissions and defective work; that this award of such a substantial sum establishes incontrovertibly failure to substantially comply, that accordingly the plaintiff cannot recover pursuant to the principles of law announced in *Anderson & Hunter v. Todd*, 8 N. D. 158, 77 N. W. 599; *Braseth v. Bank*, 12 N. D. 486, 98 N. W. 79; *Marchand v. Perrin*, 19 N. D. 794, 124 N. W. 1112.

Decision.

Ordinarily, the question of the substantial performance of a building contract is one of fact for the jury. *Pitcairn v. Hiss Co.*, 113 Fed. 492, 51 C. C. A. 323; *Elizabeth v. Fitzgerald*, 114 Fed. 547, 52 C. C. A. 321; *Fitzgerald v. La Porte*, 64 Ark. 34, 40 S. W. 261.

The jury found that there was a substantial performance of the contract; the instructions of the court required them so to do in order to find for the plaintiff. The defendant maintains, however, that the verdict, as returned, shows an allowance of \$2,488.49 awarded for omissions and defective work; that the amount so allowed by the jury was a substantial sum, and that that which requires a substantial sum to finish is not substantially finished; that, accordingly, the finding of the jury furnished an incontrovertible fact requiring the court to order judgment notwithstanding the verdict. It may be somewhat difficult to understand the items of allowance and disallowance in the verdict returned. This, however, is not a source of wonder. The record was long; the instructions were oral; the jury returned to the court after retirement to learn something about the figures concerning the cost of repairs; the bills therefor were not introduced in evidence. It appears, however, that the defendant took possession of the building and proceeded to make repairs of the omissions and defects alleged and proceeded to furnish labor and materials towards completing the contract.

In its answer the owner sets up as counterclaims the amount of this work and material furnished. This amount, covering decorating, floor cleaning, varnishing, cleaning up premises, carpenter work, and materials furnished totals \$1,917.41. In accordance with the figures of the respondent this would leave \$571.08 over and above the labor and material furnished after the owner took possession of the building. If, however, the jury did not allow interest, the amount would be \$333.30. The only basis for stating that possibly the jury did not allow interest is a possible misconstruction that the jury may have placed upon the instructions of the court when the jury returned to the court for further information. The court stated that the extreme limit of the plaintiff's recovery was \$5,792.17, although previously it had instructed the jury to allow interest. It is true that the owner asserts, and there is evidence to show, that the plaintiff wilfully abandoned the contract and failed in many respects to perform the conditions thereof. On the other hand, there is evidence in the record that there has been a substantial performance of the contract, either by the builder or owner, or both. Under the circumstances, substantial performance might occur through the work and materials furnished by the owner after taking possession.

In *Hunn v. Penn. Inst. for Blind*, 221 Pa. 403, 70 Atl. 812, 18 L. R. A. (N. S.) 1248, the court, concerning a contract provision giving the

owner the right to take possession and complete the building, stated:

"We therefore hold that the averment of complete performance in so far as the construction of the building is involved is sustained by proof which shows that the contractors performed a large part of the work, and that the building was finally completed by the owners in accordance with the contract."

Again, in *Van Clief v. Van Vechten*, 130 N. Y. 580, 29 N. E. 1019, the court said:

"The owner, however, although under no obligations to do so, completed the building herself, according to the contract, which thus continued operative through her action. After the contractor refused to proceed she performed the contract for him, as it expressly permitted her to do. As her action was according to the contract, it will be presumed, under all the circumstances and in support of the judgment, that it was under the contract. While she threatened to cancel it, there is neither finding, nor request to find, that she did cancel it, and instead of pleading a cancellation or rescission in her answer, she asked to have the amount expended by her to complete the building 'allowed as a set-off or counterclaim to any claim of the said defendant Smalle or the plaintiffs herein, or of any of the other defendants herein, in case the court should eventually determine that the said defendant Smalle is entitled to any sum whatsoever under the said contract.'"

Accordingly, we are not prepared to hold, as a matter of law, that there has not been a substantial performance of the contract because the jury possibly allowed, as deductions, either \$571.08 or \$333.30 in addition to the items furnished by the owner after taking possession. The allowance of such amount is not necessarily fatal to the finding of a substantial compliance, if the jury saw fit to give credence to the testimony of plaintiff's witnesses. *Jefferson Hotel Co. v. Brumbaugh*, 168 Fed. 867, 94 C. C. A. 279.

The failure or refusal of the architect to issue a certificate did not preclude right of action by the plaintiff. 9 C. J. 763; *Hunn v. Penn, Inst. for Blind*, supra; *Nolan v. Whitney*, 88 N. Y. 649.

It is ordered accordingly that the judgment of the trial court be reversed, and judgment be entered pursuant to the verdict of the jury.

ROBINSON, J., concurs.

BIRDZELL and CHRISTIANSON, JJ., dissent.

GRACE, C. J. (specially concurring). The question of substantial performance of the contract was one of fact for the jury and under proper instructions was submitted to it. All of the facts were submitted to the jury. It returned a verdict in plaintiff's favor, which should have been permitted to stand. The trial court, however, upon motion for judgment notwithstanding the verdict, entered judgment for the defendant. This was error. The judgment of the trial court should be reversed, and judgment entered on the verdict.

KAROLINE NASSET, Respondent, v. CHAS. H. HOUSKA and A. L. MARTIN, Appellants.

(186 N. W. 255.)

Vendor and purchaser — vendor held entitled to interest from sale date until payment; litigation involving amount of nonresident aliens inheritance tax does not affect marketability of citizen's title; where no sale terms are specified, cash is presumed.

1. Plaintiff brought an action to quiet title to certain land, and judgment was entered in her favor. Defendant's appeal is from the judgment.

It is *held* for reasons stated in the opinion that the judgment should be affirmed.

Opinion filed Dec. 12, 1921. Rehearing denied Jan. 3, 1922.

Appeal from a judgment of the District Court of Rolette County, *A. G. Burr, J.*

Judgment affirmed.

Cuthbert, Smythe & Wheeler and *E. T. Burke*, for appellants.

That Houska was the agent of the plaintiff and that she is bound by

his acts in the premises. See: 21 R. C. L. (principal and agents ¶ 5, 6 and 25). *Luke v. Griggs*, 4 Dak. 287, 30 N. W. 170, 31 Cyc. p. 1215; 31 Cyc. p. 1566, ¶ E.

The retention of the money tendered by Martin constitutes an estoppel. *Dowagiac Mfg. Co. v. Mellekson*, 13 N. D. 257, 100 N. W. 717; *Russel v. Waterloo Thresh. Mach. Co.* 17 N. D. 248, 116 N. W. 611; *Townsend v. Kennedy*, 6 S. D. 47, 60 N. W. 164; *Union Trust Co. v. Phillips* 7 S. D. 225, 63 N. W. 903.

Sinness & Duffy, for respondent.

Where a vendor fails to convey the land sold, the vendee may recover the purchase money paid, with interest from the time of payment if he is out of possession or without interest if he has had possession. *Kicks v. State Bank*, 12 N. D. 576, 98 N. W.

This proposition is well sustained by the authorities. *Fernander v. Dunn*, 65 Am. Dec. 607, 19 Ga. 497.

And in case of a breach of warranty of title in a deed this is the measure of damages fixed by statute. § 7149 C. L. of 1913.

Wisconsin holds that where a purchaser goes into possession and the vendor fails to convey good title, the purchaser may rescind and recover damages, but that where he elects to hold possession under the contract, "he can do so only upon condition that he pays the purchase-money and interest according to the contract." *McIndoe v. Morman*, 26 Wis. 588 7. Am. Rep. 96; *Dunn v. Mills*, 70 Kan. 656, 2 An. Cas. 363, and note thereto in An. Cas; § 370 subject Vendor and Purchaser, 27 R. C. L. 616; *Worley v. Nethercott*, 91 Cal. 512, 25 A. S. R. 209; *Larkin v. Montgomery Bank*, 9 Port (Ala.) 434, 33 Am. Dec. 324; *Giles v. Williams*, 3 Ala. 316, 37 Am. Dec. 692.

GRACE, C. J. This is an appeal from a judgment of the district court entered in plaintiff's favor against the defendants. The action is one to quiet title to a certain tract of land situated in Rolette county, and described as the S. W. $\frac{1}{4}$ of section 10 in township 159 north, range 69. The complaint is largely in statutory form. Martin claims to be the owner in fee of the premises since October, 1917. The source of his claim is shown by ¶ 4 of the answer, which is as follows:

"Further answering plaintiff's complaint, your defendants allege

that under date of July 26, 1917, plaintiff entered into a certain writing with your defendant Charles H. Houska, whereby among other things the plaintiff granted to your defendant Houska exclusive option or right to sell said described premises for the sum of \$5,800, the plaintiff further agreeing to furnish good title to said land described; that thereafter and during the month of July, 1917, your defendant sold said described premises to his codefendant, A. L. Martin, which sale was communicated to and ratified by the plaintiff, said Martin, going immediately into possession, and that thereafter there was paid to and accepted by the plaintiff the sum of \$1,200 on account of the purchase price of said premises, and that thereafter defendant Charles H. Houska tendered to the plaintiff the sum of \$4,378.85, being the balance due on account of said agreed purchase, less certain items of disbursement by your defendant Houska, which were agreed to by the plaintiff and her agents."

The answer further, in substance, alleges that Martin is entitled to a warranty deed to the premises from plaintiff, and that all delays in closing the sale were not the fault of defendants, and were acquiesced in by plaintiff. That the delay was occasioned by awaiting the determination of a test case involving the question of the North Dakota Alien Inheritance Tax then pending in the Supreme Court of the state of North Dakota, which was finally determined in the Supreme Court of the United States of America in the case of Howard Moody v. Otto A. Hagen et al. See *Skarderud v. Tax Commission of North Dakota*, 245 U. S. 633, 38 Sup. Ct. 133, 62 L. ed. 522.

The material facts necessary to be stated are as follows: Ole Nasset was at the time of his death in 1915 the owner of the S. $\frac{1}{2}$ of section 10 and the S. W. $\frac{1}{4}$ of section 11, all in the township and range first above mentioned. He left surviving him as heirs at law Karoline Nasset, the plaintiff, Hansine Nass, and Bertine K. Udtian. Proceedings were had in the county court of Rolette county with reference to the administration of the estate, and Hansine Nass was duly appointed and qualified as administratrix; Charles H. Houska acting as her attorney in the administration of the estate.

On the 23d day of November, 1917, a written agreement was entered into between the heirs relative to the distribution of the real estate, under which the plaintiff was to receive the S. W. $\frac{1}{4}$ of section 10, above mentioned. Prior to the time the estate was closed Karoline Nasset entered into the following agreement in writing:

"Maddock, N. D., July 26, 1917.

"It is hereby agreed by and between Karoline Nasset and John Nasset and Charles H. Houska of Bisbee, N. D., that the said Karoline Nasset and John Nasset hereby authorize the said Charles H. Houska of Bisbee to sell the land belonging to Karoline Nasset which falls to her as heir of Ole Nasset, deceased, and described as follows: S. W. $\frac{1}{4}$ of section 10, township 159, range 69, Rolette county, consisting of 160 acres, for the sum of \$5,800.00. This power to last for 60 days and is irrevocable. Said Karoline Nasset to furnish good title to said land. The said Karoline Nasset to furnish abstract.

"John Nasset.

"Karoline Nasset,

"Charles H. Houska.

"Witness:"

Houska sold the land to Martin for \$5,800, who paid \$1,200 in cash, leaving a balance of \$4,600, which remained unpaid until February, 1919, when the defendants tendered Houska's check in the sum of \$4,378.85 on condition that the plaintiff delivered a warranty deed of the premises.

The final decree of distribution of the estate was entered on October 12, 1918. It distributed the land in accordance with the terms of the agreement between them. In tendering what defendants claimed to be the balance they allowed 6 per cent. interest on \$4,600 for $2\frac{1}{2}$ months, or \$57.50. This, added to the \$4,600, gives us \$4,657.50. They deducted \$278.65 for inheritance, recording, and attorney's fees and other expenses, and tendered the check of Houska in the amount above named, after deducting from \$4,657.50, \$278.65.

The principal question presented is whether the plaintiff is entitled to interest on the part of the purchase price remaining unpaid from the time of the sale to the time when it is paid, or whether she is entitled to interest only from the time of the entry of the final decree of distribution. We think it must be conceded that shortly after the sale the defendant Martin went into possession of the land, and has since cropped and cultivated the same, and has had the use and benefit of all such crops. In these circumstances we are of the opinion that he is chargeable with interest at the rate of 6 per cent. from the time of the sale on the sum remaining unpaid. Warvelle on Vendors, § 180; Pills-

bury v. Streeter, 15 N. D. 174, 107 N. W. 40. The defendant having enjoyed the rents and profits during the whole time, we see no legal reason why he should not pay interest as above stated.

There is another reason why plaintiff would be entitled to interest for the time we have above indicated. The defendant's claim that she could not deliver title on account of certain litigations then pending which prevented the closing of the estate and the issuance of the final decree of distribution, viz. Moody v. Hagen, 36 N. D. 471, 162 N. W. 704, Ann. Cas. 1918A, 933, which case was then pending in the Supreme Court of North Dakota. It involved a construction of § 8977, C. L. 1913, relative to an inheritance tax. By this statute an inheritance tax of 25 per cent. is imposed on the inheritance of non-resident aliens as opposed to a tax of $1\frac{1}{2}$ per cent. on the inheritance of citizens. As we view this litigation, it did not affect plaintiff in any manner. She was a citizen of the United States, and there could be no controversy as to the amount of inheritance tax she should pay, and the marketability of her title was not affected thereby.

We are of the opinion that Houska was the agent of plaintiff to procure a purchaser of the land as would appear from the written authority above set forth, but before he received that authority he had some understanding with Martin with reference to his purchasing the land and amount of the purchase price thereof. Martin in effect consented to the purchase of the land for the sum of \$5,800 prior to the time that Houska received his authority to make the sale of it. No terms of sale having been specified, a sale for cash is presumed. Considerable argument has been had with reference to the question of agency. We think that question is largely immaterial in this case; for, since Martin has had the use and benefit of the land ever since the purchase of it, he should pay interest on the balance of the purchase price remaining unpaid since the time of the sale, after being credited with the amount then paid, to wit, \$1,200.

Plaintiff at all times had a marketable title so far as the inheritance tax was concerned and there was no other objection than that, to her title. A petition on her behalf could have been presented to the county court for distribution to her of the share of the estate to which she was entitled, which under the agreement between the heirs included the land here in controversy, and upon payment of the balance of the purchase price a deed could have been procured from her to Martin.

We are of the opinion that the judgment of the trial court should be affirmed, reserving to defendant Martin the right to comply with the judgment within 60 days from the filing of the remittitur in the court below. The judgment is affirmed. Respondent is entitled to her costs and disbursements on appeal.

CHRISTIANSON, BIRDZELL, ROBINSON, and BRONSON, JJ., concur.

SCHNITZ BROTHERS a co-partnership, consisting of Sam Schnitz and Ben Schnitz, Respondents, v. BOLLES & ROGERS COMPANY, a corporation, Appellant.

(186 N. W. 96.)

Evidence — testimony of market value based on reports neither offered nor proved trustworthy is incompetent.

1. Testimony of the market value of hides in the Chicago market on a certain day, which is based upon current reports of a publishing company neither offered in evidence nor proved to be representative and trustworthy, is incompetent.

Evidence — evidence of individual sales before and after tendered delivery is incompetent, unless under conditions sufficiently similar to show market value.

2. Where market value is sought to be established, evidence of individual sales of hides upon dates anterior and posterior to the time of a tendered delivery is incompetent unless shown to be at a time sufficiently near and under conditions sufficiently similar to aid in the determination of the market value at the date of the tendered delivery.

Opinion filed Dec. 14, 1921. Rehearing denied Jan. 3, 1922.

Action in District Court, Stark County, *Crawford, J.*, to recover damages for failure to accept hides pursuant to a contract of sale. Defendant has appealed from a judgment in plaintiff's favor.

Reversed and new trial granted.

T. F. Murtha and A. P. Reed, for appellant.

Simpson & Mackoff, for respondents.

If there is any evidence whatever from which the jury could decide the fact, such finding by the jury will not be disturbed by any appellate court. *F. A. Patrick Co. v. Austin* (N. D.) 127 N. W. 109; *Lowry v. Piper* (N. D.) 127 N. W. 1046; *Nilson v. Horton* (N. D.) 123 N. W. 397; *Acton v. Fargo & M. St. Ry. Co.* (N. D.) 129 N. W. 225; *Casey v. First Nat'l Bank* (N. D.) 126 N. W. 1011; *Mont. Eastern Ry. Co. v. Lebech*, 32 N. D. 162; *Northern Trust Co. v. Bruegger*, 35 N. D. 150.

Written contract cannot be changed by oral testimony. Custom must be pleaded. 17 C. J. 516, § 80; *Stevens v. Casualty Co.* 12 N. D. 463; *Sykes v. Bank*, 49 N. W. 1058 (S. D.); *Case Threshing Mach. Co. v. Loomis*, 31 N. D. 27; *First Nat'l Bank v. Aberdeen* (S. D.) 137 N. W. 597.

The rule is that the plaintiff may recover damages which manifests itself up to the time of the verdict, where the wrong consists in the breach of a contract. *Mason v. Alabama Iron Co.* 73 Ala. 270; *Southern Bell Tel. Co. v. Earle*, 118 Ga. 506, 45 S. E. 319; *Russell v. Excelsior Store Co.* 120 Ill. A. 23; *Kochenrath v. Christman*, 203 S. W. 738 (Ky.) *Standard Oil Co. v. Denton*, 70 S. W. 282 (Ky.); *Allen v. Encroth*, 111 Minn. 395, 127 N. W. 426.

BRONSON, J. This is an action for breach of a contract. The defendant has appealed from a judgment entered upon a verdict of \$2,078 in plaintiff's favor. In the evidence it appears that the plaintiffs made a contract with the defendant to deliver May 18 to May 20, 1920, a minimum carload of green, salted hides, at 20½ cents for No. 1's and 19½ cents for No. 2's, freight paid to Chicago; the hides to be in merchantable condition, banked overnight, and 2 per cent. tare deducted. Pursuant to this contract, the defendant sent its representative to Dickinson, N. D., the plaintiffs' place of business, on May 18, 1920, to inspect and receive the hides. On that date the parties proceeded to bank the hides, preparatory to shipment. In the course of this operation a dispute arose between the plaintiffs and the representative concerning an allowance or deduction upon hides affected with manure other than the 2 per cent. tare mentioned in the contract. The representative, upon objections made by the plaintiffs to this manurance dockage, final-

ly telegraphed to the defendant to the effect that the contract did not show manure dockage; that the plaintiffs would not allow any manure dockage; that the defendant should wire him what he should do. The defendant replied, "Leave the hides and take first train home." In accordance with some evidence adduced by the plaintiffs, which was denied by evidence of the defendant, the plaintiffs then told the representative that they wanted him to take the hides; that they would give him all the manure dockage he wanted; that the representative replied to this offer that he did not want these hides even if they allowed him any dockage he wanted. Immediately, on that day, the plaintiffs then served upon the representative the summons in this action. The representative left without receiving the hides. The defendant subsequently appeared in the action, and the plaintiffs served a complaint to recover damages for the failure to receive such hides pursuant to the contract.

Much evidence was introduced by the parties concerning the meaning of the contract, merchantable condition of hides, the operation of banking, the meaning of 2 per cent. tare, and the custom of the trade for allowance of dockage for manure. Plaintiff's testimony is to the general effect that no dockage for manure was deductible excepting the 2 per cent. tare mentioned in the contract. The defendant's testimony is to the general effect that the 2 per cent. tare is the allowance provided for shrinkage in transportation, and that the custom of the trade is to deduct dockage for manurance where it exists upon hides submitted. One of the plaintiffs testified that he had been in the hide business for some nine years; that the market price of hides is determined by the price at Chicago less freight; that he had not been in Chicago during that year; that they kept posted on the market price of hides through a publishing company which sent reports and telegrams to them when the market dropped; that just prior to the time when the representative came they had received a telegram from this publishing company, and on May 20th they received another telegram; that the market price of hides on May 18, 1920, was 12 cents; that the telegrams referred to the price of hides on a particular date; that they were in code and addressed to them; that he based his information upon the market price pursuant to this publishing company's reports and its telegrams. He further testified that he had one of these telegrams and could get the other from the telegraph office. The telegrams were not produced and were not offered in evidence. He otherwise testified that when he was in Min-

neapolis May 12th and 13th the market was in an unsettled condition; that it was unsettled on May 18th; that on May 12th he was offered 12 cents from one party for hides; that they could not sell these hides in Chicago on May 18th; that later they received an offer from another party of 12 cents for these hides, and on June 9th sold them to another party for 14½ cents flat, natives and brands mixed. The defendant offered testimony to the effect that the market price on hides continued about the same until June; that, upon the refusal of the plaintiffs to allow dockage and to fulfill their contract, it purchased other hides, in place of the hides it should have received from the plaintiffs, on May 19, 1920, at 20¾ cents and 19¾ cents, which included three-fourths of a cent brokerage commission to the defendant. The defendant has specified many errors in the reception of the evidence and in the instructions of the trial court. In particular it contends that the trial court erred in receiving testimony concerning the market value of the hides after May 18, 1920, in permitting one of the plaintiffs to testify as to the Chicago market price on May 18th or thereabouts, in connection with the testimony of the market value on May 18th and of the sales made on different dates as throwing light thereupon; further, that the evidence is insufficient to establish a market price on May 18, 1920, so as to justify the verdict rendered by the jury.

In view of the question that is determinative of this appeal, in our opinion, it is unnecessary to further state the assignments of error or the evidence in connection therewith. We are of the opinion that the record fails to show the market value of the hides for which a contract was made on May 18, 1920, so as to justify the verdict returned by the jury; further, that the trial court erred in receiving the evidence of one of the plaintiffs as to the market value of the hides in question on May 18, 1920, and in receiving other evidence of sales or of market value on a date different than May 18, 1920. Pursuant to the Uniform Sales Act, the measure of plaintiffs' damages for loss in the price of the hides is the difference between the contract price and the market or current price at the time when the goods ought to have been accepted. Section 64, chap. 202, Laws 1917. See *Mpls. Thresh. Mach. Co. v. McDonald*, 10 N. D. 408, 187 N. W. 993. The representative of the defendant was present on that day for that purpose; the plaintiffs tendered such hides for acceptance, if at all, on that day; they commenced their action for breach of the contract on such day. The plaintiffs attempted to assert and

to establish a market value for such hides. Accordingly the measure of loss in the price sustained is the difference between the contract price and the market price of the hides on May 18, 1920. 35 Cyc. 594; 22 C. J. 187, 190.

The market value of hides on May 18, 1920, was the Chicago market, less freight. The plaintiffs attempted to establish this market value through the market reports made by a publishing company. The testimony of one of the plaintiffs so attempting to establish the market value on May 18, 1920, is based upon information received from this publishing company. The market reports of this publishing company would be competent evidence to establish market value, provided they were trustworthy and representative of transactions actually consummated or proposed in good faith and obtained from authoritative or reliable sources in the usual course of business. Wigmore on Evidence, vol. 3, § 1704; 22 C. J. 188; Houston Packing Co. v. Griffith (Tex. Civ. App.) 164 S. W. 431. See Fountain v. Wabash Ry. Co., 114 Mo. App. 676, 90 S. W. 393; Fairley v. Smith, 87 N. C. 367, 42 Am. Rep. 522. No testimony was afforded in the record to show that these market reports were trustworthy. The plaintiffs offered to produce, but did not produce, such reports. If produced, upon the record, insufficient foundation was laid for their admission. A fortiori the direct testimony of one of the plaintiffs of the market value of the hides on May 18, 1920, based on such market reports, was incompetent. Wigmore on Evidence, vol. 1, § 717.

Likewise the testimony of private sales made before or after May 18, 1920, were incompetent to establish the market value of the hides on May 18, 1920, unless made at a time sufficiently near and under conditions sufficiently similar, to be corroborative of the market value of hides attempted to be proved on such date. 22 C. J. 188, 190; 24 R. C. L. 74.

Judgment must be reversed, and a new trial granted.

It is so ordered.

GRACE, C. J., and CHRISTIANSON, ROBINSON, and BIRDZELL, JJ., concur.

WILLIAM LANGER, Respondent, v. THE COURIER NEWS et al., Appellants.

(186 N. W. 102.)

Appeal and error — venue — application for change on ground that impartial trial cannot be had is within court's discretion; denial held not an abuse thereof.

An application for a change of venue on the ground that an impartial trial cannot be had in the county where the action is pending is addressed to the sound, judicial discretion of the trial court, and the ruling made by the trial court will not be disturbed unless an abuse of discretion appears. In this case it is *held* that the trial court did not abuse its discretion in denying a motion for a change of venue.

Opinion filed Dec. 15, 1921. Rehearing denied Jan. 10, 1922.

Appeal from the district court of Richland County, *Allen, J.*

Defendants appeal from an order denying a motion for a change of venue.

Affirmed.

Harry Lashkowitz, for appellants.

An order for change of venue is an appealable order. *Bolten v. Donovan*, 9 N. D. 575; 84 N. W. 357.

An order denying an application for change of venue is appealable because it affects the merits. *Robertson Lumber Co. v. Jones*, 13 N. D. 112; *Kramer v. Heins*, 34 N. D. 507; *Candy v. Bissell's Estate* 115 N. W. 571; North Dakota Statute.

Our statutes do not prohibit more than one application for change of venue and unless the statutes provide otherwise more than one change of venue can be granted in the same case. 40 Cyc. 179; *Hazard v. Wason*, 152 Mass. 268, 25 N. E. 465; *New Port v. Rowen*, 4 Hayw. Tenn. 195; *Goodno v. Oshkosh*, 31 Wis. 126.

W. S. Lauder and *A. G. Divet*, for respondent.

The decision of the trial court will not be disturbed on appeal unless the appellate court, from the whole record, can plainly see that the trial court's discretion was grossly abused. *Booren v. McWilliams*, 33 N. D. 339; *Stockwell v. Hague*, 25 N. D. 504; *Kramer v. Heins*, 34 N. D. 507-512; *State v. Gordon*, 32 N. D. 31; *Territory v. Eagen*, 3 Dak. 119; *R. C. L. Vol. 27*, p. 827.

A party may not use the right to a change of venue simply to prolong litigation. *Hudson v. Hanson*, 75 Ill. 198; *Peoria etc. R. Co. v. Mitchell*, 74 Ill. 394; *Wheeling v. Black*, 25 W. Va. 266; *Cook v. Garza*, 9 Texas, 358; *State v. Matlock*, 82 Mo. 455.

"A party applying for a change of venue should do so at the earliest opportunity." *Moss v. Johnson*, 22 Ill. 633; *Smith v. Pelton Water Wheel Co.* 151 Cal. 399; *Smith v. Amiss*, 30 Ind. App. 530-66 N. E. 501; *Ellis v. Sterns*, 27 S. W. 222 (Texas); *Sumner Co. v. Wellington Township* 39 Kans. 137.

"The 'abuse of discretion' to justify interference with the exercise of the discretionary power implies not merely error of judgment but perversity of will, passion, prejudice, partiality or moral delinquency." *Citizens St. R. Co. v. Heath*, 62 N. E. 107, 29 Ind. App. 395; *Stewart v. Stewart*, 62 N. E. 1023, 28 Ind. App. 378; *People v. N. Y. Cent. R. Co.* 29 N. Y. 418

PER CURIAM. This is an appeal from an order denying a change of venue. The action is for libel. It was heretofore before this court upon an appeal from an order overruling a demurrer to the complaint. 179 N. W. 909. This court held that the complaint stated a cause of action. The remittitur was filed in the trial court on November 19, 1920. On or about December 29, 1920, an answer was interposed. On March 12, 1921, the defendant made application to change the place of trial from Cass county to some other county upon the ground that an impartial trial could not be had in that county. On April 16, 1921, Hon. A. T. Cole, the district judge, before whom the motion was heard, made the following order:

"The above-entitled action came duly on to be heard before the court at the chambers thereof, in the courthouse in the city of Fargo, Cass county, N. D., on this 16th day of April, 1921, on motion of defendant for an order changing the place of trial of said action. * * * It is now hereby

"Ordered that the said motion be and the same hereby is granted, and the place of trial of said action be and the same hereby is changed from the district court of Cass county, N. D., to the district court of Richland county, N. D., in the Third judicial district of the state; and

"It is hereby further ordered that the clerk of district court of Cass county shall transfer to the clerk of the said district court of Richland county all the records, pleadings and files in said action now on file in his office.

"And it is hereby further ordered that in view of the fact that there is now pending in the district court of Traill county a certain action in which J. R. Waters is plaintiff and Arthur C. Townley is defendant, and that some of the witnesses in said action may be material, important witnesses in the trial of the action herein entitled, the trial of this action shall take place at a time when the witnesses in the said case of Waters v. Townley can attend. This order subject to a further hearing if good cause be shown therefor.

"Dated at Fargo, N. D., this 16th day of April, 1921.

"By the Court:

"(Signed) A. T. Cole, Judge."

Pursuant to said order, the clerk of the district court of Cass county transmitted the papers and the files in the case, to the district court of Richland county, where they were received and filed on April 19, 1921. Subsequently, the defendants made an application before the Honorable A. T. Cole, district judge of Cass county, who made the order transmitting the cause to Richland county, that the case be transferred for trial to some other county than that of Richland. On June 16, 1921, Judge Cole made an order refusing to disturb the change of venue, ordered by him, by the order dated April 16th. On June 21, 1921, the defendants made application before Judge Allen, presiding as judge of the district court of Richland county, that the venue of said action be changed from Richland county to some other county. In support of this application, the defendants submitted some 30 affidavits, including the affidavits of the plaintiff's attorney, who is a resident of Fargo, in Cass county. These affidavits were to the effect that owing to the political aspect of the case, and the public sentiment existing in Richland county, the defendants could not obtain a fair trial in Richland county. In opposition to these affidavits, the plaintiffs served a large

number of affidavits from men who, so far as their affidavits show, were at least as well qualified to speak as those who made the affidavits for the defendants. According to these latter affidavits, defendants can obtain a fair trial in Richland county. After a hearing, the trial judge made an order denying the application for a change of venue. This appeal is taken from that order.

On this appeal, the only error assigned is that the trial judge erred in denying the defendants' motion for a change of venue from Richland county to some other county.

Whether a change of venue should or should not be had on account of local prejudice is primarily one for the determination of the trial court. In other words, an application for a change of venue on the ground that an impartial trial cannot be had in the county where the action is pending is addressed to the sound, judicial discretion of the trial court; and the ruling made by the trial court will not be interfered with unless a manifest abuse of discretion appears. *Booren v. McWilliams*, 33 N. D. 339, 157 N. W. 117. "The reason for the rule is obvious. Whether a change of venue is necessary to obtain a fair and impartial trial is not a question of law, but of fact. A judge on the spot, viewing all the circumstances, and having knowledge of persons, facts and influences is much better qualified than is an appellate court at a distance, with only *ex parte* affidavits before it, to determine the fact whether or not it is true that the defendant cannot have a fair trial by an impartial jury in the county in which he is indicted or in which the plaintiff has commenced his suit." 4 Ency. Pl. & Pr. 499-502. Upon the record submitted, this court is wholly unjustified in interfering with the ruling of the trial court.

Order affirmed.

CHRISTIANSON, BRONSON, and BIRDZELL, JJ., concur.

GRACE, C. J., did not participate.

ROBINSON, J. (dissenting). This is a political libel suit, a common nuisance case. Three times it has come before this court: (1) On appeal from an order overruling a demurrer to the complaint; (2) a motion

for a stay of proceedings pending an appeal; (3) an appeal from an order denying a change of venue. The libel is this:

“Langer Wants Control.

“It became clear early in the referendum campaign that two factions were seeking control of the I. V. A. One was headed by Attorney General Langer and the other by President Everson. Langer visited heads of Minneapolis and St. Paul corporations that are financing the I. V. A. early this year and demanded that he be made custodian of the slush funds that were expected in North Dakota. His record was against him, and these gentlemen turned him down, though politely. Because of this Langer is sore, it was said yesterday, and is attempting to build up a machine of his own.”

The false innuendo is to this effect: That the purpose and meaning of the libel was to affirm that Langer sought the slush fund to bribe voters at the general election and to corrupt the press, and that it was so understood by those who read the libel. Now that innuendo is clearly false, and yet it is the basis of the action. The libel does not admit of any such understanding. It in no manner indicates that Langer sought the fund for other than legitimate campaign purposes. And without that false innuendo, the complaint would not have been sustained, as it was, by three judges of our court. In two more recent cases the judges have held that even on a demurrer they will not longer hold as true that which they know to be false. All that has a direct bearing on the way in which Judge Allen used his discretion on the motion for a change of venue and a stay.

Pending an appeal from the order denying a change of venue, the court and counsel made preparations to rush the case to trial, and even put it on the peremptory call of the trial calendar. Hence counsel took fright and rushed to this court with a motion for a stay, and he was told that the motion might well be intrusted to the discretion of Judge Allen. Then Judge Allen heard the motion and allowed a stay on five conditions: (1) That within 10 days defendants give a bond in the sum of \$2,000 to pay any judgment plaintiff may recover pursuant to the order of Judge Cole made as a condition of granting leave to answer. (2) That within 10 days defendants give a bond in the sum of \$5,000 to pay any judgment plaintiff may recover. (3) That within 10 days defendants prepare and present to the court for settlement a statement of the case. (4) That within 10 days after settlement defendants complete

the appeal and cause the record to be transmitted to the Supreme Court with defendants' brief. (5) That within 10 days defendants pay to plaintiff's attorney \$100 to reimburse plaintiff for expenses in preparing for the trial. This order and those conditions were so manifestly arbitrary and illegal, unjust and oppressive that the Chief Justice of this court ordered a stay. Now the fair conclusion is that in denying the change of venue and in at once putting the case on the peremptory call of the trial calendar and in denying the stay, unless on such arbitrary conditions, and in all that he did in the matter, Judge Allen did not exercise a fair judicial discretion. And the distinguished lawyers did not deal fairly with the judge in urging or influencing him to do such things. Hence it behooves this court to consider the appeal on its merits and not on false presumptions.

The Merits.

Without the false innuendo the complaint did not state a cause of action. McCue Case, 39 N. D. 190, 167 N. W. 225.

The action is mainly political, and it may fairly be presumed that every political partisan will incline to the side of his party leader. Twice Mr. Langer has been elected to the office of Attorney General as a candidate of the League party. When he broke with his party in 1919 and became the leader of the opposition, of course it led to bitterness, abuse, and mudslinging. Mr. Langer spent about six months going over the state and denouncing the leaders of the League and the defendants. By the newspapers and the voters in Richland and in Cass counties he was strenuously sustained. In 1920 at the primary election the vote for Governor was as follows:

In the State—Frazier	59,355
“ “ “ Langer	53,941
In Cass County—Frazier	2,620
“ “ “ Langer	4,521
In Richland County—Frazier	1,182
“ “ “ Langer	1,941
Barnes County—Frazier	1,712
“ “ “ Langer	1,810

This shows the pull and influence of the Wahpeton newspapers, the Fargo Forum, and the Grand Forks Herald. The old liners of Wahpeton make affidavits and move heaven and earth to prevent a fair trial in a county where great political bias does not prevail.

True counsel insists that in such a large county as Richland there must be many that are in no way prejudiced—and that is true; but it might be quite difficult to find them. And then it is true that a little leaven leaveneth the whole lump, and that at Wahpeton the leaven of prejudice against the League party is active and powerful. A fair-minded person brought to Wahpeton might quickly be infected by the leaven of prejudice. The case would be wholly different if it were a personal and not a political action. Were this an action on contract or an action with no political flavor, it never would have developed the rancor and bitterness and lack of professional courtesy shown in this case. An ordinary personal action does not appeal to the prejudice of either judges or jurors, but that is not true of a political action between political bosses or chieftains or of any action between clerical chieftains or bishops, especially on matters relating to their creeds.

Counsel insist that the motion for a change of venue was addressed to the discretion of the trial judge—and that is true. And so was the motion for a stay of proceedings pending the appeal. It was addressed to the discretion, and we have seen how that discretion was used. The facts are that most judges are not above the leaven of prejudice and some attorneys are not above using it. Now it is needless to prolong the discussion. It must be conceded that the defendants are entitled to a fair trial and that the chances are ten to one they cannot have a fair trial in Richland county. Hence the order denying a change of place of trial should be reversed, and as Valley City, in Barnes county, is convenient to all the parties, and as it appears the people are not so intensely partisan, the court should order that the place of trial be changed to Barnes county.

T. G. C. KENNELLY, as administrator of the estate of Luigi Nardella, deceased, Respondent, v. NORTHERN PACIFIC RAILWAY COMPANY, a corporation, Appellant.

(186 N. W. 548.)

Statement of facts.

1. One Luigi Nardella was employed by the defendant railway company, in the capacity of section man. While so employed and while in the discharge of his duties in the defendant's railway yards at Mandan, and while engaged in cleaning ice and snow from a crossing where a street of the city crossed the railroad tracks, he was struck by certain cars of defendant which were propelled against him and so injured that he immediately died.

Death — \$4,000 damages held not excessive.

2. Plaintiff brought an action under the Federal Employers' Liability Act to recover damages for the benefit of the widow of deceased and her two children. The evidence disclosed that one of the children was more than thirty years of age and was married, and was in no way dependent upon his father for support. It further shows that the other child, a boy of seventeen years of age, may have in part been dependent. The jury returned a verdict in favor of plaintiff for \$4,000, and apportioned the same as follows: to the widow \$4,000. It is *held* that the verdict is sustained by the evidence.

Master and servant — extraordinary risk of injury by cars held not assumed by section hand.

3. The defendant interposed assumption of risk as a defense. The evidence disclosed that the risk was not an ordinary but an extraordinary one, and there is no evidence to show that deceased either knew of or appreciated it; it is *held* that the deceased did not assume the risk.

Commerce — section hand cleaning ice from crossing held engaged in "interstate commerce."

4. The railroad tracks upon which deceased was working at the time of his death were used in the transportation of both interstate and intrastate commerce. *Held*, in the circumstances of this case and from the evidence that deceased was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act.

Sufficiency of instructions.

5. Certain instructions of the court considered and *held* not to be prejudicial nor erroneous.

Appeal and error — single undertaking to cover two appeals held sufficient.

6. Certain motions by plaintiff for dismissal of the appeal considered and for reasons stated in the opinion are denied.

Depositions — informalities held waived by general appearance by defendant.

7. Where defendant makes a general appearance, he waives the legal right to object to the reception in evidence of depositions on the ground that notice to take depositions was served before the summons, that the interpreter taking the depositions was prejudiced, and that the depositions were taken on a legal holiday; Comp. Laws 1913, § 7890, providing that either party may commence taking testimony by depositions at any time after service upon or appearance of defendant.

Opinion filed Jan. 14, 1922.

An appeal from an order denying motion for judgment notwithstanding the verdict or for a new trial, and from the judgment, *Berry, J.*

Order and judgment affirmed.

Young, Conmy & Young, for appellant.

There was no proof of negligence here. *Aerkfetz v. Humphreys*, 145 U. S. 418-421; *Hinson v. Atlanta & C. Air Line Ry. Co.*, 90 S. E. 722; *Land v. St. Louis & S. F. R. Co.*, 148 Pac. 612; *Fort Worth & D. C. Ry. Co. v. Copeland*, 164 S. W. 858; *Boldt v. Pennsylvania R. Co.*, 218 Fed. 368.

"The employer is 'not bound to assume that any employe familiar with the manner of doing business, would be wholly indifferent to the going and coming of the cars. *Aerkfetz v. Humphreys, et al.*, *supra*. Wherein defendant may reasonably be said to have failed in the duties to such employes with relation to this yard and the manner of doing work therein, we are unable to perceive from the evidence." *Crowe v. N. Y. C. & H. R. Co.*, 70 Hun, 37, 23 N. Y. Supp. 1100; *Connelley v. Penn. Ry. Co.*, 228 Fed. 322, 142 C. C. A. 614; *Travis v. Kansas City So. Ry. Co.*, 121 La. 886, 46 So. 909; *Neidlein v. Southern Pac. Co.*, 179 Pac. 194; *Ciebatone v. Chicago, Great Western Ry. Co., et al.*, 178 N. W. 890-1.

Error in taking deposition on a legal holiday.

"Over objection made at the time, the deposition was taken on February 12th, a legal holiday under the statute. The point was also raised in the motion to suppress. We submit the motion to suppress should have been granted." *Leonosis v. Bartilins* (S. D.) 63 N. W. 543, 75 S.

D. 93; Milwaukee Harvester Co. v. Teasdale (Wis) 64 N. W. 422; People v. Donovan (N. Y.) 31 N. E. 1009; Davidson v. Munsey (Utah), 74 Pac. 431.

The loss of the society or companionship of a son is a deprivation not to be measured by any money standard. It is not a pecuniary loss under such a statute as this. *Am. R. R. of Porto Rico v. Didricksen*, 227 U. S. 149-150.

"Where a switchman was killed while moving cars of fruit which were left by a train at a station near the state line, it cannot be said in an action under the Federal Employer's Liability Act, in the absence of testimony showing whether such train or cars crossed the state line, that they were moved in interstate commerce. *Osborne v. Gray*, 241 U. S. 15, L. ed. 36 Sup. Ct. Rep. 486, affirming 5 Tenn. Civ. App. 519.

"A switchman was not within the Federal Employer's Liability Act where he was struck and injured by a train which was not shown to have been engaged in interstate commerce, while he was protecting a switch with a flag as his crew were placing on a private siding empty freight cars the ultimate use and destination of which did not appear." *Shanley v. Phila. & R. R. Co.*, 221 Fed. 1012; *Illinois C. R. Co. v. Behrns*, 233 U. S. 473, 58 L. ed. 1051, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914 C. 163, 10 N. C. C. A. 153 affirming 134 C. C. A. 639, 217 Fed. 967, which reversed 192 Fed. 581.

Jacobsen & Murray for respondent.

"The Supreme Court of the United States, has laid down the doctrine clearly as to what will or will not constitute negligence." *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 36 L. ed. 485.

"The same rule is followed by the Minnesota Supreme Court and applied to a trackman working in the railroad yards." *Murran v. Chicago, M. & St. P.*, (Minn.) 90 N. W. 1056.

"The same rule is applied to track men by the Washington Supreme Court. *Anest v. Columbia & P. S. R. Co.*, 154 Pac. 1100.

"The same rule was confirmed and applied by the Supreme Court of Wisconsin, in the case of: *Kalashian v. Hines*, Wisconsin, 177 N. W. 602."

"The deceased did not assume the risk of this accident. Why? Because the accident was caused by the negligent acts of co-employees." *Kenyon v. Ill. Cent. Ry. Co.* 173 N. W. 44; *Bennett v. Atchison, T. &*

S. F. Ry Co. 174 N. W. 798; Koofos v. G. N. Ry. Co. (N. D.) 170 N. W. 859; Hennessy v. Ginsberg, 180 N. W. 796; Kalashian v. Hines, 177 N. W. 602; Falahee v. City of Jackson, 180 N. W. 507; Lusk v. Phelps, 175 Pac. 756; Gowan v. McAdoo, 173 N. W. 440.

"It is to be noted that in the case at bar that the defendant cross-examined the witness in the taking of those depositions. Under well settled rules, he waived all irregularities. We also quote from the above South Dakota case: last column, on p. 453: Allison v. Chi. St. P. Ry. Co. 158 N. W. 452.

"The service upon defendants mentioned in § 510 means service of process by which defendants are brought into court." Also see Walters v. Rock, (N. D.) 18 N. D. Rep. 45; Green v. Walker (Wis.) 41 N. W. 534.

It is beyond the province of the court to say what the amount of damages shall be. That is solely for the jury, and the amount thereof rests solely in the discretion of the jury. Bennett v. Atchison, T. & S. F. Ry. Co. 174 N. W. 798.

GRACE, C. J. This action is one brought under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), whereby plaintiff, as administrator of the estate of Luigi Nardella, deceased, sought to recover damages in the sum of \$35,000 on account of the alleged carelessness and negligence of the defendant in propelling, switching, or pushing one or more of its loaded cars against and upon the deceased in such a manner that he was hauled under the wheels and his body ran over by them, and his head cut off; the cars at the time being propelled or pushed by one of defendant's engines. The complaint is in the usual form in this character of case, and need not be set out at length.

The answer admits that Nardella was on January 4, 1917, in defendant's employ as a section hand, and that at the time he received the injuries which caused his death he was engaged in cleaning snow and ice off its tracks in its yards in the city of Mandan, but claims he received the injuries which caused his death, not from any negligence of the defendant, or its servants, but by reason of his contributory negligence. Defendant further alleges Nardella received the injuries causing his death through and because of one of the ordinary risks of his employment as a section laborer; that he knew of the dangers and perils of the situation, and assumed all risks of injury in connection therewith,

and further denied that plaintiff was legally and lawfully appointed as administrator.

The action was tried to the court and a jury. The jury returned a verdict in favor of plaintiff in the sum of \$4,000, all of which was apportioned to the widow of Nardella, as sole beneficiary, and judgment was entered accordingly. Subsequently defendant made a motion for judgment non obstante or for a new trial. The court entered an order denying the motion and defendant appeals from that order and from the judgment. Both appeals may be considered together.

The facts necessary to be stated are as follows: The defendant has its yards at the city of Mandan. In the yard are several yard tracks which extend east and west, south of the main track. About three-fourths of a mile east of the depot there branches out of the main line track No. 1. It extends westward, paralleling the main line through the Mandan yards. Near where track No. 1 intersects the main line there is a branch out of track No. 1, extending in a southwesterly direction, and this is designated the lead track. From this lead track other branches or tracks extend, and are numbered from 2 to 7 inclusive, and they are about 12 feet distant from each other. East of the depot perhaps about one-half mile one of the streets of Mandan crosses these tracks. On the street the crossings are of plank, lying parallel to the rails. On the 4th day of January, 1917, the track foreman directed Nardella and a companion worker by the name of Delafave to clear the snow and ice from this crossing, and while doing so to face each other, so that each could give the other warning in event of trains approaching.

As directed the deceased and Delafave, using picks and shovels for the purpose, proceeded to clear the snow and ice from the crossing. They had been working there some time before the injury occurred. The deceased faced west, and Delafave faced east. They were a short distance apart. While in this position, and while removing the ice and snow from the crossing, the switching crew kicked from the east, and in a westerly direction, on the lead track, three cars loaded with cinders. No warning was given. These cars got close to the deceased before they were discovered by Delafave. When he discovered them, he shouted to the deceased "Look out," and then jumped from the track. The deceased tried to get out of the way of the cars but was knocked down by them. He got hold of the front end of the car, and was dragged along for some distance, his head dragging on the rails, and he called to Dela-

fave to help him. After being dragged some distance, his clothes caught in a switching frog, and he was there injured and killed in the manner hereinbefore stated. There was no brakeman on the cars. Deceased received no other warning than that from Delafave. The whistle and bell on the engine were not sounded. West of the crossing there was nothing to obstruct the vision of the switching crew, or any of them of the deceased. West of the point where the accident happened some 400 or 500 feet there were cars on all the tracks except one. One Stabler, a witness for defendant, and who was connected with the switching, in substance testified that, about four minutes before the cars were kicked in on the track on which Nardella was working when killed, he told him that cars were about to be kicked in on that track. This evidence is controverted, and whether such notice or warning was given was a question of fact for the jury, and as its verdict was for plaintiff, it must have found that no such warning was given. The weather on the day of the injury was cold, but the day was clear.

The following special questions were submitted by the court to the jury:

(1) Q. Did Switchman Stabler notify Luigi Nardella before he was struck that they were about to kick some cars along the lead where he was working? A. No proper warning.

(2) Q. Did Switchman Hausman notify Luigi Nardella before he was struck that they were about to kick some cars along the lead where he was working? A. No.

(3) Q. Was the switching operation which resulted in the death of Luigi Nardella conducted in the ordinary and usual manner? A. No.

(4) Q. If you answer question No. 3 No, state fully where and in what manner it was different from the ordinary and usual switching operation. A. Carelessness of switchman and fellow workmen.

(5) Q. Were any of the switchmen or trainmen handling the switching operation which resulted in the death of Luigi Nardella negligent? A. Yes.

(6) Q. If you answer question No. 5 Yes, state fully what the negligence was, and which switchman or trainman was negligent. A. All of them.

(7) Q. Did Luigi Nardella use and exercise the care for his personal safety that an ordinary prudent person working in the switching yards would, under the same circumstances? A. Yes.

(8) Q. Did Luigi Nardella keep his own lookout for trains? A. Yes; from the west.

(9) Q. What pecuniary loss did the deceased's wife and children suffer because of his death? A. \$4,000.

(10) Q. If you find the deceased was negligent himself, what sum of money should be deducted from the above amount because of that negligence? A.——.

(11) Q. Was the bell on the engine ringing as the cinder cars, which killed Luigi Nardella, were kicked down and over the crossing? A. No.

(12) Q. Was Switchman Stabler at the crossing in question at the time the accident occurred? A. Yes.

Before considering the assignments of error a disposition of two motions made by plaintiff for dismissal of the appeal may be had. One of the motions asked for the dismissal of the appeal on the ground that no assignments of error had been served with notice of appeal from the order denying a new trial or judgment non obstante. There appears in the record, assignments of error in the appeal from the order, as well as in the appeal from the judgment; hence that motion should be and is denied. The other motion is to dismiss the appeal from the judgment on the ground that no proper undertaking was filed therein. In appealing from the order defendant gave an undertaking in the sum of \$250.00 to cover costs in the appeal from the order as well as the appeal from the judgment. If the undertaking had been in the sum of \$500 to cover costs in the two appeals, perhaps no question could arise. It would then have been in compliance with § 7836, C. L. 1913, and by that section the several undertakings referred to in chap. 15 of the Code of Civil Procedure, of which the above section is a part, may be included in one instrument at the option of the appellant. The appeal is in good faith, and if it were necessary under § 7840 this court could permit the defendant to file an additional undertaking. We think necessity does not require this to be done, as the one given will perhaps be sufficient to cover all taxable costs in the case. Hence the motion to dismiss the appeal from the judgment is denied.

The defendant has made 31 assignments of error, some of which relate to the refusal of the court to suppress the deposition of witness Delafave, defendant claiming in that respect that the notice to take deposition was served before the summons in the action; that no complaint

was served with the summons; that the interpreter used in taking the deposition was prejudiced against the defendant, on account of having been formerly in the defendant's employ and discharged by it; and, finally, that the deposition was taken on a legal holiday to wit, February 12.

We are of the opinion there was no error in receiving the deposition in evidence, for at the time the same was taken the defendant appeared and participated in the taking thereof. The appearance was general. The defendant therefore waived the above informalities; that is, the legal right to object to the reception in evidence of the deposition for any of the causes above mentioned. Section 7890, C. L., provides that either party may commence taking testimony by deposition at any time after service upon or the appearance of the defendant in the action. Many of the assignments of error relate to the reception or exclusion of testimony as adduced at the trial, either by deposition or witnesses present and testifying. We have examined them with considerable care, and conclude that none of the rulings of the court in this respect amount to prejudicial reversible error. In fact, many of the assignments of error in this respect are very technical.

Error is predicated on several of the instructions. All have been examined and none of them merit any discussion except two, which are analyzed in defendant's brief. The first of these is as follows:

"The assumption of risk is a defense in this case. Assumption of risk as used in these instructions means that a servant or employee on accepting the employment assumes all the ordinary and usual risks and perils incident thereto, which he knows, or in the exercise of reasonable care should have known, to exist. However, a servant or employee does not assume the extraordinary and unusual risks of the employment.

"Gentlemen, you will apply this rule to all the facts and circumstances in this case, and determine therefrom whether or not the deceased, Luigi Nardella, assumed the risk of the alleged acts of negligence that caused his injury, if any, resulting in his death."

This instruction is only a part of the whole instructions in the same respect. The court further instructed as follows:

"You are instructed that a section hand such as Luigi Nardella, working in a busy railroad yard, where trains are moving and cars are being kicked and shunted around at all times, assumes the risk from danger ordinarily incident to his occupation, and must protect himself from approaching trains or cars, either attached to the engines or being kicked

from one place to another in the ordinary and usual manner.

"The railway company here is not an insurer of the safety of its employees. Their work, particularly that of a laborer in a switchyard, is dangerous, and injury because of one of the dangers of the business is an assumed risk, and the railway company is only liable if there is negligence shown by a preponderance of the evidence, and that this negligence was the proximate cause of the accident.

"You are instructed that it was the duty of Luigi Nardella to protect himself against injury from ordinary switching operations, and no recovery can be had here unless plaintiff has shown you by a preponderance of the evidence that some of the railroad men were negligent in the performance of their duty, and that such negligence was the proximate cause of the death of Luigi Nardella.

"You are instructed that the switching yards of any railroad company are necessarily a place of the greatest danger and a section hand working in these yards especially on or near the lead track, as was Luigi Nardella must be diligently on the lookout, and if you find from the evidence that the cars in question were kicked down the lead track in the ordinary manner and without negligence, and there was no negligence on the part of other railway men, proximately causing the death, and Luigi Nardella was killed because of his failure to protect himself from the approaching cars, then I charge you, as a matter of law, his death was because of his own fault alone, and plaintiff cannot recover damages in this action, but your verdict must be for defendant."

In determining whether the instruction is erroneous, recourse must be had to the federal Employers' Liability Act of April 22, 1908 (chap. 149, 35 Stat. L. 65), which provides for the recovery of damages for injuries received by certain persons while engaged in interstate commerce. The act supersedes and displaces chap. 297 of the Session Laws of 1915 of the state of North Dakota in so far as the latter purports to deal with the subject-matter of the former. Second Employers' Liability Cases, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. ed. 327, 38 L. R. A. (N. S.) 44. And though the context of the two acts is practically identical, the federal act only is effective, and the state act is of no effect in so far as it purports to fix liability in damages to any person suffering an injury while he is employed by a carrier in interstate commerce.

Conceding the correctness of this view, it would seem that an action under the federal act should be brought in the federal court, thus avoid-

ing much inconvenience and confusion. That court is constantly occupied in the consideration of federal questions, and necessarily would be more familiar with them than a state court, which has them to consider at least only infrequently. However, in the decision of *Claflin v. Houseman*, 93 U. S. 130, 23 L. ed. 833, it was held:

"When a federal question is presented to a state court, it is its duty to retain jurisdiction and decide it."

Section 1 of the federal act provides:

"That every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

Section 3:

"That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence, shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Section 4:

"That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for in-

juries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

What was intended to be accomplished by the enactment of the act? Was it intended in some measure to be a benefit and protection to employees who received injury in the course of employment and in what manner, if any, has it affected the defense of the assumption of risk?

In *Boldt v. Pennsylvania Railway Co.*, 245 U. S. 445, 38 Sup. Ct. 140, 62 L. ed. 385, it is said that—

"At common law the rule is well settled that a servant assumes extraordinary risks incident to his employment or risks caused by the master's negligence which are obvious or fully known and appreciated by him. *Shearman & Redfield on Negligence* (6th ed.) § 208; *Bailey, Personal Injuries* (2d ed.) § 385. This general doctrine was clearly recognized in *Gila Valley & Railway Co. v. Hall*, 232 U. S. 94, 101; *Jacobs v. Southern Railroad Co.*, *supra*; *Chesapeake & Ohio Railway Co. v. De Atley*, 241 U. S. 310, 313; and *Erie Ry. Co. v. Purucker*, 244 U. S. 320, 324."

Assuming that statement to be correct, the servant, in addition to assuming the extraordinary risks incident to his employment necessarily must have assumed the ordinary ones. As we view the following decisions of the Supreme Court of the United States: *Seaboard Air Line Ry. Co. v. Horton*, 233 U. S. 493, 503, 34 Sup. Ct. 635, 58 L. ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475, and *Jacobs v. Southern Ry. Co.*, 241 U. S. 229, 235, 36 Sup. Ct. 588, 60 L. ed. 970—notwithstanding the act, the defense of assumption of risk still remains as at common law except as affected by § 4 of the act, *supra*.

In the *Horton* Case it is stated:

"It seems to us that § 4, in eliminating the defense of the assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action."

It would seem from these decisions and others by the same court, to which reference has heretofore been made and by other decisions of that court not here cited, that it has construed the act to mean about as follows, viz.: That it abrogates the fellow-servant rule and the defense of contributory negligence; that the act does not abrogate the common-law principle of the assumption of risk, except where the carrier violates

any statute enacted for the safety of the employees, where such violation contributes to the injury or death of the employee; that in a measure it established the rule of comparative negligence. The act being federal, duty as well as courtesy requires that the decisions of the highest federal court be considered as the correct interpretation of the act.

If, however, we were construing the state act (which bears a great similitude to the federal act) in a similar case arising in intrastate commerce, we are not so certain that we would arrive at the same conclusion with reference to the retention of the principle of assumption of risk—whose source, the English case of *Priestley v. Fowler*, 19 Eng. Rul. Cas. 102, was a case of no importance, except for the announcement therein of the fellow-servant and assumption of risk rules. In 18 Ruling Case Law, 672, it is said of this case:

"But not until several decades had elapsed did it come into prominence. During the 60's a scattering of decisions lent it their support; in the 70's the courts of many states adopted the doctrine; and in the ensuing decade it was recognized by all save a very few courts. Indeed, it seems that only one court has consistently refused to accept 'the assumption of risk' as an independent principle of law. The period during which the doctrine came into existence was one that favored capital in every way, and it was generally thought to be politic to deny the laborer a right of recovery against the capitalists when his only contention was that he had been injured in the discharge of his duties. * * * Social and economic ideals and standards have undergone revolutionary changes in the past decade, and we may expect to find the courts holding that no defense is available to the employer where it is shown that the employee was injured while performing his duties in the usual and contemplated manner."

It would seem that the fellow-servant rule, the doctrine of contributory negligence, and assumption of risk are rules which came into existence for the protection of the employers, the capitalists, so that they might employ men to work with dangerous instrumentalities and complicated machinery in unsafe places without incurring liability for injuries to workmen. Those principles are not founded in justice, and the adoption of them as principles of law has afforded the employer a safe and sure means of avoiding their just liabilities, and have imposed upon a weaker class great burdens and suffering. The effect of the operation of those principles cannot be ascertained fully, unless it were

possible to take a census of the crippled and injured employees of industry and of the deaths which have occurred therein while they were engaged in their employment for which no compensation has been allowed. It is difficult to understand the relation of these principles to each other. In 18 R. C. L. 672, 673, is analyzed the relation of assumption of risk to negligence and contributory negligence. It is there said :

"During the earlier years of its existence the doctrine of assumption of risk was accepted without much examination into its fundamentals or its relation to other subjects. In recent times, however, perhaps owing to the doubts that economic changes have cast upon its expediency, the doctrine has been subjected to much careful examination and criticism. In particular the courts have devoted themselves to a consideration of its relation to negligence and contributory negligence; and it has been almost uniformly concluded that a denial of recovery on the score of negligence on the part of the employee proceeded upon a different principle than a refusal of compensation based on assumption of risk, or, in other words, that assumption of risk and contributory negligence are distinct and different defenses. At the same time the courts assert that both defenses may be available under the same state of facts, and indeed the same case. But it is declared that the two principles rest upon different grounds—that assumption of risk rests in contract or upon the principle expressed in contract or upon the principle expressed by the maxim, *Volenti non fit injuria*, whereas contributory negligence rests in tort or an omission of duties; and, according to some courts, a distinction exists in respect of the imminency of the peril. It is generally agreed that assumption of risk may be a defense in cases where there is no contributory negligence, and where more than ordinary care has been exercised by the employee. Such has been the general trend. It is sufficiently certain, however, and is becoming generally recognized that attempted distinctions between these two principles (contributory negligence and assumption of risk) are metaphysical, not practical. * * * Eminent courts and publicists have regarded the doctrines of assumption of risk and contributory negligence as nothing more than different names for the same thing. * * * Nor is the identity of the two doctrines without practical importance. From the dual terminology of the subject, and the confusion and misunderstanding that have followed thereon, have resulted deplorable consequences, sometimes amounting to a miscarriage of justice."

And had it been held in construing the federal act that "contributory negligence" and "assumption of risk" were but different names for the same thing, the doctrine of comparative negligence would in reality have been established, but as construed, it would seem to exist only where the risk is extraordinary and not known or appreciated.

Regardless, however, of the merit or demerit of the doctrine of assumption of risk and whether it is identical with the principle of contributory negligence, it would seem clear that it has no application here; for the evidence shows that the risk was not one incident to the employment, but was an extraordinary one, and there is no evidence to show that the deceased either knew or appreciated it. The evidence shows that the switching crew consisted of five men, three switchmen, and the engineer and fireman of the engine; that with the engine they pulled the three cars of cinders onto the lead track, and "kicked" them down it to where deceased was working; in other words the engine pushed the cars for a short distance at a considerable speed, and then it was released from the cars, and they proceeded alone at a considerable speed, unattended by any brakeman. The whistle of the engine was not blown, nor the bell was not rung. Two switchmen were near where the accident happened, about 40 feet, but gave the deceased no warning. As before stated, it is claimed by Stabler that he notified deceased from four to five minutes before the cars came down that they were coming down on that track. This, however, is denied by other testimony, and, the jury having found in plaintiff's favor, it must have determined that no such warning was given. The evidence fairly shows that there was no other engine in that vicinity, in fact we think it fairly shows there were no other engines in the yard, and if so there was no showing that there was any ringing of bells or blowing of whistles, so that if the whistle on the engine that kicked these cars had been blown or the bell rung it could not have been heard on account of the general confusion, and if the engine had remained attached to the cars all of the way and the whistle had been blown and the bell rung as it approached the crossing where deceased was working, and if there had been a brakeman on the cars to give danger signals to the engineer and to set the brakes or cause them to be set, the injury and death of Nardella may have been avoided, at any rate the bringing down of the cars in the manner in which they were brought created a great and unusual danger to plaintiff, and forced upon him an extraordinary risk which he could not anticipate, and of which

there is no proof that he knew or appreciated, and hence he did not assume it.

The question of assumption of risk was an issue in the case, and an issue of fact for the jury. Its verdict was in favor of plaintiff, and it must be assumed that it, under the evidence, found the risk was extraordinary, and that the deceased did not assume it. The answers to the special interrogatories established beyond question the negligence of the switching crew, and that the switching operation was not conducted in the ordinary and usual manner. They further established that Nardella exercised such care for his personal safety as an ordinary person employed in switching would exercise.

The defendant contends that the verdict is excessive, and that there is no proof of a proper measure of damages, and that the instruction in respect to the proper measure of damages is erroneous. We are of the opinion there is no merit in these contentions, and that the instruction in this respect was not erroneous. The part of the instruction complained of is as follows:

"The measure of damages in this action, if you find for the plaintiff, is the financial benefit which might reasonably be expected by the widow and the children from the deceased, Luigi Nardella, in a pecuniary way had he not been killed. The damages of the beneficiaries are limited to their pecuniary loss sustained by the death of the deceased. The damages assessed, if you find for the plaintiff, cannot in any event, exceed \$35,000."

Under the rule announced in *Michigan Central Railroad Co. v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. ed. 417, Ann. Cas. 1914C, 176; *American Railroad Co. v. Didricksen*, 227 U. S. 145, 33 Sup. Ct. 224, 57 L. ed. 456; *Gulf Colorado Railway Co. v. McGinnis*, 228 U. S. 173, 33 Sup. Ct. 426, 57 L. ed. 785—we are of the opinion the instruction was not erroneous. The evidence discloses that the deceased was the father of three children, one of whom was more than 30 years of age and not dependent on the father for support at the time of the bringing of the action; another at that time was deceased; the third, a boy, was about 17 years of age, and the evidence shows that he was to some extent dependent for his support.

The verdict was for a gross amount, \$4,000. It found that neither the girl nor the boy was entitled to recover anything, but that the widow was entitled to recover \$4,000. The verdict in every respect corresponds

with the rule announced in the McGinnis Case, *supra*. The widow, not only could reasonably expect that the deceased during the 20 years of his life expectancy would have contributed as much as he had theretofore contributed, but she might also reasonably expect him to contribute more, and she could also reasonably expect that in addition to what he directly contributed he would accumulate and save for her the remainder of his net earnings; that is what would be reasonably expected of the average man who had the interest of his family at heart, and the evidence sufficiently discloses that the deceased was this kind of man.

Nardella, prior to and at the time of receiving the injury which caused his death, was an employee of the Northern Pacific Railway Company, on its main line in the capacity of a section man, and in the discharge of his duties was required, among other things, to work upon the yard tracks of the railroad company's yards at Mandan, and was engaged in removing snow from the crossing where the street of the city crossed the yard tracks. The main and the yard tracks were instrumentalities for transporting both interstate and intrastate commerce. His duty was to repair the tracks and discharge other duties to facilitate interstate as well as intrastate commerce, and he was discharging those duties when killed; and this without regard to the character of the particular cars—interstate or intrastate—which struck and killed him. We are of the opinion, therefore, that when killed he was engaged in interstate commerce within the meaning of the federal Employers' Liability Act. *Pedersen v. Delaware, L. & W. Ry. Co.*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. ed. 1125, Ann. Cas. 1914C, 153; *Philadelphia & Reading Ry. Co. v. Di Donato*, 256 U. S. 327, 41 Sup. Ct. 516, 65 L. ed.—.

We do not feel that we should consider at length any of the other assignments of error. We have given them all careful consideration, and there are none that amount to prejudicial reversible error. The evidence is sufficient to support the verdict. The order and judgment appealed from are affirmed. Respondent is entitled to his statutory costs and disbursements on appeal.

ROBINSON, J., concurs.

BRONSON, J. (specially concurring). I concur in the affirmance of the judgment. This is the second time this case has been before this

court. See 41 N. D. 395, 170 N. W. 868. The jury returned a general verdict, and answered 12 special questions in plaintiff's favor. The jury found that the switchmen of the defendant failed to give the decedent proper warning, and to notify him that the defendant was about to kick some cars along the lead track where he was working; that the switching operation was not conducted in the ordinary and usual manner; that the switchmen and trainmen were negligent in the operation; that there was carelessness in the switching operations and of decedent's fellow workmen. The jury also by its general verdict found that the decedent did not assume the risk, and that the defendant and the decedent were then engaged in interstate commerce. I am of the opinion that the findings of the jury find support in the evidence, and should not be disturbed. See *Koofos v. G. N. Ry.*, 41 N. D. 176, 170 N. W. 859. I am of the opinion also that the trial court upon the record did not err in recognizing the capacity of the plaintiff to maintain this action, in receiving the deposition questioned, and in sustaining the amount of damages awarded by the jury.

BIRDZELL, J., concurs.

CHRISTIANSON, J. I agree that the motion to dismiss the appeal should be denied. The respondent contends that the appeal should be dismissed under the rule announced in *Sucker State Drill Co. v. Brock*, 18 N. D. 598, 120 N. W. 757. In my opinion this contention is without merit. In that case the undertaking made no reference to the appeal from the order denying a new trial. In this case the undertaking on appeal specifically refers to both the appeal from the judgment and the appeal from the order denying the alternative motion for judgment notwithstanding the verdict or for a new trial. Under the rule announced in *Sucker State Drill Co. v. Brock*, *supra*, such undertaking is sufficient.

I agree with the majority members that the deceased was engaged in interstate commerce, and that the case falls within the provisions of the federal Employers' Liability Act. I also agree that the verdict in this case cannot be said to be excessive as a matter of law.

I do not agree, however, with the intimation in the principal opinion to the effect that United States Supreme Court placed an erroneous construction upon the federal Employers' Liability Act when it ruled in *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 493, 34 Sup. Ct. 635, 58

L. ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475, and *Jacobs v. Southern Ry. Co.*, 241 U. S. 229, 36 Sup. Ct. 588, 60 L. ed. 970, that the defense of assumption of risk is available in cases arising under the Employers' Liability Act, except where the violation by the carrier of a statute enacted for the safety of employees contributed to the injury or death of the employee. The proposition which has caused me the greatest difficulty is with respect to the sufficiency of the evidence to sustain the findings of the jury to the effect that the defendant was guilty of actionable negligence; and that the deceased did not assume the risk of the injury which caused his death.

Of course, negligence and assumption of risk are ordinarily questions for the jury, and it is only where the evidence is such that reasonable men in the exercise of reason and judgment can arrive at only one conclusion that they become questions of law. While I have considerable doubt as to the sufficiency of the evidence to support the findings of the jury upon these questions, I am not prepared to say that the jurors, the trial judge, and the majority members of this court are in error in reaching the conclusions which they did.

BIRDZELL, J., concurs.

THE STATE BANK OF BOWMAN, Appellant v. WALTER NELSON and CLAIR S. JOHNSTON, Defendants, and SAMUEL P. HALPERN, Respondent.

(186 N. W. 766.)

Appeal and error — chattel mortgagee held guilty of conversion of mortgaged crops; whether answer submitted counterclaim arising after action begun held unnecessary to determine on appeal.

1. In an action to foreclose a chattel mortgage which covered, among other property, crops to be later grown on land occupied by the mortgagors, where the mortgagors were not personally served and where the complaint showed that the owner of the land, who was made a party defendant, claimed an interest in the crop, the latter answered, setting up a lease made with one of the mortgagors subsequent to the date of the

mortgage and with the knowledge of the mortgagee. The lease reserved to the lessor title to the crop as security for the stipulated cash rental and advances. The answer further denied that a legal seizure had been made under the warrant issued in the action, alleged a conversion by the plaintiffs and damages incident thereto, but concluded with a prayer for relief that defendant be decreed to be an owner and entitled to possession. The mortgagor abandoned the premises before the crops were harvested and the defendant, with the plaintiff's acquiescence, caused the grain to be harvested and threshed at defendant's expense.

It is *held*:

The evidence shows that the grain in controversy was converted by the plaintiffs and it fails to show a legal seizure thereof by the sheriff.

Chattel mortgages — in chattel mortgage foreclosure proceeding, where the answer alleges conversion, and evidence thereon is not objected to, held that defendant might have judgment consistent with the pleading and proof.

2. Where issue is taken upon allegations of fact constituting a conversion and evidence is introduced upon such issue, without objection and an appropriate measure of damages established, such judgment may be entered for the defendant as is consistent with the pleading and proof.

Chattel mortgages — issues held not restricted by prayer for prior relief in answer.

3. Under the record in this case, the issues relating to conversion are not restricted by the prayer for relief in the answer.

Chattel mortgages — landlord's lien held superior to chattel mortgagee's lien.

4. The evidence clearly shows that the defendant's advances exceeded the full value of the mortgagor's interest in the crop and hence that the defendant had a superior right thereto.

Opinion filed Jan. 14, 1922.

Appeal from the District Court of Bowman County, *Lembke, J.*

Affirmed.

Theo. B. Torkelson, for appellant.

Unity of possession is the distinguishing feature of a tenancy in common, and each co-tenant has an equal right with the other or others to the possession of the subject of the tenancy. Tiedeman on Real Property, § 239, p. 109; 2 Bl, Commentaries, (Chase's ed.) 191.

"The only unity there, is that of possession—because no man can cer-

tainly tell which part is his own." See also collection of cases vol. 29 L. R. A. (N. S.) 225.

Different rules of law apply in matters pertaining to the subject matter of the co-tenancy. *Jones v. Cohen*, 82 N. Car. 75; *Bishop v. Bean*, 36 Ala. 80; *Hanford v. Tethersow*, 2 Jones, (N. Car.) L. 293; *Strong v. Cotter*, 13 Minn. 82; *Gamhill Bridge Co. v. Newby*, 1 Ore. 173.

Because of the equal right of possession of co-tenants, one of two or more joint tenants or tenants in common of a chattel cannot maintain replevin or an action for the recovery of a specific chattel or his interest therein against his co-tenant. *Paulliam v. Burlingame*, 81 Mo. 111; *Balch v. Jones*, 61 Cal. 234; *Ellis v. Culver*, 2 Harr, (Del.) 129; *Brown v. Roach*, 78 Ind. 361; *Alford v. Bardeen*, 1 Nev. 228; *Hill v. Seager*, 3 Utah, 379; *Strauss v. Crawford*, 89 N. Car. 149.

Trover cannot be maintained for the mere detention or exclusive use of the common property. *Webb v. Danforth*, 1 Day (Conn.) 301; *Leonard v. Scarborough*, 2 Ga. 73; *Fightmaster v. Beasley*, 7 J. J. Marsh. (Ky.) 410; *Hinds v. Terry*, 1 Miss (Walk) 80; *Ballou v. Hale*, 47 N. H. 347; *Tyler v. Taylor*, 8 Barb. (N. Y.) 585; *Farr v. Smith*, 6 Wend (N. Y.) 338; *Gilbert v. Dickerson*, 7 Wend, (N. Y.) 449; *Campbell v. Campbell*, 2 Murph. (N. Car.) 65.

A conversion to sustain such an action must amount to a total destruction of the property, or something equivalent to it, through the fault of the co-tenant thus converting it. *Am. & Eng. Enc. Law*, 1st ed. Vol. 11 p. 1128; *Alderson v. Schulze*, 64 Wis. 460.

One tenant in common of a chattel cannot sue another for a conversion unless the common property is destroyed, carried beyond the limits of the state, or, when perishable, so disposed of as to prevent the other from recovering it. *Grim v. Wicker*, 80 N. C. 343.

Emil Scow and E. T. Burke, for respondent.

BIRDZELL, J. This is an action to foreclose a chattel mortgage. The mortgagors, Nelson and Johnston, were not personally served, and did not appear. The defendant Halpern answered. From a judgment in favor of the latter for \$1,614.52, the plaintiff appeals, and asks for a trial de novo. The material facts are substantially as follows:

The defendants Nelson and Johnston, farmers in the vicinity of Bowman, had become indebted to the plaintiff bank in the sum of \$6,-

339-55. On December 30, 1919, they gave to the bank a note for this amount, payable June 1, 1920, secured by a chattel mortgage upon certain described cattle, horses, and machinery and upon "all crops of every name, nature and description, which have been or may be sown, grown, planted, cultivated or harvested during the year A. D. 1920 on the following described real estate, viz.: On the S. W. $\frac{1}{4}$ of section 15, N. W. $\frac{1}{4}$ of section 22, N. W. $\frac{1}{4}$ of section 10 and the S. $\frac{1}{2}$, S. $\frac{1}{2}$, section 14, all in township 130, range 103." Nelson resided upon the premises at the time, and he and Johnston were in possession. The defendant Halpern owned the land. On February 19, 1920, Halpern leased a portion of the land described in the mortgage to one Rossenborg and the remainder to the defendant Nelson. The plaintiff bank, at the time of the leasing to Nelson, was consulted with reference to the same, and advised in a general way regarding the terms of the lease, although it seems that it did not receive a copy. Halpern made known to the bank his desire that it should not take the personal property under the mortgage during the coming crop season, as the note would mature in June, and the bank manifested its interest in the crop to be raised. The lease was in the nature of a cropper's contract. It covered the N. $\frac{1}{2}$ of section 10, the S. $\frac{1}{2}$ S. $\frac{1}{2}$ of section 14, S. W. $\frac{1}{4}$ of section 15 and the N. W. $\frac{1}{4}$ of section 22, except certain of the cultivated lands therein, which had been rented to Rossenborg. The cropper agreed to haul Halpern's share to an elevator at Griffin for 8 cents per bushel, and it was agreed that the division of all grains should be made at that elevator, all the wheat to be delivered in the name of Halpern. The share of each contracting party was to be one-half, and certain expenses were to be divided accordingly. It was expressly agreed that the title of all crops should remain in Halpern until division, and that the cropper's share should be held by Halpern as security for \$300 cash rent to be paid on pasture lands and "for any other or further advances that the said party of the first part might make" to the second party. It seems that the mortgagor Johnston did not remain upon the place, and took no part in cropping the land that season; also that Nelson was financially embarrassed to such an extent that it was found necessary for Halpern to make certain advances to him to defray current expense of operation. In addition to the purchase of a tractor by Halpern and his becoming liable for the purchase price of a small truck, which two items are not claimed as advances in this action, Halpern advanced about \$1,088.16. This he claims is a lien on

Nelson's share under the contract. Some of the items claimed as advances are contested by the plaintiff, and will be referred to later. On August 6th, Nelson left the country, and Halpern made the arrangements for harvesting and threshing the crop, advising the plaintiff bank as to what he was doing. While Halpern was thus arranging for the threshing and the hauling of the grain with the knowledge of the bank, it had caused the foreclosure proceedings in question to be begun; but it did not advise Halpern of that fact. The latter arranged for one Gross to haul certain of the grain from the threshing machine, and with one Tembreull to haul the balance. He directed one Blank, his father-in-law, to superintend the threshing. On the morning the threshing operations started, after Gross had hauled one load from the machine, Tembreull appeared with a truck and a trailer, which he placed in position to receive the threshed grain, contrary to the directions of Halpern's agent, and he forcibly seized the spout and directed it into his truck over the protest of the agent. Several hours afterwards the deputy sheriff came upon the premises and gave directions to the effect that the agents of the bank were not to be disturbed in taking the grain as the bank had put up a bond. This record does not disclose the return of the deputy sheriff on the warrant of seizure, issued in connection with this foreclosure action. It seems that the grain was later stored in the elevator. As the grain was delivered to the elevator in Bowman storage tickets were not issued to the sheriff; but, at the direction of the bank, they were issued in the name of Nelson, Halpern, and the bank, and the deputy sheriff gave instructions that the tickets were not to be given out.

The plaintiff in its complaint, in addition to the ordinary allegations in a foreclosure action, pleaded the leasing arrangements between Halpern and his codefendants, and that the defendant Halpern claimed an interest in the crop adverse to the plaintiff. In his separate answer Halpern pleaded the terms of the lease, his advancements thereunder, the default of Nelson, the conversion of the crops by the plaintiff, and his damages incident thereto. In the prayer for judgment, however, he asked that he be decreed to be the owner and entitled to the immediate possession of one-half of the crops, in default of which he have judgment for the value; also that he be decreed to have a superior lien on the other one-half for his advances; that possession of this half be restored to the answering defendant, or his lien thereon paid with interest. There is also a prayer for the recovery of special damages claimed by this

defendant to have been incurred through being deprived of this particular wheat for seed purposes; defendant claiming that it had a special value for that purpose above the market value. The trial court found that there were 475 bushels of wheat and 133 bushels and 18 pounds of flax grown on the premises, one-half of which belonged to Nelson, and that there were 140 bushels of rye raised by Rossenborg to which the Nelson mortgage did not attach, and 56 bushels of rye raised on the premises occupied by Nelson to which the mortgage did attach and upon which it became a superior lien to that of Halpern. The court found the wheat and flax to have been converted, that its value, according to the highest market price, was \$1,480.90, and that Halpern had a prior lien upon Nelson's share for advances amounting to \$1,072.40.

The principal argument of the plaintiff and appellant upon this appeal is that, as Nelson and Halpern were tenants in common of the crop, and as the bank, the appellant, succeeded to the interest of Nelson and took possession under the mortgage in the right of Nelson, it did not convert the crop to its own use. The evidence clearly shows that the bank did not proceed legally under its mortgage to acquire possession of the mortgaged property, but that it took possession by force before any attempt was made to seize the crop under the warrant of seizure. Neither does the record show that any legal seizure has ever been made. It abounds, however, with evidence that those who were active in excluding Halpern from possession of the grain were acting as agents of the bank; thus the bank is in no position to justify under the warrant of seizure. It did, in fact, convert the grain to its own use.

It is next contended that the defendant cannot recover damages as for conversion in this action because the prayer for judgment is for the recovery of specific property, as in claim and delivery, and not for damages for conversion. The record shows that the parties upon the trial contested the issues submitted by the complaint and the answer; so it is both unnecessary and improper to consider now upon appeal whether or not the answer submitted a claim in the nature of a counterclaim arising after the action was begun. See *Strehlow v. McLeod*, 17 N. D. 457, 117 N. W. 525, 17 Ann. Cas. 423, and *Northwestern Port Huron Co. v. Iyerson et al.*, 22 S. D. 314, 117 N. W. 372, 133 Am. St. Rep. 920. The answer alleges a conversion in fact, and upon the trial the issue tendered thereby was accepted by the plaintiff through permission given at its request to file a reply denying the allegations of conversion.

The Code provides specifically that such relief may be granted the plaintiff in any case as is consistent with the case made by the complaint and embraced within the issue. Section 7680, Comp. Laws 1913. And it further recognizes the right of the defendant to file any counterclaim which arises out of a transaction set forth in the complaint, or which is connected with the subject of the action. Section 7449, Comp. Laws 1913. Such a counterclaim is, in effect, a separate cause of action in which the defendant is the plaintiff. *Johnson v. Wagner*, 42 N. D. 542, 174 N. W. 73. And under the principle of § 7680, the defendant interposing a counterclaim upon which issue is joined is equally entitled to any relief consistent with the case made by his pleading and proof.

But it is contended that the prayer for relief set forth in the counterclaim clearly characterizes the pleading as an effort by the defendant to obtain adjudication merely of his right to possession. The answer cannot be properly construed without taking into consideration the elements of a wrongful conversion. In order to establish that a conversion had taken place it would be necessary for the defendant to show that he had either a general or special property right and possession, or the right of immediate possession. 38 Cyc. 2044. *Clendening v. Hawk*, 8 N. D. 419, 79 N. W. 878. So in any event, before the defendant may recover damages for conversion, it would be essential that he establish his right of possession. It is true, as contended by the appellant, that, at the conclusion of his answer, the defendant purports to demand a judgment in the alternative for the possession or the value of the property converted; but the relief that may be granted, as herein before stated, is not necessarily limited to the prayer, but it may be any appropriate relief that is within the issues. The preceding paragraphs of the answer and counterclaim clearly allege facts constituting a conversion, and denominate the acts of the defendants as such. They also allege the damages thereby occasioned. Upon the trial, the principal issue contested was that of the conversion, as the evidence related largely to the circumstances surrounding the acts of the plaintiff's agents in depriving the defendant of possession. In addition, proof of the appropriate measure of damages was made without objection as to its relevancy or materiality. The prayer for relief does not necessarily limit or narrow the issues presented by the preceding allegations. *Missouri River Trans. Co. v. Minneapolis & St. L. Ry. Co.*, 34 S. D. 1, 147 N. W. 82; 31 Cyc. 111. But, however strongly a contrary rule

might be contended for in this case, we are of the opinion that in view of the state of the pleadings and of the record made at the trial, a judgment for the defendant, based upon a conversion by the plaintiff is amply warranted.

The plaintiff questions some of the items of advances, but if the questionable items be deducted those that must be conceded, together with the defendant's claim for \$300 cash rental for which Nelson's share was pledged as security, amount to more than the value of the share. Hence it is needless to consider the evidence bearing upon the disputed advances.

The plaintiff and appellant further contends that it should be reimbursed in the sum of \$135.50 for expenses incurred in connection with the flax crop. Here again, if Halpern should recover in his own right one-half the value of the crop, the remaining half, to which his lien for advances attaches, is not adequate to cover the advances and expenses necessarily incurred by him. The claim of the plaintiff for these expenses was properly denied.

The respondent contends that the court erred in denying him a lien upon certain of the rye and in decreeing the plaintiff to have a first lien thereon. It does not appear to us from the record that the respondent has sustained the burden of proof upon this matter, and hence the judgment will not be disturbed.

It follows that the judgment is right, and it is affirmed.

BRONSON, ROBINSON, and CHRISTIANSON, JJ., concur.

GRACE, C. J., concurs in the result.

WILLIAM V. RYAN, Respondent, v. GILBERT BREMSETH,
Appellant.

(186 N. W. 818.)

Appeal and error — in the absence of settled case, findings must be accepted; and the evidence is presumed to support material facts alleged.

1. In the absence of a settled case containing the evidence, the facts found by the trial court must be accepted as true; the presumption obtains that the evidence supports the material facts alleged in the complaint and that the findings are supported by the evidence and, further, that additional matters covered by the findings and not embraced in the issues formed by the pleadings were properly determined by action of the parties at the trial.

Appeal and error — in the absence of a settled case, the Supreme Court may determine whether the conclusions are warranted by the findings and review the judgment roll.

2. In the absence of a settled case, the Supreme Court may determine whether the conclusions of law are warranted by the findings of fact and may review error appearing affirmatively in the judgment roll.

Pleadings — complaint first challenged on appeal will be liberally construed, and, if its defects were amendable, it will be sustained.

3. A complaint, challenged for the first time upon appeal as to its sufficiency, will be liberally construed and, if any defects therein could have been remedied by amendment in the trial court, will be sustained.

Pleading — in absence of settled case and upon objection first in the Supreme Court, a complaint to cancel a contract held not objectionable after foreclosure as alleging cause for rescission alone.

4. In the absence of a settled case, and upon the presentation of an objection for the first time in the Supreme Court, a complaint, seeking in equity to rescind and cancel a contract for a deed, followed by a trial, and findings and judgment providing for a strict foreclosure, is not subject to the objection that it alleges a cause of action for rescission alone.

Appeal and error — in the absence of a settled case, findings, conclusions and judgment of strict foreclosure of contract for deed with liquidated damages held not error.

5. In the absence of a settled case, findings of fact, conclusions of law and a judgment providing for the strict foreclosure of a contract for a deed and determining that the vendor shall retain payments made upon the contract as liquidated damages in compensation for use and occupancy, or for rental value of the land, pursuant to an express stipulation in the contract, and that the vendor shall receive one-half of the grain crop, produced during the year of litigation, are not erroneous.

Vendor and purchaser—in equitable foreclosure of contract for deed notice of intention to cancel is not necessary.

6. In an equitable action for the foreclosure of a land contract it was not necessary, as a condition precedent, that a written statutory notice of intention to cancel be served.

Vendor and purchaser—on strict foreclosure of land contract purchaser held entitled to a further extension of time to meet defaults.

7. In a judgment providing for strict foreclosure of a land contract, although the trial court did not err in not granting the statutory period of redemption, nevertheless, upon equitable principles it is *held*, that the vendee was entitled upon the facts as found, to a further extension of time within which to meet the defaults found, consistent with plaintiff's rights and crop production.

Opinion filed Jan. 19, 1922.

Equitable action in District Court, Ramsey County, *Buttz, J.*, to cancel a land contract.

Judgment amended and further period of redemption allowed.

Flynn, Traynor & Traynor and *Adamson & Thompson*, for appellant.

"Before the owner of land who has agreed to convey the same by a contract of sale, can cancel the contract for non-compliance therewith he must proceed promptly to declare his election to cancel on discovery of defaults and if he does not proceed promptly to do so, he will be deemed to have waived his right to insist that the vendee has lost his rights in equity on account of failure to comply with his contract." See *Timmons v. Russell*, 13 N. D. 487; also the following cases following same rule: *Kicks v. State Bank of Lisbon*, 12 N. D. 576; *Smith v. Detroit*, etc., (S. D.) 97 N. W. 17; *Fergusson v. Talcott*, 7 N. D. 183; *Bozum v. Johnson*, 8 N. D. 306; *Pres. v. Lee*, (S. D.) 86 N. W. 642.

J. F. T. O'Connor, C. F. Peterson, for respondent.

A variance is immaterial unless actually and prejudicially misleading, and shown to the satisfaction of the court to be so. Compiled Laws 1913, § 7476; *Halloran v. Holmes*, 13 N. D. 411, 416, 101 N. W. 310; *Weber v. Lewis*, 19 N. D. 473, 126 N. W. 105.

The function of the complaint is to inform defendant of the nature of plaintiff's demand so that he may not be misled in the preparation

of his defense. If the complaint does this in a general way, it is sufficient as against an attack by demurrer although inartificially drawn. 31 Cyc. 101 and cases cited; *Sleeper v. Baker*, 22 N. D. 386, 39 L. R. A. N. S. 664, 134 N. W. 716; *West End Furniture Co. v. Norman*, 44 N. D. 45, 176; N. W. 5; *Gessner v. Horne*, 22 N. D. 60, 132 N. W. 431.

A complaint challenged for the first time upon the trial by an objection to the introduction of new evidence thereunder will be liberally construed and sustained if it is reasonably possible to do so every presumption will be indulged in favor of the pleading. *Morris v. Occident Elev. Co.* 33 N. D. 477, 157 N. W. 486; *Christoferson v. Wee*, 24 N. D. 506, 130 N. W. 689; *Rodeo v. Seaman*, 33 S. D. 241, 45 N. W. 441; *Neilson v. Edwards*, 33 S. D. 398, 148 N. W. 844.

Statement

BRONSON, J. The defendant has appealed from a decree canceling and foreclosing a contract for a deed. The evidence has not been settled nor certified. Upon the judgment roll and findings the conclusions of the law and the judgment of the trial court are questioned. The facts, as they appear therefrom, are: On July 23, 1918, plaintiff, through a contract for a deed, agreed to sell and to convey to the defendant approximately one section of farm lands in Ramsey county. The defendant agreed to pay therefor \$35,392.50, as follows: The assumption of the Prosser mortgage, a lien upon the lands, for \$7,840, together with interest thereon after November 22, 1918; the assignment of a contract for a deed upon a section of land in Montana subject to liens for \$2,765, defendant to receive a credit of \$7,235 therefor; the conveyance of 160 acres of land in Benson county, N. D., subject to liens for \$1,900, defendant to receive credit of \$1,800 therefor. The balance of the purchase price (\$18,517.50, with the interest thereon at 6 per cent.) the defendant agreed to pay by the delivery of one-half of all grain to be sown and grown on the lands beginning with the crop for the year 1919, such grain to be delivered in designated towns or on board cars at defendant's cost and expense, and the proceeds thereof applied first in the payment of interest, and then of the principal. The defendant further agreed to pay all taxes and assessments upon the lands commencing with the year 1918. The contract provided that until the delivery of

one-half of such grain the legal title to, and the absolute ownership of, all grain should be and remain in the plaintiff; further, that in case of default the defendant agreed to surrender possession of the premises and to forfeit all payments made to the plaintiff as liquidated damages and as compensation for the use of the farm during the time the defendant had possession.

The plaintiff instituted action December 10, 1920. The complaint alleges defaults of the defendant as follows: Failure to pay the Prosser mortgage, either principal or interest; taxes for 1919 and 1920; failure to pay the entire interest due on the balance of the purchase price or any part of the principal thereof; failure to deliver or account for the crop of 1920; failure to farm the premises in a good and husbandlike manner. It further alleges that the Prosser mortgage is about to be foreclosed; that the defendant occupies the premises and will permit such foreclosure; that the contract constitutes a cloud upon plaintiff's title; that the procedure at law for the cancellation thereof will require at least six months, and that the land should be prepared for the crop season of 1921; that accordingly plaintiff applies to a court of equity for relief to the end that the contract may be canceled and declared null and void and decreed to constitute no lien, and that plaintiff be awarded possession of premises on or before March 1, 1921.

The answer alleges, among other things, that the land was exceedingly foul when defendant took possession; that he has farmed it in a good and husbandlike manner, so as measurably to free the land of its foul condition; that he has repaired the buildings and dug a well on the land at an expense of approximately \$1,500; that he has actually invested in such land, including his equities in the Montana and Benson county lands, \$13,603.30; that the contract does not contain all of the agreements between the parties; that after the preparation of the contract plaintiff assured the defendant that no default would be claimed by reason of failure to make payment of principal or interest on the Prosser mortgage or taxes on the land; that, if the defendant was unable to make such payments, the plaintiff would take care of them and simply add the amount thereof to the contract. He further alleges waiver of the alleged defaults; that plaintiff accepted the payment of \$907.25 from defendant on December 1, 1920, after the Prosser mortgage and interest became due; that plaintiff further permitted defendant to proceed with plowing and other farming operations in the fall of 1920; that defendant

plowed and prepared for crop for the year of 1921, 325 acres of land, in addition seeded, in the fall of 1920, 90 acres in rye; further that, by reason of the payments made by the defendant to plaintiff, he was unable to pay the interest and principal of the Prosser mortgage and the taxes for 1919 and 1920; that the interest on the Prosser mortgage has been paid by the plaintiff and an extension of time secured by the plaintiff for the payment of such mortgage. It further alleges that the forfeiture clause in the contract is unjust; that the liquidated damages therein specified are void and in the nature of a penalty, since they in no manner furnish an accurate measure of damages which plaintiff might sustain by reason of defendant's defaults.

The action was tried May 9 to 11, 1921. The trial court found that the improvements made by defendant did not enhance the value of the land to any great extent, excepting the well to the extent of at least \$600; in general, concerning farming methods, that defendant has acted in good faith and has gone to large expense in order to farm the land; that the price received for the 1920 grain is the price to be credited the defendant for the reason that he requested the grain to be held; that the defendant is in default concerning the 1919 and 1920 taxes, excepting as to the portion of the latter not yet delinquent, and in the payment of interest on the Prosser mortgage for 1919 and 1920 in the sum of \$1,010, which was paid by plaintiff on December 1, 1920; that there was no understanding that plaintiff was to make payments of interest or principal on such mortgage when due or that no default would be claimed in the event of defendant's failure to pay the interest or the mortgage; that it was, however, a part of the agreement that plaintiff would do what was necessary to renew the Prosser mortgage if defendant was unable to pay the same; that plaintiff frequently requested defendant in 1920 to pay the interest on such mortgage and the taxes; that the Montana and Benson county properties, at their present market values, and considering the amount of money defendant has put into the same, are not sufficient to compensate the plaintiff for the use and occupancy, or for the rental value, of the land involved, or more than enough to pay him for the loss in damages actually sustained, if he be compelled to take back the land. The court further finds, pursuant to a statement incorporated in the findings, that the total interest accrued on the purchase price of the land up to December 1, 1920, amounted to \$2,456.94; that the defendant's debt, including 1919 and 1920 taxes and the amount

paid by the plaintiff on the Prosser mortgage, has increased from \$18,517.50 on October 1, 1918, to \$20,483.74 on December 1, 1920. The court also finds that defendant is in default to the extent of 39½ bushels of wheat out of the crop of 1920; further that, if the defendant is unable to make good the defaults on or before September 15, 1921, he may retain one-half of the crops raised upon the land in 1921, upon payment of all expenses, excepting one-half of the thresh bill, and delivery of plaintiff's remaining share in the elevator.

As conclusions of law the trial court determined that the defendant was in default by reason of the failure to pay taxes and interest on the Prosser mortgage and to deliver wheat out of the crop of 1920; that the plaintiff was entitled to retain the property and money received as his damages under the contract; that the plaintiff was entitled to one-half of the 1921 crop less one-half of the thresh bill; that the plaintiff should do what was necessary towards renewing the Prosser mortgage, and to that extent the contract was reformed; that the defendant was entitled to make good the defaults on or before September 15, 1921; otherwise that plaintiff should have immediate possession and should be fully reinvested with all title. Pursuant to such findings, judgment was entered on August 19, 1921.

On September 14, 1921, upon application of the defendant, reciting his inability to make good the defaults by reason of inability to thresh, the court granted an extension of time until October 5th and a stay of execution. Again, on October 3d, upon a similar application by the defendant for an extension of time in order to enable him to complete threshing, haul, and market the grain, the trial court extended the time within which to make good the defaults until October 20, 1921. On October 26, 1921, upon application of the plaintiff showing failure of the defendant to perform the conditions of the judgment, the trial court ordered judgment to be made final and defendant's interest in the land and right of redemption absolutely at an end.

The defendant contends that the complaint alleges, and the plaintiff has elected to state, a cause of action for rescission and cancellation; that, accordingly, the plaintiff, pursuant to his election, cannot rescind the contract and retain the benefits derived; that the trial court erred in entering a judgment of foreclosure; that the plaintiff, by accepting \$907.25 on December 1, 1920, and the crop of 1920, waived the right to insist on foreclosure for the defaults then existing; that no notice of

intention to cancel the contract was ever given as required by statute; that the forfeiture clause in the contract is in the nature of a penalty, and its enforcement, upon the findings, operates to penalize the defendant; that the trial court erroneously permitted the plaintiff to retain one-half of the crop for 1921; that erroneously the trial court denied to the defendant the right to make good the defaults within six months from the date of the judgment; that these errors appear upon the face of the judgment roll.

Decision

Manifestly, in the absence of a settled case, this court cannot try anew the questions of fact involved. *National Cash Register Co. v. Wilson*, 9 N. D. 112, 81 N. W. 285. There can be no review of the findings of fact without a settled case; the facts found by the trial court must be accepted as true. This court may determine whether the conclusions of law made by the trial court are warranted by the facts as found. *Thuet v. Strong*, 7 N. D. 565, 75 N. W. 922; *Brown v. Skotland*, 12 N. D. 445, 97 N. W. 543; *Brandenburg v. Phillips*, 18 N. D. 200, 202, 119 N. W. 542. The presumption obtains that the evidence supports the material facts alleged in the complaint, and that the findings are supported by the evidence. *Whitney v. Akin*, 19 N. D. 638, 643, 125 N. W. 470; *Regent State Bank v. Grimm*, 35 N. D. 290, 294, 159 N. W. 842. It may further be presumed that additional matters covered by the findings of fact and not embraced in the issues formed by the pleadings were properly determined by action of the parties at the trial. *Raad v. Grant*, 43 N. D. 546, 169 N. W. 588, 590. However, error appearing affirmatively in the judgment roll requires no settled case for the review thereof. *Savold v. Baldwin*, 27 N. D. 342, 345, 146 N. W. 544.

The contention of the defendant that the complaint is insufficient to sustain the cancellation and foreclosure of the contract as determined by the trial court is without merit. The rule is well settled that a complaint challenged for the first time upon appeal as to its sufficiency will be liberally construed, and, if any defects therein could have been remedied by amendment in the trial court, will be sustained. *Ditton v. Purcell*, 21 N. D. 648, 656, 132 N. W. 347, 36 L. R. A. (N. S.) 149; *Jensen v. Clausen*, 34 N. D. 637, 645, 159 N. W. 30. The evident intent

of the pleadings and the proceedings in the trial court was to cancel and foreclose the contract by an equitable proceeding.

Likewise the contention that plaintiff waived rights of foreclosure by accepting payment on December 1 1920, cannot be sustained in the absence of the evidence. The trial court found that the sale of the 1920 grain was delayed upon the request of the defendant.

No statutory written notice of intention to cancel the contract was required in order to maintain this action. Chap. 151, Laws 1917; Raad v. Grant, 43 N. D. 546, 169 N. W. 588, 592. The trial court found that the plaintiff repeatedly gave notice to the defendant of intention to cancel the contract if defaults were not made good. The trial court found that the Montana and Benson county properties, upon present market values and considering defendant's equities therein, were insufficient to compensate plaintiff for use and occupancy or for rental value of the land, or to pay damages sustained by plaintiff. The trial court concluded that the plaintiff was entitled to retain payments made by defendant on the contract. The contract contains an express stipulation so providing in the event of default. From the findings it appears that the interest accrued, upon the balance of the purchase price up to December 1, 1920, amounts to \$2,456.94; the interest on the Prosser mortgage paid by the plaintiff is \$1,010; the amount of the unpaid taxes for 1919 and 1920 is \$711.59. This makes a total of \$4,178.53, indebtedness accrued since the date of the contract, owing the plaintiff. The defendant has paid \$2,212.29. Adding to this amount the value of the well as found by the court, \$600, makes a total of \$2,812.29 paid, or to be used as a credit, in favor of the defendant.

Accordingly the defendant has failed to meet subsequent accruing indebtedness, even allowing a credit for the well, to the extent of \$1,-366.24 up to December 1, 1920. Presumably the interest accruing on the balance of the purchase price since December 1, 1920, and the 1921 taxes will considerably exceed in amount the value of one-half of the 1921 crop retained by the plaintiff. The findings do not disclose the value of any equity remaining in the Benson county or Montana properties, whether possessed by the plaintiff or the defendant, nor whether any right or title is still retained in such properties either by the plaintiff or the defendant. From the findings it appears that the defendant has contributed no money or property so as to constitute an equity in the balance of the purchase price due upon the contract. The value of the

equity contributed upon the purchase price through the Montana or Benson county properties is left unsettled and undetermined. What the evidence may have disclosed in this regard assuredly we cannot ascertain nor determine, in the absence of its settlement and certification. Unless manifest injustice in equity should result thereby, it was proper for the trial court to give effect and recognition to the stipulation of the parties providing for retention of payments by the vendor. *Pfeiffer v. Norman*, 22 N. D. 168, 173, 133 N. W. 97, 38 L. R. A. (N. S.) 891. Upon the record, in its present shape, we are unable to state or to hold that the trial court erred in its conclusions with regard to retention of the payments made. We are further of the opinion that the trial court did not err in granting to the plaintiff one-half of the 1921 crop. The computations above stated and the inferences to be drawn from, and the presumptions attaching to, the findings are sufficient to justify such conclusion. The contract further expressly provides for retention of legal title to crops in the plaintiff. We are further of the opinion that the trial court did not err in not granting a six months' period of redemption as provided in cases of a statutory foreclosure. Chap. 151, Laws 1917; *Raad v. Grant*, 43 N. D. 546, 169 N. W. 588, 592.

However, we are of the opinion that the defendant should be accorded, upon equitable principles, a further time beyond that allowed by the trial court within which to make good the defaults found. The plaintiff did not proceed by the statutory method of cancellation. Through such method the defendant would have been entitled to a six months' period of redemption. The plaintiff sought, by an equitable action, to secure speedy relief and more appropriate action. As it has happened through the course of litigation, the time within which plaintiff secured possession of the land under the decree was delayed beyond the statutory time that would have occurred in a statutory cancellation. The plaintiff has sought the aid of equity, and the plaintiff must, and this court should, as far as the present record will permit, accord to the defendant equity. It is manifest, in a period of deflation of land prices such as the parties assert to exist, that loss by one or both of the parties cannot be escaped as far as present money values are concerned. Upon such basis the defendant will suffer loss, if he makes good the defaults; and, if he does not, he will suffer loss equally or more. Upon such basis the plaintiff will suffer loss if such defaults are not made good. Accordingly the plaintiff is not in a posi-

tion to complain if equity affords an opportunity to make good the defaults found. The plaintiff, in equity, has sought the cancellation of the contract. The trial court, through its findings, in equity has awarded a strict foreclosure. The remedy of a strict foreclosure is a harsh remedy. Ordinarily equity will not avail thereof, if other methods of foreclosure can be utilized with justice to the parties. From the findings it appears that the defendant tried, in good faith, to till the lands involved in a good and husbandlike manner; that he made some improvements on the land; that even after this action was started he farmed the lands, harvested and threshed grain thereon; that in the fall of 1921, and after the rendition of the judgment herein, he did plowing and sowed rye upon the lands, evidently contemplating a continuance of the contract and the ability to meet the defaults. These actions of the defendant did not serve to injure plaintiff's interests or his property rights. Although the trial court, after the rendition of the judgment, accorded to the defendant two extensions of time within which to meet the defaults, nevertheless we are of the opinion that justice and equity, under the circumstances, require that defendant be accorded every opportunity to meet the defaults found, consistent with plaintiff's rights.

In the findings it appears that a credit of \$9,035 for the Benson county and Montana lands was given by the plaintiff upon the purchase price of the land involved herein. It is true that the trial court found that the properties at their present market values, considering defendant's investment therein, are insufficient to compensate the plaintiff for his losses sustained. However, the trial court does not determine their present market value or the present value of defendant's equities therein. Although upon the record we are unable to hold that it was error to decree to the plaintiff the retention of the credit given by the defendant for the Benson county and Montana lands, nevertheless it does not appear affirmatively that full justice is done by retaining such credit and decreeing a strict foreclosure within a comparatively limited time. In such circumstances equity should do full justice, and not by halves. If, now, a foreclosure through sale of the premises should be ordered, it might simply serve purposes of either jeopardizing or destroying the rights and interests of both parties; those of the defendant by imposing an insurmountable burden of costs and the payment of the full obligation; those of the plaintiff by denying the present enforcement of existing defaults and by greatly lessening the value of his lien. A strict fore-

closure has been awarded wherein the present values of all the lands concerned are not found nor determined nor the equities therein. Pursuant to the findings, the defendant has paid the interest accruing on his indebtedness for two years and two months, up to December 1, 1920, lacking the sum of \$244.65. His farming methods have not injured plaintiff's interests or the land. His defaults consist in the failure to pay his 1919 and 1920 taxes and interest on the Prosser mortgage. He has an apparent investment in this land, figured at the date of the purchase, of \$9,035. Under the circumstances it is our opinion that plaintiff, seeking to avail of the harsh remedy of a strict foreclosure, must accord to the defendant an opportunity to meet the defaults mentioned if thereby his interests are not jeopardized and damaged. It is therefore ordered that the judgment of the trial court be amended as follows: On or before March 1, 1922, the defendant shall pay to the plaintiff the sum of \$500. On or before March 1, 1922, the defendant shall pay to the plaintiff the sum of \$500. On or before March 1, 1922, the defendant shall pay to the plaintiff the further sum of \$500, or, in lieu thereof, tender for the approval of the trial court security for the payment thereof on or before December 1, 1922. Thereupon, and upon the approval of the security, if tendered, the foreclosure stipulated in the judgment shall be stayed until December 1, 1922, and the trial court shall award to the defendant possession. The balance of the existing defaults, as found in the findings and judgment, shall be made good by the defendant on or before December 1, 1922. If the defendant makes good the defaults as herein provided, no costs of this court shall be allowed.

It is so ordered.

CHRISTIANSON and BIRDZELL, JJ., concur.

GRACE, C. J., concurs in the result only.

ROBINSON, J. (dissenting). Truly this is a Shylock action. On October 1, 1918:

The plaintiff contracted to sell defendant a section of land in

Ramsey county, N. D., at \$55 an acre	\$35,392.50
He sold the same subject to a mortgage for	7,840.00
He received and gave credit for a section of Montana land.....	7,235.00
He gave credit for land in Benson county	1,800.00

From the crops of 1919-20 he received paymnet.....	2,413.20
He received a good well on the land	600.00

—with considerable other improvements.

And on December 10, 1920, within 10 days after receiving nearly \$1,000, he commenced this action to forfeit the land contract and all payments because of the nonpayment of illegal and excessive taxes for two years and the non-payment of about \$1,000 on the mortgage which defendant assumed. The action is under a Shylock clause in the contract which provides for such a forfeiture. Defendant answers that because of that clause he refused to sign the contract, and that to induce him to sign the plaintiff agreed that he would not take any advantage of the forfeiture, and that he himself would advance the money to pay interest on the mortgage and to pay the taxes. Defendant by answer asks that the contract be reformed and corrected so as to express that agreement; but the trial court has ignored that issue and all the defendant's equities and has given a judgment of forfeiture and an order ousting the defendant and giving plaintiff possession. Surely that seems like a mockery of equity and justice, and it may not be covered up by a multitude of words. Of course, the defendant acted the part of a sucker when he relied on the oral agreement to protect himself against the forfeiture clause. Still he had a right to rely on it and to rely on the court to reform the contract. No evidence is needed to show that the forfeiture clause is unconscionable, and here is the plain statute:

"For the purpose of revising a contract it must be presumed that the parties thereto intended to make an equitable and conscientious agreement."

The court has wholly ignored that statute and the request to revise the contract. Hence the duty of this court is to reform the contract by striking out or holding void the forfeiture clause. We must not ignore the rule that equity never enforces a penalty or a forfeiture. We must not ignore the plain words of the statute, which is that equity will not enforce a penalty or a forfeiture in any case. Comp. Laws 1913, § 7188. The plaintiff has no right to claim a forfeiture. He has received about one-third of the purchase price of the land. His position is that of a mortgagee. He holds the legal title of the land only as security for the balance of the purchase money. His remedy is that of a mortgagee, to obtain a decree of foreclosure and sale of the land for the sum due, subject to redemption as provided by statute.

The judgment should be reversed, with directions to strike out the forfeiture clause of the contract and permit the plaintiff to take a regular judgment of foreclosure and sale.

INGA ANDERSON, Appellant, v. CITY OF FARGO, a municipal corporation, Respondent.

(186 N. W. 378.)

Statement of facts.

1. Plaintiff brought this action against defendant to recover damages for its alleged negligence in maintaining upon a certain school play ground certain apparatus such as troughs, chutes and heavy swings, which were used by the children while attending the school there conducted.

Plaintiff's son, a boy aged thirteen years and three months, while attending the school, and while playing upon said play grounds, was struck and killed by one of the heavy swings.

Statutory provisions.

2. The title of all school property of the City of Fargo was vested in the City, for the use of the schools therein, by a special act of the legislature of March 4th, 1885, which act was amended February 2nd, 1915. The same act provided for a Board of Education for the schools of the City, and gave it exclusive control of them, and the further right to purchase, sell, exchange and lease houses or rooms for school purposes and lots or sites for school houses, and to borrow money for school purposes, as provided by the act as amended.

Municipal corporations — complaint for death of pupil on playground held not to state cause of action against city.

3. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The trial court sustained the demurrer, which for reasons stated in the opinion, we think, was not error.

Opinion filed Jan. 4, 1922. Rehearing denied Jan. 20, 1922.

Appeal from an order of the District court of Cass county, *Englert, J.*

Order affirmed.

Taylor Crum, (Aubrey Lawrence, of counsel), for appellant.

If a board is the agent of the city, the city is liable for its acts and omissions. 33 N. D. p. 69, et seq.

The same doctrine is held in many other cases of which the following are a few. *City of Denver v. Spencer*, 82 Pac. 590; *Burridge v. City of Detroit*, 76 N. W. 84; *Mahon v. New York*, 31 N. Y. Supp. 657; *Denver v. Peterson*, 36 Pac. 1111; *Lowe v. Salt Lake City*, 44 Pac. 1050; *Weber v. Harrisburg*, 64 Atl. 905; *Barthold v. Philadelphia*, 26 Atl. 304; *Silverman v. New York*, 114 N. Y. Supp. 59; *Powers v. City of Philadelphia*, 18 Pa. Super. Co. 621; *Briegel v. Philadelphia*, 135 Pa. 451, 19 Atl. 1038; *Barnes v. District of Columbia*, 91 U. S. 540, L. ed. 23, 440; *District of Columbia v. Woodbury*, 136 U. S. 450, L. ed. 34, 472; *Bailey v. the Mayor 3 Hill (N. Y.)* 531, Am. Dec. 38, 669; *Capp v. St. Louis*, 46 L. R. A. (N. S.) 731, 733.

The city of Fargo, by and through all its officers and agents, suffered and permitted the nuisance in question to remain, unsuperintended, on that crowded public play ground for weeks and weeks. *Chicago v. Robbins*, (U. S.) L. ed. 17, 289; *Robbins v. Chicago*, (U. S.) L. ed. 18, 427; *Gilluly v. City of Madison*, 24 N. W. 137; *Parker v. Mayor*, 99 Am. Dec. 486; *Hughes v. City of Fon du Lac*, 41 N. W. 407; *Schroeder v. City of Barabo*, 67 N. W. 27; *Watson v. Melford*, 45 Atl. 167; *Ferris v. Board of Ed.* 81 N. W. 98; *Town of Suffock v. Parker*, 79 Va. 660, 52 Am. Rep. 640; *Roman v. City Leavenworth*, 133 Pac. 551; See instruction No. 4, 1st col. p. 553; *Kansas City v. Siese*, 80 Pac. 626.

W. H. Shure, (B. F. Spalding, of counsel), for respondent.

A demurrer does not admit conclusions of law, neither does it admit any construction pleaded by the pleader of instruments pleaded or facts imposed by law. 21 R. C. L. 508; A. L. R. 1915E, 926.

It is not sufficient to aver that it was the defendant's duty to perform the act alleged to have been neglected. The facts and circumstances from which the law implies such duty must be alleged. *Ward v. Danzeisen*, 111 Ill. App. 163.

An averment that certain conduct is the duty of defendant is of no avail where facts are not stated from which the law will create the duty. *Illinois Steel Co. v. McNulty*, 105 Ill. App. 594.

A complaint for negligence must show the existence of a duty of defendant to exercise due care towards the person injured and a mere allegation that it was defendant's duty to do or not to do a certain act is a conclusion of law and insufficient. *Pittsburgh, C. C. & St. L. Ry. Co. v. Leighteiser*, 163 Ind. 31 Cyc. 54; 247, 71 N. E. 218; rehearing denied 71 N. E. 660.

The purpose and scope of a corporation is governed by the language of its creation and not by the restricted use of a word or two contained in the act. *Vermont Loan & Trust Co. v. Whithed*, 2 N. D. 83; *Stern v. City of Fargo*, 18 N. D. 289; *Price v. Fargo*, 24 N. D. 440.

Whatever means and instrumentalities are necessary, usual and proper for affectuating the act may be provided therein. *Claiborne Co. v. Brooks*, 111 U. S. 400; *Merrill v. Monticello*, 138 U. S. 673.

A school district is as well organized a municipality as a city and may exist with it in territory, in whole or in part, as a city may cover the territory of a county wholly or partially. There is no incompatibility between them, and both are separate and different functions. The duties of the others are no part of the ordinary concerns of town or city corporations. *Gray on Limitation of Taxing Power*, §§ 2148, 2101; *Wilson v. Board*, 133 Ill. 443, 27 N. E. 203; *Adams v. Ewert*, 16 S. D. 133, 91 N. W. 474; *Tuttle v. Polk*, 92 Iowa, 433, 60 N. W. 733.

The city is not liable for the negligent acts of the board of education. *Sullivan v. Boston*, 126 Mass. 540, 9 Am. Law Rep. Ann. 817; *McCarten v. City of New York*, 133 N. Y. Sup. 939; *Brown v. New York City*, 66 N. Y. Sup. 382; *Diehn v. City of Cincinnati*, 25 Ohio State 305.

GRACE, C. J. This appeal is from an order sustaining a demurrer to the complaint. The action is one brought by the plaintiff, a widow, against the defendant, to recover damages on account of the death of her son, a boy of 13 years of age, alleged to have been caused by the negligence of the defendant in maintaining certain school playgrounds, alleged to be owned by the city, upon which certain apparatus, hereinafter more fully described, was alleged to have been maintained by it, and by which, in the circumstances herein mentioned, the boy was struck in the head and killed.

The substance of the complaint will be mentioned in order that it may be determined whether the trial court erred in making its order sustaining the demurrer. It contains allegations to the effect that the

city of Fargo was incorporated as a municipal corporation on the 12th day of April, 1875, under an act to incorporate the city of Fargo, approved March 5, 1875; that on or about the month of April, 1913, the defendant adopted the commission form of government pursuant to the provisions of chap. 77, Laws North Dakota 1911; that a copy of the Act of March 4, 1885, being a special law providing for a board of education for the city of Fargo, is made a part of the complaint, and an amendment of that act approved February 2, 1915 (Laws 1915, chap. 125), amending § 14, and repealing § 24 thereof; that in April, 1885, defendant by vote of the people organized its board of education; that the members thereof became elective officers of the defendant, a municipal corporation; that the defendant has since 1885 conducted its public schools pursuant to the provisions of the Act of March 4, 1885, and the amendment thereto; that among other real estate owned by the defendant is block 3 of Darling's addition to the city of Fargo, on which there is a certain public school building designated as "the Aggasiz School"; that at all times during the year 1920, and since, the title and ownership, control and possession of the schoolhouse, the furniture, books, and apparatus and of block 3 and all appurtenances thereof were vested in defendant; that upon the west side of block 3 is a public playground, used and frequented, and permitted to be used and frequented, by more than 500 children, ranging from 6 to 15 years of age; that upon the playground the defendant, through its officers, agents, and servants, the said board of education, wilfully and negligently, and by reason of carelessness and wrongful acts and omission of its said officers, agents, and servants, and for want of due attention to its duties, erected and suffered to be erected, and permitted to remain for several weeks prior to December 1, 1920, upon such school playground, and in a public and notorious manner, two chutes or inclined troughs, the summits of which were 8 or more feet in height, and accessible to children by means of permanent iron ladders from which the chutes or inclined troughs sloped towards the west at a steep grade to the ground; that a few feet in a westerly direction from these chutes the defendant, through its officers, agents, and servants, publicly and notoriously erected, and permitted to remain for several weeks prior to December 1, 1920, several series of heavy swings, the same being contrivances and apparatus adapted for people to swing upon to and fro, and were constructed of wood and were suspended from poles or timbers which were fastened or attached

to the tops of posts or poles more than 12 feet in height with heavy wooden iron-bound or iron-mounted planks, each suspended by heavy iron chains attached to said poles or timbers, which swings, when in operation, from east to west and from west to east, were wholly unguarded or superintended by any teacher or any adult person, and were unprotected by any fence or barrier whatsoever, and without any mattress or netting thereunder; that the chutes and swings were not a part of the original plan, of the public school building or public school playground, and were foreign to the original plan provided for, accepted, and used in building said public schoolhouse and running of said public resort at said public school playgrounds; that said chutes and swings were, by the neglect or by the positive act and permission of the defendant, through its officers, agents, and servants located and constructed, or permitted to be constructed, and for several weeks to remain, so as to constitute an eminently dangerous, constant, continuous, and, as to children, an attractive, enticing, inexcusable, and alluring, public nuisance, which said danger was patent and obviously apparent to any adult person of ordinary intelligence and caution; that defendant, by and through its officers, agents, and servants, did by locating, erecting, and maintaining, and by permitting such apparatus to be located, erected, and maintained did perform and suffer to be performed a wilful malfeasance and did so wilfully, carelessly, and negligently permit said chutes and swings to remain on said public resort and public school playgrounds for several weeks without any supervisors, and without taking precaution to protect children lawfully on the grounds from being injured and killed thereby; that on the 1st day of December, 1920, one John William Anderson, age 13 years and 3 months, in good and robust health, and while lawfully on said public playground, and under legal compulsion to attend that school, and while in the vicinity of the chutes and swings with other children, innocently yielded to the instincts of childhood and was sliding, running, and playing on or about such apparatus, as more than 500 other children were wont and likely to do, was struck in the head and neck by one of the heavy iron-bound or iron-mounted plank swing seats, and mortally wounded thereby, and within a few minutes thereafter, without regaining consciousness, languished and died, as the direct and immediate result of having been so struck, and this without the fault and negligence of the plaintiff or the deceased, considering his age and the surroundings, but was wholly caused by the presence on the public school

playground of said nuisance, of which the defendant was in duty bound to take notice and abate, but which, on the contrary, it allowed and permitted to remain for several weeks prior to and on the 1st day of December, 1920, which was a great risk and hazard and mortal danger to the 500 children; that plaintiff is a widow, 42 years of age, with three living daughters, ages respectively 15, 9, and 6 years, who are wholly dependent upon the plaintiff for their education, care, and support; that her son, the deceased, in addition to his school and domestic tasks, was at the time of his death, and for some time prior thereto, earning and contributing about \$20 per month toward the support of himself, the plaintiff, and the three sisters, and was likely to be, and was, the sole person upon whom plaintiff depended, and was likely to depend, for assistance for her own and daughters' support; that plaintiff was damaged in the sum of \$200 expended for burial expenses and for a physician called when the said son was killed, and has sustained further damages by reason of the death of her son in the sum of \$25,000.

Defendant demurred to the complaint. One of the grounds of demurrer was that the complaint does not state facts constituting a cause of action against the defendant. If it appear plainly from the face of the complaint the plaintiff has no cause of action against the defendant, then there was no error in the order of the court sustaining the demurrer.

It will be observed that the plaintiff has pleaded the act of March 4, 1885, providing for a board of education for the city of Fargo, and the amendatory act thereof, approved February 2, 1915. If it should appear from these that the board of education of the city of Fargo is a distinct corporate entity from the municipal corporation of the city of Fargo, and that the former has control and dominion over all the schools of Fargo, including the school buildings, school grounds, and school playgrounds, all school apparatus, the right to buy or sell school property, the right to issue bonds for school purposes, and the right to sue and be sued, and this free and clear from any right of interference by the city of Fargo, then we think that it must be clear that, if the plaintiff has any cause of action, it is not one against the city of Fargo; we think the complaint on its face so shows, and hence it does not state facts sufficient to constitute a cause of action. Ample support of this conclusion is contained in the act providing for the board of education. Section 7 thereof is as follows:

"The board of education shall be a body corporate in relation to all

the powers and duties conferred upon them by this act, to be styled 'the board of education of the city of Fargo,' and, as such, shall have power to sue and be sued, to contract and be contracted with, and shall possess all the powers usual and incident to bodies corporate, as shall herein be given, and shall procure and use a common seal. A majority of the members of said board shall constitute a quorum for the transaction of business."

Now, if the board of education has the power to sue and be sued, with reference to any matter pertaining, affecting, or arising out of the carrying on or the government, of the schools of Fargo, then it must be evident that the city of Fargo does not have such right. Likewise, if the board has the right to contract and be contracted with, with reference to any matters affecting the schools or school property, then it is clear that such right does not exist in the city of Fargo. This reasoning will appear the more clear on examination of the language of § 11, which in substance provides that:

The board has the power to purchase, exchange, lease or improve sites for schoolhouses; to build, purchase, lease, enlarge, alter, improve and repair schoolhouses and their out houses and appurtenances; to procure, exchange, improve, and repair school apparatus, books, furniture and appendages, but the powers herein granted shall not be deemed to authorize the furnishing of class or text books to any scholar whose parents or guardian is able to furnish the same; to provide fuel and defray the contingent expenses of the board, including the compensation of the secretary, to pay teachers' wages, after the application of public money which may by law be appropriated for that purpose. It also has the power to levy a tax in such sums as may be determined by them to be necessary and proper to accomplish any of the foregoing purposes

Under § 14, as amended by chap. 125 of Session Laws 1915, the board is authorized, and it is made its duty, whenever it deems it necessary to the efficient organization, establishment, and maintenance of the schools of the city, and when the taxes authorized by the act are not sufficient or not deemed burdensome upon the taxpayers, to issue the bonds of the city in the manner and under the conditions specified in the act.

Under § 18, the board is authorized to establish and maintain as many schools in the city as they deem requisite and expedient. In that

section are many other extensive powers not necessary here to set forth in detail.

Under § 21, while the title of all school buildings, sites, lots, furniture, books, apparatus and appurtenances is vested in the city of Fargo, it is so vested to be exclusively used for school purposes; any of such school property could not be levied upon or sold on any process issued on a judgment against the city. In other words, as we construe that section, the city of Fargo holds the naked legal title of the school property for the exclusive use and benefit of the schools and the school system of Fargo.

We think it is clear not only from the provisions of § 7, *supra*, but from the provisions as well of other sections to which reference above has been made, that the board of education of the city of Fargo is a body corporate, and as such is exclusively charged with the control and management of all the school property of Fargo, and has full and complete dominion over it, and power to deal with it as hereinbefore mentioned, and, this being true, if plaintiff has any cause of action by reason of the matter stated in her complaint, it is not against the city of Fargo, but against the board of education, and we think the complaint so shows.

We are not called upon in this case to determine whether plaintiff has a cause of action against the board of education. It will be time enough to determine that question when it reaches here, if it ever does. If it should be presented, it will present several important legal questions for decision, not necessary here to mention.

We are of the opinion that the complaint does not state facts sufficient to constitute a cause of action, and that it further shows that the defendant is not a proper party to the action, and that the demurrer interposed is broad enough to include both of these grounds of demurrer. We are further of the opinion that the trial court did not err in sustaining the demurrer. Its order in that respect is affirmed. Defendant is entitled to his costs and disbursements on appeal. The case is remanded to the district court, and it is directed to enter an order of dismissal of the action.

BIRDZELL, CHRISTIANSON, ROBINSON, and BRONSON, JJ., concur.

STATE OF NORTH DAKOTA, Respondent, v. GEORGE FUCHS,
Appellant.

(186 N. W. 752.)

Bastards—verdict against defendant held supported by evidence.

1. On an appeal by the defendant from a judgment rendered against him in a bastardy proceeding and from an order denying a new trial, it is *held* that the verdict has substantial support in the evidence.

Bastards—date on which child begotten not material except on question of paternity.

2. In a bastardy proceeding, the principal question to be determined is whether the accused is the father of the child involved; and, ordinarily, the exact day on which the child was begotten is not material except as it bears on such principal question.

Bastards—refusal to permit cross-examination of complaining witness as to civil action against defendant held not prejudicial error.

3. For reasons stated in the opinion, error predicated upon a ruling made in cross examination of the complaining witness is held to be non-prejudicial.

Opinion filed Jan. 20, 1922.

Appeal from the district court of Sheridan County, *Nuessle, J.*

Bastardy proceedings against George Fuchs. Plaintiff had judgment, and defendant appeals from the judgment and from an order denying a new trial.

Affirmed.

Geo. Thom Jr., for appellant.

Peter A. Winter, for respondent.

CHRISTIANSON, J. This is an appeal by the defendant from a judgment rendered against him in a bastardy proceeding. On November 26, 1920, one Anna Moser made complaint, under oath, before a justice of the peace in Sheridan county, charging:

"That she is an unmarried woman and is pregnant with a child which, if born alive, may be a bastard, begotten by the defendant, on or

about the 22d day of June, 1920, at or near Denhoff, Sheridan county, N. D."

Upon such complaint a warrant was issued, the defendant was apprehended and brought before the justice of the peace, where he was given a preliminary examination as provided by § 10486, C. L. 1913. On November 26, 1920, the justice of the peace made an order that the defendant be required to give an undertaking in the sum of \$1,000, with sufficient sureties, payable to the state of North Dakota, and conditioned that he would appear at the next term of the district court of that county, and from term to term until the final disposition of the proceeding, to answer the complaint and abide the judgment and orders of the court therein. On January 24, 1921, the complaining witness was delivered of a child, which was alive at the time of the trial. In the district court the defendant filed an answer denying the charge set forth in the complaint, and demanded that the issue framed thereby be tried by a jury. The case was tried in June, 1921, and the jury returned a verdict declaring the defendant to be the father of the child of the complaining witness. On June 11, 1921, the court entered judgment in conformity with the verdict. Thereafter the defendant moved for a new trial on the grounds of insufficiency of the evidence, and alleged errors in rulings on the admission of evidence, and in the instructions given to the jury. The motion was denied, and the defendant has appealed from a judgment and from the order denying a new trial.

Appellant contends that the evidence is insufficient to sustain the verdict. The argument in support of this contention is almost wholly an attack upon the credibility of the complaining witness. It is pointed out that, in certain particulars, her testimony at the trial is different from her testimony at the preliminary examination. Thus it is said that at the preliminary examination she testified that she had sexual intercourse with the defendant on June 22, 1920, and that she became pregnant as a result thereof, and that upon the trial she testified that she had sexual intercourse with the defendant on May 11, 1920, and became pregnant at that time. While this in a sense is true, an examination of the transcript of the testimony given by the complaining witness before the justice of the peace discloses that she at that time testified that she had had sexual intercourse with the defendant not only on June 22, 1920, but also at a date prior to June 22, 1920, and upon the trial in the district court she still asserted that she had had intercourse with him

on June 22. It is undisputed that she gave birth to a child, and that she is unmarried. The evidence shows that she and the defendant had been keeping company from June, 1919, till February, 1920. There is some intimation that at that time a disagreement arose; but the complaining witness says that the defendant later "made everything good." She also testified positively that on May 11, 1920, he came and took her for a ride, and that upon that occasion they had sexual intercourse, and that they again had such intercourse on June 22, 1920. She testified positively that she at no time had sexual intercourse with any one other than the defendant; and there is not the slightest proof in the record tending to show that she did. It is elementary that the credibility of witnesses and weight of testimony are questions for the jury. This rule is, of course, applicable in bastardy proceedings. See *State v. Peoples*, 9 N. D. 146, 148, 82 N. W. 749; *State v. Brandner*, 21 N. D. 310, 316, 130 N. W. 941. The complaining witness was given a thorough cross-examination. The discrepancies in her testimony were clearly pointed out. Judging by the record before us, the complaining witness was an ignorant girl. The jury saw her, and heard her story. That story is not so incredible as to be unworthy of belief. *State v. Brandner*, 21 N. D. 310, 130 N. W. 941, presented a situation very similar to that presented here. There, as here, it was contended that the evidence was insufficient to sustain a verdict against the defendant. And it was pointed out that the complaining witness

—"first accused the defendant of having but one act of intercourse with her and that upon February 10, 1908; and that after the child was born, September 19, 1908, she accused the defendant of but two acts of intercourse—the first being on December 29, 1907, and the second February 10, 1908." 21 N. D. 316, 130 N. W. 943.

The court held that this was a matter for the consideration of the jury as affecting the credibility of the witness, and refused to disturb the verdict.

It is next contended that the court erred in admitting evidence relating to the act of sexual intercourse which, according to plaintiff's testimony, occurred on May 11, 1920. It is also contended that the court erred in instructing the jury as follows:

"I charge you, gentlemen, that the particular date charged in the complaint need not be proved if in fact you find by a preponderance of the evidence that a bastard child was begotten upon the body of and

delivered by the unmarried woman, Anna Moser, and that the same was begotten by the defendant, then it is immaterial as to the particular date charged in the complaint. The question is, Was such a child born, and, if it was, was the defendant the father of the same?"

These two assignments of error are both predicated upon the proposition that the complaint alleged that the child was "begotten by the defendant, on or about the 22d day of June, 1920." And it is asserted that the date so alleged was material; that it was improper to admit evidence relating to an act of intercourse said to have occurred on May 11th; and that it was error to permit the jury to find a verdict against the defendant on such evidence.

In our opinion the assignments are not well taken. In other words, we are of the opinion that the evidence relating to the act of intercourse said to have occurred on May 11, 1920 was admissible, and also that, under the evidence in this case, the instruction given was not erroneous.

This is not a case like *State v. Ryan*, 78 Minn. 218, 80 N. W. 962, cited and relied upon by the defendant, or *Menn v. State*, 132 Wis. 61, 112 N. W. 38, where the complaining witness fixed the act of sexual intercourse in connection with some specified event or occasion, so that the proof, in effect, not only affirmed that the child was begotten by the accused at a specified time and place, but, also, negatived the idea that it could have been begotten by the accused on any other date than the one so specified. That is not the situation here. Ordinarily, the exact day on which the child was begotten is not "material except as it bears on the principal question, which is whether or not the accused is the father of the child." 7 C. J. 995; 2 Ency. Ev. 252. See, also, *Duhame v. Ducette*, 118 Mass. 569; *Francis v. Rosa*, 151 Mass. 532, 24 N. E. 1024; *Ross v. People*, 34 Ill. App. 21; *Holcomb v. People*, 79 Ill. 409. And, while the question does not seem to have been squarely raised in this state, that is the rule which has been followed by this court. See *State v. Peoples*, 9 N. D. 146, 148, 149, 82 N. W. 749; *State v. Brandner*, 21 N. D. 310, 316, 130 N. W. 941.

In this case the defendant moved for a new trial. The motion was not made on the ground of newly discovered evidence. And we fail to find anything to indicate that the defendant was taken by surprise by the evidence relating to the act of sexual intercourse alleged to have taken place on May 11th, or that he was prevented from presenting his entire defense in this case.

On cross-examination defendant's counsel asked the complaining witness a question regarding a civil action which it was intimated she had brought against the defendant. An objection made by plaintiff's attorney was sustained, and that ruling is assigned as error. Little or no argument is presented in support of this assignment of error, and it might well be treated as waived. The materiality of the testimony sought to be elicited is not apparent, and we cannot say that the court erred in ruling as it did. And we are quite clear that the ruling in no event was prejudicial.

This disposes of all the errors assigned and argued on this appeal. It follows from what has been said that the judgment and order appealed from must be affirmed. It is so ordered.

GRACE, C. J., and ROBINSON, BIRDZELL, and BRONSON, JJ., concur.

FRED W. ASCH, Respondent, v. THE WASHBURN LIGNITE COAL COMPANY, a corporation, and WALKER D. HINES, Director General of Railroads, and as such Director of Minneapolis, St. Paul and Sault Ste. Marie Railway Company, a corporation, Appellants.

(186 N. W. 757.)

Master and servant — relation created by transfer of service to third person.

1. One in the general service of another may be transferred to the service of a third person so as to become the latter's servant with all the legal consequences of the new relation; but the relation is not changed, as a matter of law, merely because the servant is sent to do certain work for such third party who has made a bargain with the master for the performance of such service, even though the third party, under his arrangement with the master, pays wages directly to the servant for his services. In order to establish the relation of master and servant between the servant and such third person it must appear that the servant has expressly or by implication consented to the transfer of his services to the new master and to accept him as his master during the time of such service.

Master and servant — railroad employer and coal mine owner held joint wrongdoers.

2. A fireman on a locomotive who is injured by a collision between the locomotive and some cars placed on the track by a coal company may maintain a joint action against the railway company and the coal company if the collision was produced by the negligence of the railway company in operating the locomotive at an excessive rate of speed, concurring with the negligent act of the coal company in placing the cars on the track.

Appeal and error — evidence — master and servant — amending complaint by adding name of Director General, and further specification as to injuries, not prejudicial error; in a fireman's personal injury action engineer's statement just before collision held admissible as part of *res gestae*; erroneous admission or exclusion of evidence held cured by other evidence; calling witness for cross-examination held not prejudicial error; evidence admissible on question of relation; testimony founded on hearsay, inadmissible.

3. Certain rulings relating to amendment of the complaint, the examination of witnesses, and the admission and rejection of evidence considered, and, for reasons stated in the opinion, *held* proper or non-prejudicial.

Evidence — permitting physician to explain X-ray plates in personal injury action held not error.

4. Where X-ray plates had been proved by a physician, it was competent for him to explain them to the jury in particulars that are not understood by laymen.

Evidence — testimony of medical experts as to nature and extent of injury held proper.

5. It is proper to receive the opinions of medical experts as to the nature and extent of a personal injury.

Evidence — injured servant is competent to testify to his feelings, pains and symptoms.

6. The injured person is a competent witness to testify to his feelings, pains and symptoms, as well as to all the characteristics of the injury, so far as the same are perceptible to the senses, and do not require the exercise of scientific skill and knowledge.

Trial — jury should not be instructed as to the effect of special verdict on parties' ultimate rights or liabilities.

7. Where a case is submitted for a special verdict the jury should not be informed by instructions as to the effect of answers to questions in such special verdict on the ultimate right or liability of either party. It is proper, however, to give to the jury instructions embodying general rules of law appropriate to the particular questions of the special verdict in connection with which such rules are given.

Trial — objectionable statement of counsel held cured by instructions to disregard.

8. Error assigned upon alleged prejudicial remarks of counsel in the argument to the jury considered, and *held* not well taken.

Master and servant — joint liability not relieved by fellow-servant doctrine.

9. For reasons stated in the opinion it is *held* that the defendant, The Washburn Lignite Coal Company, is not relieved from liability by virtue of the fellow servant doctrine.

Damages — verdict for \$8,000 for probably permanent injuries held not excessive.

10. A verdict for \$8000.00 is *held* not excessive.

Opinion filed Jan. 20, 1922.

Appeal from the district court of Morton county, *Berry J.* Both defendants appeal from a judgment and from an order denying their motions for judgment notwithstanding the verdict or for a new trial.

Affirmed.

Lee Combs, G. F. Düllam, John E. Palmer, for appellants.

"Officers who have no personal knowledge of the transaction, having been appointed long after the transaction in issue, cannot be examined." *Blasius v. Ins. Co.* 175 N. Y. Supp. 709.

"A mere soliciting agent or salesman is not managing agent or officer under the terms of the statute." *Blasius v. Ins. Co.* *Supra*; 10 Cyc. 1342, first col. note; *Hancock v. Ins. Co.* 107 Mass. 113; *Gunn v. N. Y. & N. H. Co.* 50 N. E. 1031; *McComb v. Chicago, St. Louis & New Orleans R. R. Co. et al*, 7 Fed. Rep. 426.

The officer examined must have been an agent or officer of the corporation at the time of the occurrence of the facts which are the subject of the examination or he cannot be lawfully examined under such statute. *Johnson v. St. Paul & W. Coal Co. (Wis.)* 105 N. W. 1048; *Hughes v. Chicago, St. Paul & Omaha Ry. Co. (Wis.)* 99 N. W. 897.

"An engineer is not the agent of the company to discourse on its account as to what may or may not happen or what is best for another employee to do in case of peril in the employment." *Ohio & R. Co. v. Stein*, 133 Ind. 243, 31 N. E. 180; *Jones on Evidence*, Vol. 2 p. 806, § 358 and cases cited; *Reynolds v. Continental Ins. Co.* 36 Mich. 131;

Gardner v. Detroit St. Ry. Co. (Mich.) 58 N. W. 49; Taylor v. N. Y. Central & Hudson Ry. 63 App. Div. 586, 71 N. Y. S. 884; Louisville & N. R. Co. v. Stewart, 56 Fed. 808.

"If the amendment objected to would not be a bar to a recovery under the original complaint, it ought not be allowed. It is only where the same evidence would settle both claims that the amendment is permissible." J. I. Case Threshing Machine Co. v. Eichinger, 15 S. D. 530, 91 N. W. 82; Mares v. Worington, 8 N. D. 329, 79 N. W. 441.

"The very fullest freedom of speech within the duty of his profession should be accorded to counsel; but it is license, not freedom of speech, to travel out of the record, basing his argument on facts not appearing and appealing to prejudice irrelevant to the case and outside of the proof." Thompson on Trials, § 963 and cases cited; Lindsey v. Pettigrew (S. D.) 52 N. W. 873; Bendetson v. Moody (Mich.) 59 N. W. 252.

"A person who is in the general employment of one person may be temporarily in the service of another with respect to a particular transaction or piece of work, so that the relation of master and servant arises between them, even though the general employer may have an interest in the special work.

In such case the duty of using care to see that a safe place to work is furnished, or proper warning given, devolved upon the special employer." Westover v. Hoover, 129 N. W. 285; Coughlan v. City of Cambridge, 44 N. E. 218; Miller v. Minnesota & N. W. Ry. Co. et al. 29 N. W. 188; Hitte, Adm'r. v. Republican Val. R. Co. (Neb.) 28 N. W. 284.

"He is the master, who has the choice, control and direction of the servants. The master remains liable for the negligence of his servants, unless he abandons their control to the hirer." Pioneer Fireproof Cons. Co. v. Hansen, 176 Ill. 108, 52 N. E. 19; Coughlan v. City of Cambridge, 166 Mass. 268, 44 N. E. 218; Consolidated Fireworks Co. v. Kochl (Ill.) 60 N. E. 87; McInerny v. Delaware & Hudson Canal Co., 82 Hun. 615, 151 N. Y. 412; See 26 Cyc. 1522.

The giving of general instructions as to the law of the case where a special verdict is to be returned, is improper. Boyce v. Schroeder, (Ind.) 51 N. E. 376; Stayner v. Joyce, 120 Ind. 99, 22 N. E. 89; Mauch v. Hartford, 112 Wis. 40, 87 N. W. 816.

"In returning a general verdict, the jury apply the law to the facts, and pronounce generally upon all of the issues. In a special verdict

they 'find the facts only,' and the trial judge determines their legal effect." *Morrison v. Lee*, 13 N. D. 591; *Ward v. Chicago, M. & St Paul Ry. Co.* (Wis.) 78 N. W. 443.

"It is reversible error for the court to give general instructions on any subject involved in a special verdict, well calculated to inform the jury how to answer in order to enable one of the parties to recover." *Byington v. City of Merrill*, (Wis.) 88 N. W. 26.

Sullivan, Hanley & Sullivan, for respondents.

"A master is liable for damages caused by the negligence of his servant within the scope and in the course of his employment, although he neither directs nor is aware of it." *Standard Oil Company v. Barkinson*, 152 Fed. 681—82 C. C. A. 29; See cases cited 2nd Dec. Master and Servant vol. 15, 25 Key Number 304-34 Cent. Digest Master and Servant 1226-1229.

"The concurrent negligence of a third person is not a defense. 26 Cyc. 1531 *Andrews v. Boedecker* 126 Ill. 605, 18 N. E. 651, 9 Am St. Rep. 649, (affirming 27 Ill. App. 30); *Lane v. Atlantic Works* 107 Mass. 104.

"Where the negligence of a servant is an effective cause of injury, the intervention, between the negligence of the servant and the injury, of the negligence of another person which immediately causes the injury does not relieve the master from his liability for the negligence of his servant." *Engelhart v. Tarrant*, (1897) I. O. B. 240-66 L. J. O. B. 122-75 L. T. Rep. N. S. 617-45 Weekly Rep. 197.

"16 Concurrent negligence of two responsible persons. The general doctrine is that it is no defense, in actions for injuries resulting from negligence, that the negligence of third persons, or an inevitable accident, or an inanimate thing, contributed to cause the injury to the plaintiff, if the negligence of the defendant was an efficient cause, without which the injury would not have occurred. In other words, where a defendant is guilty of negligence, which causes an injury, and the plaintiff is free from negligence contributing thereto, the fact that the negligence of a third person also contributed does not relieve the defendant from liability for his negligence." 22 R. C. L. pp. 128-129; See also Concurrent Causes—Negligence Dec. Digest ¶ 61.

"It is no defense to an action for a negligent injury that the negligence of a third person, or an inevitable accident, or an inanimate thing,

contributed to the injury, if the prior negligence of the defendant was the efficient cause of the injury." *The Joseph B. Thomas* (D. C.) 8 Fed. 578; See *Chairman v. Lake Erie & W. R. Co* 105 Fed. 449; See *Concurrent Causes Negligence—Cent. Digest* ¶ 74.

It must be shown that the servant assented expressly or impliedly to such transfer. *Delaware Etc. R. Co. v. Hardy* N. J. L. 35, 34, 34 Atl. 986; 37 L. R. A. p. 47 in notes; *Morgan v. Smith* (1893) 156 Mass. 570; *Missouri K. & T. R. Co. v. Ferch* (Tex.) 36 S. W. 487.

The employees cannot contract away the rights of the plaintiff. That contract may be good as between themselves but not as against plaintiff. *Sager v. Northern Pac. Ry. Co.* 166 Fed. 527.

Railway Company had the right to hire and discharge. 37 L. R. A. Note 40.

Railway Company owned engine. 37 L. R. A. Note pp. 44-45.

Railway Company had power of control and did control him. 37 L. R. A. 38 and 39.

"Various tests have been proposed for determining the relation of master and servant so as to render the master liable to indemnify the servant for personal injuries, but it is impossible to lay down any definite and satisfactory rule to all cases, and the question must be determined as it arises upon the facts and circumstances of the case. It is a question for the jury under proper instructions of the court." 26 Cyc. 1083-1084 and note.

"It is not necessary that there should be a breach of a joint duty in any concerted action on the part of the defendants, but it is sufficient if their several acts of negligence concur and unite in producing the injury complained of." 33 Cyc. 726; *Chicago etc. Railway Company v. Marshall*, 38 Ind. App. 217, 75 N. E. 973; *Mathews v. Delaware etc. Railway Company*, 56 N. J. L. 34, 27 Atl. 919, 22 L. R. A. 261.

"The general rule is that where the negligence of two or more persons concurs in producing a single, indivisible injury, such persons are jointly and severally liable, and this though there was no common design or concert of action."

And there is this joint liability although one of defendants owed to the plaintiff a higher degree of care than the other. *Edwards v. Great Northern Railway Company* 171 N. W. 873, 42 N. D. 154; 33 Cyc. 726; *Chicago etc. Railway Company v. Durant*, 65 Kan. 380, 69

Pac. 356; 26 Cyc. 1094; 34 Cent. Digest "Master and Servant," ¶ 165; 33 Cyc. 726-727; 29 Cyc. 487-488; 105 Fed. 449.

CHRISTIANSON, J. This action was brought to recover damages for personal injuries alleged to have been sustained by the plaintiff through the negligence of the two defendants. The case was submitted to the jury for a special verdict. The jury found, in effect, that plaintiff's injuries were occasioned by the negligence of the defendants, and that, by reason of said injuries, the plaintiff had been damaged in the sum of \$8,000. Judgment was entered in favor of the plaintiff and against both of the defendants pursuant to the verdict. The defendants moved in the alternative for judgment notwithstanding the verdict or for a new trial. The motion was denied, and the defendants have appealed from the judgment and from the order denying such motion.

The facts as shown by the evidence, and as found by the jury in the special verdict, are substantially as follows: On October 19, 1918, the plaintiff, being then about 28 years old, entered into the employment of the Director General as a wiper in the Minneapolis, St. Paul & Sault Ste. Marie Railway Company's roundhouse at Bismarck, N. D. About a week later he was made a fireman, and continued to work in that capacity up to and including December 25, 1918, when he received the injuries for which recovery is sought in this action. He made several trips as fireman on one of the locomotives on the Missouri River division of the Minneapolis, St. Paul & Sault Ste. Marie Railway Company's railroad from Bismarck to Wishek, Kulm, and other points, and continued as such fireman on one of the locomotives of that railway company until the date of the accident. About December 18, 1918, the plaintiff was ordered to go to Wilton, N. D., and he was there directed to work as fireman on engine No. 35 of said railway company, which engine was leased or assigned to work for the defendant coal company in connection with the operation of its coal mines. He continued to fire that engine from the 18th of December, 1918, until the morning of the 25th of December, 1918, when he sustained the injuries which form the basis of this action.

The Minneapolis, St. Paul & Sault Ste. Marie Railway Company owns a line of railroad running from Bismarck north through the village of Wilton. At the time of the accident that line of railroad was under the control of, and was being operated by, the Director General. The

defendant coal company owns and is operating a lignite mine situated about three miles east of Wilton. That mine is served by a spur track extending easterly from the main line of said railway company's railroad at Wilton. Such spur track has a wye connection with the main line. The greater portion of the spur track is owned by the railway company, but a portion thereof running from and adjacent to the mine is owned by the coal company. The coal was hauled from the mine, and the workmen were taken to and from the mine, by locomotives and cars furnished by the defendant Director General; such locomotives and cars were operated by crews furnished by the defendant Director General to the coal company under a written agreement which will hereafter be more fully considered. Such spur track has a main track, and there are numerous sidings, especially at the end near the mine.

Early in the morning of December 25, 1918, the plaintiff fired up the engine, and it, being attached to the tender and passenger coach, was pulled out on the main spur track from Wilton to the coal mine. One Johnson was the engineer, and the plaintiff was fireman, and the train was being taken down to the coal mine for the purpose of taking the night crew away from the mine. The train started between 5 and 6 o'clock that morning. There was a fog which rendered it somewhat difficult to see. The rails were frosty, and it was necessary to use the headlight. When the train had run about one and a half miles from the point from where it started there suddenly appeared out of the fog, within a distance of about 300 feet certain box cars which had come over the switch from the tipple. When the box cars were observed the train was going down an incline, and was traveling at a rate of speed of about 20 miles an hour or over. When the engineer noticed the cars, he called to the plaintiff, saying, in substance: There are some box cars on the track ahead, "let's get out of here!" The plaintiff, too, saw the cars about the same time that the engineer saw them. The plaintiff testified that the gangway on his side of the cab was obstructed by a heavy canvas, supported by a rod firmly fastened and frozen to the floor; that he could not get out on his side of the cab, and for that reason jumped out of the window. The engineer, however, stepped out through the gangway on his side of the cab. The evidence shows that the engine crashed into the loaded cars about 80 feet from the point where Asch jumped out.

The plaintiff became unconscious, and was picked up and taken to

a doctor's office at Wilton, where he received first aid, and later was taken to a hospital in Bismarck, where he was confined for a period of some four weeks. Later he was under observation and treatment for a considerable period of time. While the plaintiff was in the hospital an X-ray photograph was taken, which showed a subluxation of a lumbar vertebra. And, according to the testimony of a medical expert, who testified upon the trial, the plaintiff's efficiency has been greatly reduced by reason of such subluxation. According to the evidence, the plaintiff prior to the accident was in excellent health, but since the accident he has continually suffered severe pain in the back, and has been unable to perform any hard work without discomfort. He is compelled to wear a belt to support his spine, and has been troubled with a backache. His left leg is still stiff, and his back bothers him continually. For some six months after the injury he was unable to work at all, and, owing to his physical condition since, has not been, and it is not likely that he will ever be, able to return to his former occupation.

The plaintiff claims that he is entitled to a verdict against the defendant coal company and the Director General jointly for the damages which he has sustained. The defendants both deny liability. Each defendant, however, claims further that, in the event there is any liability, the other defendant alone is liable. In other words, the defendant Director General claims that the engine on which the plaintiff was working was at the time of the collision leased to the coal company; that the plaintiff at the time of the accident was an employee of the coal company, and not an employee of the Director General. The coal company, on the other hand, claims that at the time of the injury the plaintiff was an employee of the Director General; that the coal company had a perfect right to place the box cars where they were placed; that it was not negligent in doing so; and that it is in no manner liable to the plaintiff.

The evidence shows that on November 1, 1918, a written contract was entered into between the coal company on the one part and the Director General and railway company on the other part. The first paragraph of the contract sets forth the inducement:

"Whereas the coal company owns and is operating a lignite mine known as mine 'No. 2,' served by a spur track extending easterly from the main track of the railroad at Wilton, North Dakota, a distance of about three miles, with numerous sidings, which spur has a wye con-

nection with the main track, and desires to operate said spur and perform all freight service for said mine with its own motive power and employees and to transfer in passenger coaches its workmen engaged in the operation of said mine to and from Wilton, and take coal and water for its engine from the railroad's supply at said station, which will necessitate the use of the main track from a point about five hundred feet south of said spur connection to a point about five hundred feet north of the station grounds at Wilton, together with said wye and station sidings. The portion of the main track, wye and station sidings owned by the railroad which the coal company so desires to use are shown in red on the blueprint hereto attached, marked 'Exhibit A,' and made part hereof. The portion of the spur track and sidings owned by the railroad which the coal company so desires to use are shown in brown on said blueprint. The portion of the spur track and sidings immediately connected with the mine and owned by the coal company are shown in green on said blueprint."

The contract provides, among other things:

"1. The railroad grants to the coal company for the term of this agreement the following rights and privileges:

"1. To operate a passenger train with its own engine and crew over said spur track shown in brown on said blueprint and over the main line shown in red on said blueprint for the purpose of transferring its employees to and from work, and also to use so much of said portion of the main track, together with sidings and wye colored red as may be necessary to properly perform such service. * * *

"3. To transfer all freight cars as its business may require between said mine and the sidings of said spur nearest the main track. The railroad will set in empty cars for loading at said mine upon said sidings and take therefrom all loads delivered thereon by the coal company without charge.

"4. The movements of trains, cars or light engines over said tracks shall be under rules and regulations prescribed by the division superintendent of the railroad and all cars handled by the coal company shall be under the master car builders' rules.

"5. The railroad hereby leases to the coal company one standard locomotive engine equipped with a small pilot snow plow and four open platform passenger coaches all in good order for the rental of fifty dol-

lars (\$50.00) per day, such rentals to be computed from the time such engine and cars are delivered to the coal company.

"6. Subject to the provisions of article 3 hereof the railroad will maintain that portion of the main track, sidings, wye and mine spur which are to be used jointly by the coal company and the railroad and are shown in red on said blueprint. But the coal company shall pay to the railroad each month during the term of this contract, toward the cost of maintaining the tracks last mentioned colored red and structures connected therewith used jointly by the parties, the sum of twenty-five and 93 hundredths dollars (\$25.93). The coal company shall maintain at its own expense the spur track and all sidings connected therewith colored brown and green and extending approximately from a point three hundred feet east of the east headblock of the wye, station 14x35 to the end thereof.

"II. 1. The railroad agrees to furnish to the coal company and the latter agrees to use, an engine and a train crew, all the members of which shall have passed an examination on both mechanical and train rules, for the operation of the locomotive and trains to be operated by the coal company pursuant to this contract. It is expressly understood, however, that such engine and train crews shall be considered employees of the coal company and treated as employees of the coal company for all purposes in the construction and application of article three of this contract, and the coal company shall pay all wages of such engine and train crew."

Article 3, to which reference is made in the last-quoted paragraph, refers to and prescribes the respective obligations and liabilities of the coal company and the railway company with respect to the operation of trains, the maintenance of the roadway and structures, and injuries resulting from the operation of trains. The contract also makes provision for the payment of a stated compensation for the use of the spur track, main track, sidings, wye, and structures belonging to the railway company, and for the payment of bills covering rentals and maintenance.

The Director General contends that, by virtue of the provisions of the contract, the plaintiff became, and at the time of the accident was, an employee of the coal company, and that, as a matter of law, the coal company alone is liable in damages for any injuries he may have sustained. After a careful consideration of this question we have reached the conclusion that the contention cannot be sustained. In other words, we are of the opinion that there is substantial evidence to sustain the

findings of the jury that the plaintiff, at the time of the injury, was an employee of the Director General.

It will be noted that contract was made November 1, 1918. The evidence shows that prior to that date, namely, during the latter part of October, 1918, the plaintiff, at the direction of the proper employees of the Director General, went to Wilton and worked as a fireman on a locomotive doing work for the coal company similar to that which was done by the locomotive which plaintiff was firing on December 25, 1918. There is no direct evidence that the plaintiff was informed of the contract between the coal company and the Director General and the railway company. On the other hand, the plaintiff testified (and the jury found) that he had no knowledge of any such contract; that while he worked at Wilton he supposed he was working for the railway administration, and that he had no idea that he was supposed to be an employee of the coal company. When the plaintiff entered into the employment of the railway administration certain obligations were assumed by both the employer and the employee. It would seem that an employer ought not to be permitted to transfer the employee to another master, and expose him to new risks incident to such new employment, unless the employee either expressly or impliedly consents to enter the new employment, and assumes the risks and obligations incident thereto. And that is the rule established by the authorities. See *Bowie v. Coffin Valve Co.*, 200 Mass. 571, 86 N. E. 914; *Del., L. & W. R. Co. v. Hardy*, 59 N. J. Law, 35, 34 Atl. 986; 1 *Labatt's Master & Servant* (2d ed.) § 53, p. 174; note, 37 L. R. A. 47. In *Bowie v. Coffin Valve Co.*, supra, the Supreme Court of Massachusetts said that—

A servant "could not be transferred from one master to another without his consent either expressly given or implied from the nature and character of the work when compared with his ordinary employment." 86 N. E. 915, 200 Mass. 578.

The same principle was enunciated by the Supreme Court of New Jersey in *Del., L. & W. R. Co. v. Hardy*, supra, in the following language:

"To establish the fact that the servant of one has thus transferred his services to another *pro hac vice*, it must appear that he has assented, expressly or impliedly, to such transfer. No one could transfer the services of his servant to another master without the servant's consent. It must further appear that the servant has, in fact, entered upon the service and submitted himself to the direction and control of the new

master. His assent may be established by direct proof that he agreed to accept the new master and to submit himself to his control, or by indirect proof of circumstances justifying the inference of such assent. Such evidence may be strong enough to justify a court in removing the question from the jury, or it may require to be submitted to the jury." 59 N. J. Laws, 38, 34 Alt. 987.

In the case at bar the court submitted to the jury the question whether the plaintiff Asch at the time of the accident was working as a locomotive fireman in the course of his original employment. In other words, the court submitted to the jury for determination as a matter of fact whether the plaintiff had been transferred from his original employment, and had become an employee of the coal company. And the jury found that he had not been so transferred, but was at the time of the injury working under his employment by the railway administration. As already indicated, there is no evidence that the plaintiff expressly assented to his being transferred to and becoming an employee of the coal company; nor do we believe that the circumstances in the case are such as to establish, as a matter of law, that he impliedly gave his assent to such arrangement. It is true the evidence shows that plaintiff received some pay checks issued by the coal company. However, this circumstance alone was not sufficient to put him on notice that he had been transferred to and had become an employee of the coal company. See *Standard Oil Co. v. Anderson*, 212 U. S. 215, 225, 29 Sup. Ct. 252, 53 L. ed. 481, 485. The plaintiff was engaged in his usual line of work. He was firing a locomotive under the control of and operated by the Director General. He was under the direction of, and his time was taken each day by, a locomotive engineer in the general employment of the Director General. The locomotive which the plaintiff was firing took all of its water at the water tank of the railway company at Wilton, and all the coal used in operating it was taken from the coal dock of the railway company at the same place. As breakages occurred the engines were taken to the repair shop of the railway company at Bismarck. In going to Wilton he (plaintiff) went at the direction of the employees of the Director General, and in coming away from there he went in accordance with similar orders. The coal company had no right to discharge him; his status so far as concerned seniority in the service of the Railroad Administration was in no manner affected by the work he did at Wilton. In view of all the facts and circumstances, we do not believe

it can be said as a matter of law that the plaintiff assented to a transfer to, and became an employee of, the coal company. We express no opinion as to the respective rights and obligations of the Director General and the coal company as those rights are fixed by the terms of the contract. That is a matter for them, and one which does not concern or affect the rights of the plaintiff in this action.

By their answers to the interrogatories in the special verdict, the jury found that the engineer was guilty of negligence in operating the engine at the speed at which it was being operated at and immediately preceding the time the accident occurred, and that this want of care on the engineer's part contributed to plaintiff's injuries. The jury also found that the plaintiff was not guilty of contributory negligence. In view of the facts and circumstances which the evidence tended to establish, and which have heretofore been alluded to, we are of the opinion that these findings of the jury have substantial support in the evidence. In other words, we are of the opinion that, under the evidence in the case, these were properly questions of fact for the jury.

The defendant coal company contends that the complaint fails to state facts sufficient to constitute a cause of action against it. It does not appear, however, that the question was raised in the court below either by demurrer or otherwise. This contention is based, primarily, upon the proposition that the complaint does not allege that the relation of master and servant existed between the plaintiff and the coal company at the time of the injury, but that, on the contrary, the complaint shows that that relation existed between the plaintiff and the Director General. This contention, in our opinion, is not well founded. While the coal company did not owe the plaintiff the duty which a master owes to a servant, it did owe him the duty to use reasonable care in conducting its operations, so far as they might, with reasonable probability affect others, even though they were not the servants of the coal company. *Olson v. Phoenix Mfg. Co. et al.*, 103 Wis. 337, 79 N. W. 409.

It is undisputed that the plaintiff, at the time of the accident, was in a place where he had a lawful right to be, and was engaged in the performance of work which it was his duty to perform. The coal company knew that at a certain time in the morning of December 25, 1918, a train would come up from Wilton to take the night crew away from the mine. It knew that that train would come over a certain track which was used for that purpose. It is undisputed that the assistant weighmaster

of the coal company, whose duty it was to weigh the loaded cars, permitted certain cars, loaded with coal, to be placed on the track on which the train would come from Wilton to the coal mine that morning. There is no evidence tending to show that the track in question was ever before used for the purpose of placing either loaded or empty cars thereon. On the contrary the evidence shows that the track was not used, but was used merely for the movement of trains to and from the mine. And the assistant weighmaster frankly admits that the reason the cars were placed where they were was that the brake slipped and the cars went over the switch, and out on the main line. The assistant weighmaster testified that the work done by him in connection with these cars was in his regular line of duty; and it clearly appears from his testimony that the place where the cars were placed was not the usual place to put such cars, and that but for the brake slipping they would not have been placed where they were. He further testified that he notified no one of the fact that the cars had gone out onto the main track, and took no precautions whatever to prevent the accident which subsequently happened, although he knew that the train would arrive in the course of half an hour or an hour after the cars had gone onto the main track. In our opinion, the evidence amply justified the conclusion of the jury that the coal company and its employees were negligent in placing the cars where they were, and also that this negligent act contributed directly to the injury sustained by the plaintiff.

It is next contended that, under the facts in this case, the plaintiff cannot maintain a joint action against the coal company and the Director General, and that the joint verdict against them must be set aside. The claim of the defendants, and especially that of the coal company, as we understand from the argument, is that the defendants cannot be jointly sued for the injury occasioned by the collision unless it is shown that they omitted to perform, or negligently performed, some duty which they were jointly bound to perform, or unless it is shown that they jointly committed some tortious act which resulted in the injury. In our opinion, the contention is not sound, for it is not alone in cases where two or more persons are negligent in the performance of a duty which they jointly owe to another that they become liable, and may be sued jointly for the injury sustained. It is well settled that, where two or more causes join, and by contemporaneous action produce, a single injury, the author of each cause is liable, even though the authors acted

independently of each other. See *Shearman & Redfield on the Law of Negligence* (6th ed.) § 122; *Thompson, Commentaries on the Law of Negligence*, § 2781; 22 R. C. L. pp. 128, 129; 33 Cyc. 726; *Matthews v. Del., L. & W. R. Co.*, 56 N. J. Law, 34, 27 Atl. 919, 22 L. R. A. 261; *Olson v. Phoenix Mfg. Co.*, 103 Wis. 337, 79 N. W. 409. See, also, *Seckerson v. Sinclair*, 24 N. D. 625, 636, 140 N. W. 239, 244; *Edwards v. G. N. Ry. Co.*, 42 N. D. 154, 171 N. W. 873. The rule was well stated by the Supreme Court of New Jersey in the case of *Matthews v. Del., L. & W. R. Co.*, *supra*. That action was one to recover damages for an injury received in a collision. The plaintiff in the action was a passenger on a street car, and he was injured in a collision between that car and a locomotive belonging to a railroad company. He brought an action against both the street car company and the railroad company. The contention was advanced there, as here, that they could not be jointly sued, for the reason that there was no proof of joint negligence on the part of the defendants. In answering that contention the New Jersey court said:

"If this contention is sound, it is obvious that the declaration was demurrable, for it charged that the railroad company owed to plaintiff a duty to give notice of the passage of its trains across the tracks of the railway company, and that the railway company owed to him a duty to take precautions in carrying him across the tracks of the railroad company, and it averred that each company had neglected to perform the several duties thus charged, and that thereby the collision which injured plaintiff occurred. But the contention is wholly inadmissible, and the declaration would plainly have been good on demurrer. The error arises out of a misconception as to the nature of a joint tort. If two or more persons owe to another the same duty, and by their common neglect of that duty he is injured, doubtless the tort is joint, and upon well-settled principles each, any, or all of the tort-feasors may be held. But when each of two or more persons owe to another a separate duty, which each wrongfully neglects to perform, then, although the duties were diverse and disconnected, and the negligence of each was without concert, if such several neglects concurred and united together in causing injury, the tort is equally joint, and the tort-feasors are subject to a like liability. This doctrine was announced in this court by the chief justice in *Newman v. Fowler*, 37 N. J. Law, 89. The like doctrine was applied by the court of appeals in New York to a case identical with that under con-

sideration. *Colegrove v. New York & N. H. R. Co.*, 20 N. Y. 492. That case had been mentioned with approval in *Barrett v. Third Ave. R. Co.*, 45 N. Y. 628; *Slater v. Mersereau*, 64 N. Y. 138; *Artic F. Ins. Co. v. Austin*, 69 N. Y. 470 (25 Am. Rep. 221). See, also, *Cooper v. Eastern Transp. Co.*, 75 N. Y. 116. The same view is taken in other courts. *Wabash, St. L. & P. R. Co. v. Shacklet*, 105 Ill. 364 (44 Am. Rep. 791); *Union Transit Co. v. Shacklet*, 119 Ill. 232, 10 N. E. 896; *Carterville v. Cook*, 129 Ill. 152, 22 N. E. 14 (4 L. R. A. 721); *Cuddy v. Horn*, 46 Mich. 596, 10 N. W. 32 (41 Am. Rep. 178)."

Cyc. (33 Cyc. 726, 727) says:

"Where an injury is sustained by reason of the joint or concurrent negligence of two railroad companies or a railroad company and another company or person, plaintiff may sue both jointly, and it is not necessary that there should be a breach of a joint duty or any concerted action on the part of defendants, but it is sufficient if their several acts of negligence concur and unite in producing the injury complained of; nor is it material that one of defendants owed to plaintiff a higher degree of care than the other. So, in case of an injury growing out of a collision, where there was negligence on the part of both defendants, plaintiff may sue jointly, according to the nature of the collision, the two railroad companies, or a railroad company and street railroad company, or a railroad company and a hackman in whose vehicle plaintiff was a passenger. A person injured at a crossing may maintain a joint action against the company owning the road and another using it by its permission, where there was negligence on the part of the gateman of the one and those in charge of the train of the other, or the company owning the road was negligent in not maintaining a flagman at the crossing and the other company in the manner of operating its trains."

The principle stated is applicable here. Under the facts as found by the jury in this case, the injury sustained by the plaintiff resulted from a collision caused by the negligent act of the engineer in the operation of the train, and by the negligent act of the assistant weighmaster of the coal company in placing the loaded cars on the tracks over which he knew the train would come. Neither act, standing alone, but both acts in conjunction, and operating concurrently, caused the injury which the plaintiff sustained.

Error is also predicated upon the court's action in allowing the plaintiff to amend the complaint after the trial had commenced. The

amendments allowed were as follows:

The plaintiff was permitted to add to his allegation as to the injury sustained the following: "And by grievous bodily injuries to his face and other portions of his body"—and to substitute John Barton Payne in place of Walker D. Hines, as Director General. So far as the latter amendment is concerned, the court would take judicial notice that the fact that Walker D. Hines had ceased to be Director General and that John Barton Payne had been appointed as his successor. C. L. 1913, § 7938, subds. 28, 30, 33. Manifestly there could be no prejudice in permitting this amendment to be made. Nor do we believe there was any error in permitting the complaint to be amended as to the extent of the injury received. It is elementary that the allowance of amendments rests largely in the sound, judicial discretion of the trial court, and that its rulings will not be disturbed unless an abuse of discretion appears. No application for a continuance was made, and there is not the slightest indication that the defendants were taken by surprise, or in any manner prejudiced by the allowance of the amendments.

At the commencement of the trial the plaintiff called one Enright, the superintendent of the coal company, for cross-examination under § 7870, which provides that a party to a civil action, or the directors, officers, superintendent, or managing agents of any corporation, which is a party to the record in the action, may be examined upon the trial as if under cross-examination at the instance of the adverse party. Enright testified that he (at the time of the trial) was the superintendent of the defendant coal company. The defendants, however, contend that the plaintiff was not entitled to call him for cross-examination under the statute for the reason that his testimony showed that he was not superintendent at the time the accident in question occurred, and that he, at that time, was merely a traveling salesman for the coal company. We find it wholly unnecessary to determine the question raised, for it developed upon the examination of Enright that he knew nothing about the accident; he was therefore dismissed, and he gave no testimony which could in any manner affect the result of the action. The error, if any, was clearly non-prejudicial.

Error is also predicated upon the admission of the testimony of the plaintiff, Asch, as to what the engineer Johnson said to him upon discovering the box cars, viz.: "Let's get out of here!" It will be noted

from the statement of facts that this statement was made immediately preceding the collision, and at a time when the locomotive was 300 feet or less from the box cars. In our opinion, the evidence was admissible. The statement made by the engineer, according to the testimony of the plaintiff, was a spontaneous utterance, made contemporaneously with the accident. The authorities generally hold such statements admissible as a part of the *res gestae*. See *Champlin v. Pawzuteck Valley St. Ry. Co.*, 33 R. I. 572, 82 Atl. 481; 2 Jones (Horwitz), *Commentaries on Evidence*, § 344, p. 810 et seq., and authorities collated in notes.

Error is also predicated upon the testimony of the plaintiff as to the ownership of the railway line extending from Wilton to Bismarck. In our opinion the assignment is devoid of merit, for the defendants themselves, as a part of their case, put in full proof regarding the ownership of the tracks and engines, etc., and there was absolutely no conflict in the evidence as regards these matters.

Error is assigned upon the examination of the engineer in charge of the locomotive at the time of the injury. The engineer was called as a witness by the plaintiff. At the time he was called, plaintiff's counsel said:

"I would like to have the record show that we are calling him for certain specific questions and as a witness for the other side."

Defendants' counsel objected to this statement. The court thereupon said to plaintiff's counsel:

"You claim this man is called for cross-examination?"

To which plaintiff's counsel replied in part:

"We know this witness is a witness that has been subpoenaed here by the defendants, and we call him to ask him certain specific questions on the theory that we are making him our witness only on such questions on the direct issues we put to him."

In answer to preliminary questions the witness stated that he had been subpoenaed by the defendants, and had discussed the case slightly with defendants' counsel. We fail to see wherein defendants could have been prejudiced by this procedure.

One Enright, the superintendent of the coal company, was called as a witness for the defendants. He was asked as to who paid the crews operating the trains on the spur between Wilton and the coal mine. An objection interposed by plaintiff's counsel was sustained, and that ruling

is assigned as error. In our opinion the assignment is without merit for two reasons:

(1) On cross-examination conducted by plaintiff's counsel for the purpose of ascertaining the knowledge of the witness as to the matters concerning which he was about to testify, he (Enright) admitted that he did not himself pay the men; that they were not paid through his department; that the only knowledge he had on the subject was by virtue of information received from others, including members of the train crews. He admitted that the plaintiff in this case had never made any statement to him as to who paid him for the services he rendered at Wilton. It seems clear that the testimony sought to be elicited from the witness was not the best evidence, but was hearsay.

(2) Subsequently the defendants were permitted to adduce, and did adduce, other evidence relating to the payment of the crews operating the trains in connection with the mine, and that matter was fully covered by such other evidence. The plaintiff admitted that he had received and cashed certain pay checks, which were admitted in evidence. Such checks were issued by the coal company. Hence the defendants were in no event prejudiced by the exclusion of Enright's testimony. 37 Cyc. p. 1464 et seq.

During the course of the trial the engineer, Johnson, was again called as a witness for the plaintiff, and he testified that, during the time he and the plaintiff, Asch, were at Wilton, namely, between December 18th and December 25th, the locomotive which they operated became incapacitated; that while such locomotive was out of order a freight engine (which pulled the way freight on the main line from Bismarck through Wilton) was detached at Wilton, and such engine, together with the crew thereon, assigned to work on the spur track leading to the mine in place of the engine on which Johnson was engineer and Asch fireman, and that such engine so assigned to work on the spur track continued to do so for a period of some three or four hours, whereupon it went back to its work on the main line of the defendant railway company. It is asserted that the court erred in admitting this evidence. We are of the opinion that the evidence was admissible. As already noted, one of the main contentions of the Director General was that the plaintiff at the time of the injury was an employee of the coal company. This was one of the questions of fact submitted to the jury. A determination of this question in turn involved a consideration of whether the plaintiff gave

his assent, express or implied, to the change of employer. Any fact or circumstance having a logical bearing on this proposition was admissible. And it seems to us that the incident referred to had a tendency to sustain plaintiff's contention that he had no knowledge of the agreement between the Director General and the coal company, and that he never consented to being transferred to and becoming an employee of the coal company.

It is also asserted that the court erred in unduly restricting the cross-examination of the witness Johnson. As already indicated, Johnson was the locomotive engineer. He had been subpoenaed by the defendants. The plaintiff called him as a witness, and interrogated him as to certain matters. We are unable to say that the trial court restricted the cross-examination to such extent as to violate the rules of evidence. It seems to us rather that the court merely limited the cross-examination strictly to the matters inquired into on direct examination, and this, of course, was not error. *Jones on Evidence*, ¶ 820; *Knapp v. Schneider*, 24 Wis. 70. But, even if the cross-examination was unduly restricted, the error was fully cured, for the defendants subsequently called Johnson as their own witness, and he was examined and testified fully with respect to the matters sought to be inquired into (and excluded) on his cross-examination. See 38 Cyc. 1466, 1467.

Error is also assigned upon the admission in evidence of the articles of incorporation of the coal company, and a blank used by the engineer in making reports while engaged at work in connection with the mine at Wilton. Little argument is advanced in support of these assignments, and, in our opinion, they are devoid of merit.

There were introduced in evidence in behalf of the plaintiff two X-ray photographs, one of a portion of plaintiff's spine, and the other of one of his feet. The doctor who took these photographs was placed upon the stand as a witness for the plaintiff. After identifying the plates, and stating that they were in the same condition as when they were taken, he was permitted to interpret and explain them. He also was permitted to give his opinion as an expert as to the nature and extent of the injuries as disclosed by such plates. It is contended that the rulings incident to the reception of all of this evidence were erroneous.

While it is argued that the X-ray photographs should not have been admitted in evidence, no error is assigned upon the rulings admitting them; hence defendants are now in no position to argue that these photographs should not have been admitted. We deem it proper to say, how-

ever, that it is not apparent that the trial court erred in admitting the X-ray photographs in evidence. Nor do we believe that the court erred in permitting the doctor to explain the X-ray photographs. One of the photographs showed a dislocation or subluxation of a vertebra. The other showed a fracture of a small bone in one of plaintiff's feet. While it is true the photographs themselves were, and are, the best evidence as to what they show, it is equally true that an X-ray photograph may wholly fail to convey to an ordinary layman the facts as they actually are shown in such photograph. And, we believe that it is proper for an expert to explain an X-ray photograph in particulars that are not understood by a layman. See *United R. & Elec. Co. v. Dean*, 117 Md. 686, 84 Atl. 75; *Bradley v. Inter Railway Co.* (Iowa) 183 N. W. 493.

Nor do we believe the court erred in permitting the doctor to give his opinion as an expert as to the nature and extent of the injury, and its probable duration and effect. The authorities generally hold these matters to be a proper subject of expert testimony. The *Encyclopedia of Evidence* (7 Ency. Ev. p. 399) says:

"For the purpose of arriving at a proper conclusion as to the nature and extent of the injury, and its probable duration and effect, it is proper to receive the opinions of medical experts.."

To the same effect see *Rogers on Expert Testimony* (2d ed.) p 130; *Jones' Blue Book of Evidence*, § 378, pp. 929-932.

Error is also predicated upon the admission of the testimony of the plaintiff to the effect that for some six months after the injury he was unable to work, and that from the time of the injury and up to the date of the trial he was suffering with severe headaches, had pains in the back and in the leg, and was nervous. In our opinion this evidence was admissible.

The *Encyclopedia of Evidence* says:

"It is proper and indeed necessary to inquire into the nature and extent of the injury complained of; and accordingly it is proper to receive evidence as to the physical condition, in respect to health, of the injured person prior and subsequent to the injury; that before the injury the plaintiff was healthy and vigorous, and that in consequence of the injury he suffered pain and disease." 7 Ency. Ev. 383—385.

"The injured person is a competent witness to testify to his feelings, pains and symptoms, as well as to all the characteristics of the injury, internal or external, so far as the same were perceptible to the senses,

and do not require the exercise of scientific skill and knowledge; and indeed it has been held that he is better qualified to testify to such matters than any one else." 7 Ency. Ev. 394—395.

Among the questions submitted in the special verdict were:

"Was the plaintiff, Asch, at the time he received the injuries complained of, guilty of want of ordinary care which contributed to produce the injuries complained of?"

"Were the injuries received by the plaintiff the result of the ordinary risks of his employment?"

In its instructions the court defined the terms "ordinary care" and ordinary risks of the employment," and directed the jury to determine from the evidence in the case whether affirmative or negative answers should be made to the two questions above quoted. It is contended that the court in effect gave general instructions, and also "indirectly advised the jury the effect or result of their answering the questions involved one way or the other." In our opinion the instructions are not objectionable on either ground. No general instructions were given in the case at all. The only instructions given were with reference to the particular questions embraced in the special verdict and propositions incidental thereto. Thus the court instructed as to the rules to be applied in determining the credibility of witnesses, and the weight of evidence, defined the terms "burden of proof" and "preponderance of evidence," and also, as has been indicated, defined the terms "ordinary care" and "ordinary risks of employment." It seems to us that it was not only permissive, but that it was eminently proper, for the court to define these terms in order that the jury might intelligently answer the questions containing them. *Horn v. La Crosse Box Co.*, 131 Wis. 384, 111 N. W. 522; *Schroeder v. Wis. Cent. R. Co.*, 117 Wis. 33, 93 N. W. 837; *Banderob v. Wis. Cent. R. Co.*, 21 S. D. 396, 113 N. W. 738. See, also, *Swallow v. First State Bank*, 35 N. D. 608, 617, 161 N. W. 207; *Nygaard v. N. P. Ry. Co.*, 178 N. W. 962.

Error is also predicated upon certain statements claimed to have been made by plaintiff's counsel in the closing argument to the jury. It appears from plaintiff's testimony that, upon being taken to the hospital at Bismarck after the injury, he was placed under the care of, and received treatment from, Dr. Ramstad. It, also, appears that immediately prior to or during the course of the trial the trial court, at defendants' request, appointed certain physicians to examine the plaintiff; that Dr.

Ramstad was one of the physicians so appointed, and that he, with the other physicians, examined the plaintiff. In his closing argument plaintiff's counsel commented on the failure of the defendants to call Dr. Ramstad as a witness. Defendants' counsel excepted to this statement. Plaintiff's counsel thereupon stated that he had made the statement in answer to statements made by defendants' counsel during his argument to the jury; that during such argument defendants' counsel had commented on the fact that the plaintiff had failed to call Dr. Ramstad, the doctor who examined plaintiff when he was brought to the hospital, and that he (plaintiff's counsel) therefore, by way of reply to defendants' counsel, called the attention of the jury to the fact that Dr. Ramstad had not been called by the defendants either, although he had been available to them. The trial court thereupon said:

"Gentlemen of the jury, you are instructed by the court to disregard any statement of counsel that is not contained in the evidence. You will remember what the evidence is and be guided solely by the evidence in the case."

We are entirely satisfied that the record so presented to us does not disclose any prejudicial error. See *Erickson v. Wiper*, 33 N. D. 193, 222, 224, 157 N. W. 592.

The defendant coal company asserts that it is in any event relieved from liability by reason of the fellow-servant doctrine. We find it unnecessary to determine whether that doctrine is applicable where a coal company, incidental to its business, engages in railroading. It is sufficient to say that upon the trial, as well as in this court, the coal company asserted that the plaintiff was not its employee, but the employee of the Railway Administration, and that was the finding of the jury. The duty which the coal company owed to the plaintiff, and the legal rules fixing its liability, have already been alluded to, and need not be restated here.

The defendant coal company also asserts that the verdict is excessive. Reference has already been made to the nature of plaintiff's injuries as disclosed by the evidence. We are of the opinion that the amount fixed by the jury is not so large as to justify this court in interfering therewith.

This disposes of all the errors assigned and argued. It follows from

what has been said that the judgment appealed from must be affirmed. It is so ordered.

GRACE, C. J., and BRONSON, and BIRDZELL, JJ., concur.,

ROBINSON, J., concurs in result.

FIRST NATIONAL BANK OF HALSTAD, MINN., Petitioner, v.
S. A. OLSNESS, Commissioner of Insurance, D. C. POINDEX-
TER, State Auditor, Respondents.

(186 N. W. 751)

States — hail insurance warrants held assignable, but not negotiable.

1. Under chap. 77, Session Laws of 1921, hail insurance warrants are assignable but not negotiable.

States — hail insurance warrants are payable in full out of hail insurance fund, and not subject to pro-rating.

2. Hail insurance warrants are payable in full, when called by the state treasurer, out of the hail insurance fund and are not subject to being pro-rated in case of the insufficiency of the fund.

Opinion filed Jan. 21, 1922.

From a judgment of the District Court of Burleigh county, *Coffey, J.*
Certified questions answered and cause remanded.

Opinion of the Court, *Birdzell, J.*

E. T. Burke, for petitioner.

Sveinbjorn Johnson, Attorney General, *Geo. F. Shafer*, Assistant Attorney General, for defendants.

BIRDZELL, J. In a mandamus proceeding entitled as above and pending in the district court of Burleigh county, the petitioner seeks to have issued, to cover certain hail losses, a hail warrant, negotiable or assignable in form, payable out of the hail insurance fund, without being subject to pro-rating upon the contingency of the fund being insufficient. It was stipulated in the court below that the plaintiff's right depended upon the answers to two questions:

First, are the hail warrants heretofore issued in the following form negotiable or nonnegotiable:

For Certified Hail Loss	Charge State Hail In-
1921	surance Fund
County of	..
	State of North Dakota.
	Auditor's Office.
	No B
	Bismarck,
Pay to the order of	
the sum of	\$
To the State Treasurer	Dollars
of North Dakota	
Bismarck	D. C. Poindexter, State Auditor
	Ralph Madland, Deputy
	By

Second, when the warrant is issued in the above form, is it, in case of the insufficiency of the fund designated, payable ratably out of the funds collected into the hail insurance fund for that year, or is it payable when called in the amount stated on its face with statutory interest?

The trial judge ruled that the warrants, in the form above set forth, are nonnegotiable, and that they are binding obligations of the state payable in full, and not ratably. The above two questions are certified to this court for answer.

It being clear that such warrants are payable only out of the hail insurance fund, they are nonnegotiable. They are nevertheless assignable as ordinary warrants for the payment of money, and are so recognized

by the express provisions of § 22 of the Hail Insurance Act (chap. 77, Laws of 1921).

We are of the opinion that the warrants are payable in full, as they are called for payment by the state treasurer, and are not subject to any subsequent condition of repayment in case the fund should prove insufficient to meet all claims. § 6 of the act provides for the levy of a flat tax of three cents per acre each year for five years for the purpose of carrying out the act and creating a surplus in the hail insurance fund for the prompt payment of losses. § 21 requires the state treasurer to call the warrants for payment to the amount of collections remitted to him by the various county treasurers during the preceding month, and the warrants are made due and payable on the call of the treasurer. This clearly means that they are payable in full when called, and not subject to being pro-rated. The liability for payment is limited to the hail insurance fund, however, and is not a general liability of the state. See *State ex rel. Linde v. Taylor*, 33 N. D. 76, 109, 156 N. W. 561, L. R. A. 1918B, 156 Ann. Cas. 1918A, 583; *Sargent County v. Bank of N. D.*, 182 N. W. 270.

Remanded to the district court.

CHRISTIANSON, ROBINSON, and BRONSON, JJ., concur.

GRACE, C. J., being disqualified, did not participate.

MARGARET KRAPP, Respondent, v. PAUL KRAPP, Executor of the Last Will and Estate of Johan Krapp, Deceased, Appellant.

(186 N. W. 754.)

Executors and administrators—evidence held to sustain verdict for board of deceased father-in-law; presumption against agreement of parent to pay child for board held not applicable.

The plaintiff brings this action against the estate of her deceased father-in-law for six hundred twelve days board and lodging at \$1 a day.

The jury found a verdict in favor of plaintiff on an express contract, and it is *held* that the verdict is well sustained by the evidence.

Opinion filed Jan. 30, 1922.

Appeal from the District court of Stutsman county; *Coffey, J.*

Affirmed.

A. W. Aylmer and *A. L. Aylmer*, for appellant.

Defendant contends that the statements of plaintiff (as to the times the old man stayed at her place, being the times for which plaintiff is making this claim against the old man's estate) come within the definition of a "transaction with the deceased," and were therefor incompetent and prejudicial. *Sheldon v. Thornburg*, 133 N. W. 1076 (Iowa); *Wetmore v. Thurman*, 141 N. W. 482; *Druey v. Baldwin*, 172 N. W. 663, (N. D.); 7871-1913 N. D. Code; *Druey v. Baldwin*, 172 N. W. 663 (N. D.); *Regan v. Jones*, 105 N. W. 614 (N. D.); *First Nat'l Bank v. Hilleboe*, 114 N. W. 1086 (N. D.); *Cardiff v. Marquis*, 114 N. W. 1088 N. D.

Plaintiff can testify that the book is her account book, but cannot testify that the items are correct, or explain them. 40 Cyc. 2326 (39); 40 Cyc. 2326 (40); *Dyer v. Minturn* 189 Pac. (1046); *Coburn v. Parrett* 150 Pac. (786).

"So long as the chances are equal that it may have had some effect one way or the other, the party excepting is entitled to the principal that irrelevant testimony should be shut out from the jury. *Jones on Evidence*, Vol. 5, § 897, (63); *Jones* Vol. 5, § 895 note (42); 32 N. D. 263 (272) 155 N. W. 78.

Knauf and *Knauf* for respondent.

ROBINSON, J. This is a second appeal from a verdict and judgment against the defendant for 612 days' board and lodging at \$1 a day. The board was furnished to Johan Krapp, deceased, the father-in-law of the plaintiff, and the defense is that because of the relationship the deceased should have been given free board, unless he expressly promised to pay for it. The first verdict and judgment was set aside and a new

trial granted, because the court had told the jury that an implied contract resulted from furnishing board and lodging. *Krapp v. Krapp*, 181 N. W. 951. This court correctly held that as between relations an implied contract does not arise from common hospitalities in furnishing board and lodging. The presumptions of law are presumed to be founded on reason and common sense. The general rule is that a child is always welcome to the home of the parent and a parent to the home of a child, and in such cases the law does not imply a contract to pay. Custom makes the rules of law and the presumptions, and, when the reason of the rule ceases, so does the rule itself. This court has held that the reason of the rule ceases in the case of board and lodging of a menial character. *Bergerson v. Mattern*, 41 N. D. 404, 170 N. W. 877. And so the reason of the rule ceases when it appears that the ties of affection no longer exist and when, as in this case, it appears that the "old man" is rich and his children poor, when the "old man" sues his son, and makes him pay interest on money loaned, and treats him as a stranger, and when the "old man" dies, leaving \$15,000 to one son and only \$5 to the son who is the husband of the plaintiff. When a father treats his son in that manner, the law does not presume that the son or son's wife will give him free board, lodging, and washing.

The evidence clearly shows that the parties lived and treated each other as strangers, and on that showing the rules of law are the same as those which pertain to strangers. Hence, on the evidence given at the second trial, the plaintiff was entitled to recover on an implied promise; but that is of little consequence, because the jury was instructed that the plaintiff can only recover on an express contract to pay for the board and lodging, and the evidence does well sustain an express contract. J. L. Krapp testifies that the deceased said he would pay his board. He said he had paid \$1 a day in Iowa, and that he would pay her (the plaintiff) \$1 a day, and she agreed to that. That was about 10 days after he commenced boarding, and of course the agreement applied to the past as well as the present. And so Regina Krapp testified that at several times he spoke of paying his board. He said that, when his son paid him in full, he would pay his board money; and so he told the hired man that he was paying his board.

It is vain to urge that the express contract applied only to the first nine months. When a contract to pay for board and lodging is proven, the presumption is that it continues as long as the boarding continues.

The interruption of a few days, or a month, is of no consequence. The evidence does well sustain the express contract, as well as an implied contract. The defendant had no right to compel the plaintiff to elect between such contracts. But he cannot complain of a decision which was made on his own motion, and it was altogether in his favor. In actions of this kind the plaintiff may be entitled to recover on an express contract, and also on an implied contract, or on either one, as proven by the evidence. In such a case it would be a strange and bungling practice for a party to sue on an express contract, and then, in case of defeat, to bring a second action on an implied contract, to be met with the objection that the first action was a bar to the second. The defendant has had a fair trial, and the verdict is well sustained by the evidence.

Affirmed.

GRACE, C. J. (specially concurring). This is a second appeal from a verdict and judgment in plaintiff's favor for the sum of \$612. The first case is reported in 181 N. W. 951. There all the members of the court, except myself, agreed to a reversal of the judgment appealed from. I dissented and contended that the judgment should be affirmed. The case was remanded and retried, and a second verdict in the same amount returned in plaintiff's favor, and judgment entered accordingly. An appeal from the second judgment was taken to this court; all the members of the court, who in the former case declined to affirm the judgment in that case for the reasons stated in their opinion, are now agreed that the second judgment should be affirmed. I agree that it should be affirmed, for the same reasons stated in my dissenting opinion in the former appeal, and for further reasons which inhere in this appeal, not necessary here to discuss or further mention.

CHRISTIANSON, J. I concur in an affirmance of the judgment for the reasons stated in the syllabus. I express no opinion on the procedural questions discussed by Mr. Justice Robinson. Neither do I express any opinion as to whether in event an express contract had not been proven, the facts and circumstances would have warranted the jury in finding that there was an implied contract to pay for board and lodging. Those questions are not here. The complaint alleged, and the jury found, that

there was an express contract, and there is ample evidence to sustain the finding of the jury.

BRONSON and BIRDZELL, JJ., concur.

JASON L. MOWRY, Appellant, v. THE GOLD STABECK COMPANY, a corporation, formerly known as the Gold-Stabeck Loan & Credit Company, Herman C. Ritz and A. F. Winters, Respondents.

(186 N. W. 865.)

Witnesses — testimony concerning transactions with deceased admissible, where none of parties are representatives, heirs, or next of kin.

1. In an action to determine adverse claims where no one of the parties is a personal representative, the heir or next of kin of a deceased person, testimony concerning transactions had with such deceased person is not rendered inadmissible, pursuant to § 7871 C. L. 1913.

Quieting title — court held to have properly fixed priority.

2. In an action to determine adverse claims, it is *held* for reasons stated in the opinion, that the trial court did not err in determining the defendant to be the equitable owner of the land and in fixing the priority of liens thereupon.

Opinion filed Jan. 31, 1922.

Action in District court, Rolette county, *Buttz*, J.

Plaintiff has appealed from a judgment in defendant's favor.

Affirmed.

Fred L. Ellsworth, Fred E. Harris, for appellants.

"A fee simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended." *Little v. Braun*, 92 N. W. 200, 11 N. D. 10; *Jasper v. Hazen*, 58 N. W. 454, 4 N. D. 1; 32 L. R. A. (N. S.) 1046 and cases cited; 5

L. R. A. (N. S.) 387; § 6754 C. L. 1913.

"Every grant of real property or of an estate therein, which appears by any other writing to be intended as a mortgage within the meaning of chap. 86 of this Code, must be recorded as a mortgage; and if such grant or other writing, explanatory of its true character, are not recorded together at the same time and place, the grantee can derive no benefit from the record." *Merchants State Bank v. Tufts*, 14 N. D. 238, 103 N. W. 760.

"When a grant of real property purports to be an absolute conveyance, but is intended to be defeasable on the performance of certain conditions, such grant is not defeated or affected as against any other person than the grantee, his heirs or devisees, or persons having actual notice, unless an instrument of defeasance, duly executed and acknowledged, shall have been recorded in the office of the Register of Deeds of the county where the property is situated." § 6755 C. L. 1913; *Patnode v. Deschenes*, 15 N. D. 166, 106 N. W. 573; *Gray v. Harvey*, 17 N. D. 1, 113, N. W. 1034; *Vallaley v. First Nat. Bank*, 14 N. D. 580, 106 N. W. 127.

W. O. Newhouse, R. C. Morton, and J. J. Weeks, for respondents.

"We cannot say that it was the purpose of the legislature to exclude all evidence merely because the witness from whose lips it might fall would enjoy the advantage of testifying to a transaction with a deceased person, who on that account could not confront and contradict him. Statutes which exclude testimony on this ground are of doubtful expediency. There are more honest claims defeated by them by destroying the evidence to prove such claim than there would be fictitious claims established if all such enactments were swept away, and all persons rendered competent witnesses." *St. John v. Lofland*, 5 N. D. 140.

This case and this expression of Judge Corliss is quoted with approval in "Wigmore on Evidence" § 578. See also *Jones on Evidence* 776.

Next of kin must be a party as such. *Clarke v. Ross*, Sup. Ct. Ia., 60 N. W. 629; *Lake Grocery Co. v. Chiostrì*; 34 N. D. 400; *Nora L. Savage v. M. W. A. Russell Savage et al.*, 113 Pac. 802, Vol. 33 L. R. A. (N. S.) p. 773.

BRONSON, J. This is an action to determine adverse claims concerning one-half section of land in Rolette county. The plaintiff has ap-

pealed from the judgment, and has demanded a trial de novo.

The trial court found: That the Twin City Investment Company the owner of the land in May, 1915, gave to one Winter a contract for a deed. That Winter in May, 1916, assigned such contract to the defendant Ritz. In February, 1914, the investment company made a mortgage for \$5,000 to Klein. In May, 1916, the defendant Ritz made a mortgage to the Gold-Stabeck Company for \$2,000. In November, 1917, the defendant Ritz being indebted to Wheelock Mowry, the father of the plaintiff, made an agreement, for purposes of securing such indebtedness and advances to be made, with Mowry to have a warranty deed executed by the investment company to one Janzow, and thence by Janzow to Wheelock Mowry, to secure \$5,000 then due from Ritz to Mowry, and that thereupon Mowry would execute a contract for a deed to Ritz for reconveyance upon payment of such \$5,000 and the \$5,000 first mortgage. Such deeds and contract were made. At that time the defendant Ritz had paid to the investment company the balance owing on the contract for a deed with Winter, and Ritz was then entitled to a warranty deed of the land. At that time Wheelock Mowry had full knowledge of the Gold-Stabeck mortgage, and that the same was unpaid. That the plaintiff at all times had full knowledge of such transactions. The plaintiff, or other members of the Mowry family, paid taxes and the principal and interest of the Klein first mortgage, aggregating, in toto with interest, \$6,869.36. That the defendant Ritz is the owner of the lands, and entitled to the possession subject to the payment to plaintiff of \$6,869.36, the \$2,000 Gold-Stabeck mortgage with interest, and the sum of \$5,000 to the plaintiff with interest. Pursuant to such findings judgment was entered. In the evidence it appears that Wheelock Mowry died in 1919, and prior thereto made a deed of the land, dated March 29, 1919, to the plaintiff for a consideration of \$1 and other valuable considerations. At the trial, defendant Ritz testified concerning many transactions and arrangements had with Wheelock Mowry, then deceased. The record is long, and the exhibits numerous. It is unnecessary to state at length the evidence. The plaintiff contends that, upon the record, he is an innocent purchaser of the land without notice of the Gold-Stabeck mortgage, and that the trial court should have confirmed his title; that the trial court erroneously permitted the defendant Ritz to testify concerning transactions had with a deceased person; that the contract for a deed given to Ritz

by Mowry was duly canceled, and the defendant Ritz had no title in the land; that the Gold-Stabeck mortgage did not attach to the land so far as plaintiff's interests are concerned; that, in any event, the trial court erred in not allowing priority to the plaintiff for certain payments made for taxes and upon the Klein mortgage. The defendant contends that the deed from the father to the plaintiff was a forgery (the trial court, in its memorandum opinion, strongly so intimates); that the trial court erred in not granting priority to the Gold-Stabeck Company mortgage.

Upon a consideration of the entire record we are of the opinion that the findings and conclusions of the trial court should be sustained. Although the record is neither clear nor definite concerning application that should be made for payments made by Mowry in taxes or liens upon the land, we are unable to find that the computations of the trial court are erroneous. The contention of the plaintiff, namely, that the trial court erroneously received testimony of the defendant Ritz concerning transactions had with the deceased Mowry, cannot be sustained. The statute, precluding testimony concerning transactions had with deceased persons, is specific in its character, and relates only to actions wherein the person representative, heirs, or next of kin are parties. § 7871, C. L. 1913. The plaintiff did not appear in that capacity he claims title through a deed made by his father during lifetime. The statute cannot be extended by judicial construction beyond its plain application. *Lake Grocery Co. v. Chiostrì*, 34 N. D. 386, 400, 158 N. W. 998; *Clarke v. Ross* (Iowa) 60 N. W. 627, 629. See *St. John v. Lofland*, 5 N. D. 140, 64 N. W. 930; *Wigmore on Evidence*, vol. 1, § 578; *Druey v. Baldwin*, 41 N. D. 473, 479, 172 N. W. 663, 182 N. W. 699; *Williams v. Clark*, 42 N. D. 107, 114, 172 N. W. 825, 827. Accordingly, the judgment should be in all things affirmed.

GRACE, C. J., and CHRISTIANSON and BIRDZELL, JJ., concur.

ROBINSON, J. (dissenting). The plaintiff brings this action to quiet title to a half section of land in Rolette county. He avers that he is the owner in fee simple, and that defendants claim an estate adverse to him. Defendant Ritz answers that in May, 1915, the Twin City Investment Company was the owner of the land, and contracted to sell the

same to Albert Winter, of Mankato, Minn.; that by a written contract Winter agreed to pay \$4,000 in accordance with four promissory notes, and to pay a \$5,000 mortgage of record, and that in May, 1916, for the express consideration of \$1, Winter assigned the contract to Ritz, of Minneapolis, President of the Twin City Investment Company; that on May 23, 1916, Ritz made to the Gold-Stabeck Company a mortgage on the same land to secure \$2,000; that it was recorded in July, 1918, and that it has not been paid. To the same effect is the answer of the Gold-Stabeck Company. The reply avers that at the time of making the \$2,000 mortgage Ritz had no title to the land, and that the mortgage conveyed no title or interest.

The plaintiff claims title by deeds as follows: November 3, 1917. The Twin City Investment Company conveyed the land to Janzow by general warranty deed, recorded November 30, 1917. November 26, 1917, Janzow conveyed title to Wheelock Mowry, the plaintiff's grantor, by general warranty deed, recorded November 30, 1917. November 28, 1917, Wheelock Mowry contracted to convey the land to Ritz in consideration of \$10,000 viz. \$1,000 on the 1st day of December, 1918, \$1,800 on the 1st day of December, 1919, \$2,200 on the 1st day of September, 1920; \$5,000 December 1, 1921. March 29, 1919, by general warranty deed, recorded July 12, 1920, Wheelock Mowry conveyed the land to Jason L. Mowry. The chain of title seems a little crooked. Winter made no payment of any consequence, and Janzow was a mere go-between. However, the deed made to Wheelock Mowry through Janzow was made to secure a loan as shown by the contract to convey the land to Ritz. The deed to Wheelock Mowry conveys to him and his grantors the legal title and the possession of the land, and the conveyance was not in any way subject to the Gold-Stabeck mortgage. When Ritz made that mortgage he had no title and very little equity. The mortgage was not recorded, nor was the contract recorded until Ritz obtained from Wheelock the money to purchase the land and to pay the recorded mortgages and taxes against it. When a party who has no title to land gives a mortgage with covenants of title and afterwards acquires title, then, as against him, the title inures to the benefit of his grantee or mortgagee, but it does not take priority over a deed or mortgage given to secure the purchase price of the land and to perfect title.

The only real question in this case is on the amount due the plaintiff. By his reply the plaintiff states the several amounts paid to perfect title

in addition to the large loan secured by the Mowry contract to convey title to Ritz. The trial court computed the several amounts paid, with interest at six per cent. till June 13, 1921. It found the same to be \$6,869.36, and in addition the sum of \$5,000, with 6 per cent. per annum from November 30, 1917, which amounted to \$6,250. Thus it appears at the present time there is due the plaintiff over \$13,000. On the original loan of \$10,000 Ritz agreed to pay 7 per cent., and he never paid a dollar on the loan. He paid nothing on the principal, interest, or taxes. He never put any good money into the land only as he got it from Wheelock Mowry. He completely disregarded all his promises and obligations to pay money. On the contract for a deed he agreed to pay 7 per cent. on the loan, and of course he should pay 7 per cent. on the original loan. No error being shown, we adopt the figures of the trial court, and hold that there is now due the plaintiff \$6,969.36, with interest at 6 per cent. from June 13, 1921. And there is due \$5,000, with interest at 6 per cent. from November 30, 1917. And there is due for interest on the original loan 1 per cent. a year since November 30, 1917, the date of the contract by which Ritz agreed to pay 7 per cent. on \$9,000. The 1 per cent. is to make in all 7 per cent.

And as Ritz by his answer presented a false issue by claiming title to the land, instead of offering to pay the amount due and demanding a deed, he should pay the costs of the trial court and of the appeal to this court. Hence the trial court should set aside the judgment herein, and in lieu thereof enter judgment to this effect: That the plaintiff is the owner of the fee title to the land in question, and that the same is not subject to any prior liens or claims. That there is due the plaintiff from Herman C. Ritz \$6,869.36, with interest at 6 per cent. from June 13, 1921, \$5,000, with interest at 6 per cent. from November 30, 1917, and 1 per cent. a year on \$9,000 from November 30, 1917, amounting to a sum to be computed by the court at the time of entering judgment, and stated in the judgment. Also, that Herman Ritz may pay the same, with interest at 6 per cent., within 60 days after the entry of judgment, with the costs of the trial court and the costs of the appeal, and on such payment the plaintiff must release and quitclaim to Herman C. Ritz the title to said land; and if payment be not so made, then that the land be advertised for sale and sold by the sheriff of Rolette county the same as on a regular mortgage foreclosure, to satisfy the amount due, with interest and costs. And if the land be not redeemed within a year

from the date of sale as provided by law, then that Herman C. Ritz and all persons claiming under him be forever barred from any title, claim, lien, or interest in said land.

CITIZENS STATE BANK of Fairfax, Minnesota, a corporation, and FRED A. DALLMANN, Respondents, v. KENMARE NATIONAL BANK, a corporation, and A. P. SCOFIELD, Sheriff of Ward County, North Dakota, Appellants.

(186 N. W. 755.)

Mortgages — vendor and purchaser — vendor had no substantial interest in land attached; attaching creditor of vendor was not in law a redemptioner.

The defendant bank brought an action against one M. L. Summerville, and attached the land which he had theretofore sold on written contract to one Dallmann, for which full settlement was made, according to the terms of the contract, and promissory notes secured by a mortgage on the land were taken for the balance of the purchase price. A certain mortgage against the land which was not assumed by Dallmann was foreclosed. The defendant bank claimed the right, by reason of the alleged attachment lien, to redeem from such foreclosure. The certificate of foreclosure was assigned to the plaintiff bank, and it refused to receive the redemption money deposited with the sheriff by the defendant bank. Later the sheriff issued to the latter a sheriff's deed. It is *held* that Summerville had no substantial interest in the land when attached; that he held the title thereof merely in trust for Dallmann; that the defendant bank was not in law a redemptioner; that the sheriff's deed issued to it was a nullity.

Opinion filed Jan. 31, 1922

An appeal from a judgment of the District court of Ward county, *Leighton, J.*

Judgment affirmed.

Fisk, Murphy & Nash for appellants.

"Under certain circumstances the vendor becomes the trustee of the title for the benefit of the vendee, and the vendee becomes the trustee of the purchase money for the benefit of the vendor, but this doctrine applies only in equity." *Cummings v. Duncan*, 22 N. D. 534.

Dallmann's possession does not alter the situation. His possession was simply that of his vendor. *Burke v. Schärf*, 19 N. D. 234.

P. M. Clark, for respondents.

"In order for realty to be attachable, it is essential that the debtor have some beneficial interest in the land. The bare legal title, or instantaneous seizin, would be insufficient, at least as against the equitable owners, where the attaching party has, or is bound by law to take, notice of the paramount outstanding equitable title." 6 C. J. 202.

"It is a well settled rule that the lien of an attachment does not exceed the actual interest the debtor had in the property at the time of the levy; and that if, at the time, all title and interest therein have passed from the debtor to a third person, the attaching creditor gets nothing by the levy. And an attachment lien on land is subject to every equity which exists against the debtor at the time of the levy, and the courts of equity will so limit it." 2 R. C. L. on p. 657, ¶ 69.

"An attachment under a writ against a vendor of real property in the possession of the vendee, under a contract of purchase, is neither a lien on the property nor on the unpaid purchase money; and where personal property is attached under a writ, against a purchaser in possession under a conditional sale, the attachment is not a lien on the property." *Burke v. Johnson*, 37 Kan. 337, 15 Pac. 204.

GRACE, C. J. This is an action to determine adverse claims to the northeast quarter of section 26, township 160, and range 88. These are the material facts:

On or about the 21st day of May, 1917, Dallmann contracted to buy the northeast quarter of section 34, township 160, range 88, from M. L. Summerville, and made an initial payment of \$1,500. On the 29th day of September, 1917, by mutual agreement between him and Summer-ville, another quarter section of land, the northeast quarter of 26, of the same township and range, was substituted in place of the one originally purchased, and Dallmann given credit for the \$1,500 on the purchase price of the latter tract. He also assumed a mortgage for \$2,200, on

which there had been paid \$150, leaving a balance of \$2,050. The purchase price of the land was \$9,000. For the balance of the purchase price Dallmann and his wife executed their promissory notes, payable at various intervals, and secured the same by a mortgage on the land. The notes and mortgage were dated May 21, 1917, and the latter was acknowledged on the 29th day of September of that year. The terms of the sale were contained in a written contract, which was signed by both Dallmann and Summerville.

During the year 1917 the defendant the Kenmare National Bank brought a creditor's action against Summerville, and on the 30th day of October of that year attached the land. At the time of the attachment the record title was still in Summerville. On the 1st day of October, 1917, Dallmann, with his family, moved onto the land, and have ever since remained there. No notice of the attachment proceedings was served on him, though at that time he was in possession of and occupying the land. The defendant bank does not assert any rights under the recording act.

When Dallmann purchased the land, there was, in addition to the mortgage he assumed, a small second mortgage of \$288 against the land to the State Loan Company of Kenmare, and which was payable in installments, which, for default in the failure of payment of two installments thereof, it foreclosed, and a sheriff's certificate was issued to it. On the 30th day of September, 1918, the Citizens' State Bank of Fairfax took an assignment of the sheriff's certificate from the loan company and duly recorded the same, and later demanded a sheriff's deed. On the same date that it acquired the sheriff's certificate it took an assignment of the mortgage. It had also taken an assignment of the mortgage executed by Dallmann to Summerville, and had paid Summerville for it and the notes it secured the full amount of the notes, except some small discount.

On June 1, 1919, Sheriff Scofield of Ward county, N. D., wrote the plaintiff a letter, stating that a redemption was made from the foreclosure, and that a certain amount of money had been deposited in his office for such purpose, and requested the surrender of the sheriff's certificate for redemption. The plaintiff refused to accept the money, and did not surrender the sheriff's certificate. The defendant bank sought to redeem, by reason of its alleged lien of attachment. A sheriff's deed was issued to it on the 30th day of July, 1919.

The only material question presented is whether, in these circumstances, the attachment lien was of any force or effect; if Summerville had no substantial interest in the land at the time of the attachment proceeding, there was nothing accomplished by it. In other words, no valid attachment lien was acquired. On September 29, 1917, Dallmann made full settlement for the purchase price of the land, as hereinbefore stated, and was, under the terms of the contract, then entitled to a deed from Summerville. There remained in Summerville at that time no beneficial interest in the land, but he had by the mortgage a lien thereon, securing the balance of the unpaid purchase price. He might have been compelled at that time, by an action of specific performance, to deliver the deed, had he refused to do so.

As we view the situation, at the time of the attachment of the land Summerville held a mere naked legal title to it, in trust for Dallmann, which he was bound to deliver to him. There is evidence that shows that Summerville did execute the deed on the 29th day of September, and that it was taken by him to Minneapolis in order to have his wife sign it. The deed of Summerville and wife of the land was delivered to Dallmann. Whether it was delivered at or about the time of the settlement of the transaction, or on the 12th day of November, as contended by defendant bank, we think is immaterial. At all times since the 20th day of September he was charged with the duty of delivering it, and was bound to do so. On that date the contract of purchase had been wholly performed by Dallmann.

In these circumstances, there was no lien acquired by the attachment. The defendant bank had thereby acquired no interest in the land, and could not be a redemptioner. The sheriff's deed issued to it was therefore a nullity.

The action is one in equity, and the plaintiff is entitled to the equitable relief which it received in the district court. The judgment of that court should be affirmed. It is affirmed. The respondents are entitled to their costs and disbursements on appeal.

BIRDZELL, BRONSON, ROBINSON, and CHRISTIANSON, JJ., concur.

JOHN O. GRUBB, Respondent, v. JAKE DEWING, Appellant.

(187 N. W. 157.)

Elections — where election judge accompanied to booth voters who had declared no disability, such votes cannot be held legal on contest.

Section 988 of the Compiled Laws of 1913, which provides for rendering assistance to voters who declare to the judges of election that they cannot read or that owing to blindness or other physical disability they are unable to mark their ballots, is mandatory, and where one judge of election is shown to have accompanied a number of voters to the election booth where no such disability appeared or was declared, such votes, upon contest, cannot be regarded as legal.

Opinion filed Feb. 14, 1922.

J. Judgment rendered by the trial court of Burke county, *Cooley*, Special

Affirmed.

McGee & Goss, for appellant.

Bangs & Robbins, for respondent.

BIRDZELL, J. Election contest. This is an appeal from a judgment rendered in favor of the contestant. It involves the office of county commissioner of Burke county in the Third commissioner district. The contest was instituted at the same time as the Drinkwater-Nelson contest for the office of Sheriff, decided concurrently herewith, post (187 N. W. 152), and they were tried together. The facts with reference to the election and institution of the contest are sufficiently stated in the opinion in that case, and need not be restated here. The evidence taken is applicable to both contests, except that some of it relates to precincts not within the commissioner district, and some relates to precincts involved only in this contest.

On the face of the returns Dewing received 536 votes and Grubb 518 votes for the office of county commissioner. Upon a recount in this proceeding it appeared that the plaintiff had received 518 votes and the defendant 529; but it was found by the court that 2 votes had been

counted for the defendant which were cast by persons who were not citizens of the United States, and that 12 votes were counted for the defendant which had been cast by women who were illegally assisted by a judge of the election. Subtracting the 14 votes thus found to have been illegally cast and counted for the defendant, the result was adjudged to be 518 for the contestant plaintiff and 515 for the contestee defendant.

In so far as the assignments of error upon this appeal involve the questions presented and decided in the Drinkwater-Nelson contest, that opinion is adopted as applicable hereto, and in so far as assignments are presented that are not controlled by the decision in that case they will be separately considered. The votes excluded and subtracted from Dewing on the grounds of alienage are those of Mary Skalicky and Muriel Byknonen. These were not legal votes, and they must be disposed of as in the Drinkwater-Nelson contest. This case turns upon the propriety of excluding a number of votes in Colville precinct on the ground of the failure to observe the secrecy of the ballot through assistance rendered to voters by one election judge, where no disability was declared or shown.

As to the circumstances in which assistance was rendered, Bennie Breeding, a clerk at the election, testified that on one occasion both judges of election went into the booth with a woman, and that one of the judges, Ole Sletvig, went into the booth with approximately half of the women that voted in the precinct that day; that he did not think that the women had first declared that they could not read nor mark their ballots, except the old lady who was assisted by both judges; that he did not hear any of them declare that they were unable to mark their ballots; that the provisions of the law with reference to assistance to voters were read in the morning on the opening of the polls; and that the ladies who had assistance asked Mr. Sletvig to go to the booth with them. Sam O. Enget, a judge in the same precinct, testified that there was just one lady who voted with the assistance of both judges and that she had stated to the board that she could not read; that none of the other ladies declared or told the judges that they could not read, or that they were physically unable to mark their ballots; that Sletvig, the other judge, assisted about half of the women voters; that these women asked Sletvig to go into the booth with them that he (Enget) had remarked during the morning that this should not be done; that Sletvig continued to go to the booth with the ladies that called for him; that there was no

particular discussion between him and the other judge about it; that the other judge had stated to him that he might come in at any time he wanted to; that he had asked him to come in, and he (Enget) did not refuse to go into the booth with any woman who had stated that she was unable to mark her ballot. This is the substance of all of the testimony given upon this subject. It shows clearly that assistance was rendered to approximately half the women who cast votes in Colville precinct, and that in only one instance was there any declaration by the voter of her inability to mark the ballot, in which instance both judges rendered assistance as provided by law. Section 988 of the Compiled Laws of 1913. Can these ballots be legally counted in this contest for the candidate for whom they were cast?

Section 129 of the state Constitution provides that all elections by the people shall be by secret ballot, subject to such regulations as shall be provided by law. The necessity for secrecy in connection with the operation of the Australian ballot system is so generally recognized that the reasons for it need not be discussed. Suffice it to say that it serves the double purpose of protecting the voter in the independent exercise of his franchise, and it gives one of the best assurances against sundry fraudulent practices that designing corruptionists have invented. To the end that secrecy may be observed, the Legislature, in carrying out the constitutional policy, has provided that not more than one person shall be permitted to occupy an election booth at the same time. Section 986, Compiled Laws of 1913. That the booth shall be protected by a guard rail, and that not more than one elector for each booth shall be permitted within the railing at one time. Section 990, Compiled Laws of 1913. That no person shall show his ballot, after it is marked, to any person in such a way as to reveal the contents thereof, or to any person for whom he has marked his vote, and that no elector shall place any mark upon his ballot by which it may afterwards be identified as the one voted by him. Section 1042, Compiled Laws 1913. It is the manifest aim of all these provisions to guarantee absolute secrecy. They not only prevent others from ascertaining by observation how the elector votes while he is engaged in the process, but they prohibit the exhibition of the ballot by the voter himself to any person. The only instance of a departure from this that the law recognizes is where a voter declares to the judges of the election, or when it appears to the judges that he cannot read, or that by blindness or other physical disability he is unable to mark his ballot,

two of the election officers shall, upon request from the voter, render assistance, but that such officers shall give no information regarding the same. In their discretion, the judges may require the voter to declare his disability under oath. Section 988, Compiled Laws of 1913. Where election laws require a declaration of disability as a condition of receiving assistance from election officers, such declaration is regarded as a mandatory requirement, the failure to observe which results in an illegal vote. *Tebbe v. Smith*, 108 Cal. 101, 41 Pac. 454, 29 L. R. A. 673, 49 Am. St. Rep. 68; *Huston v. Anderson*, 145 Cal. 320, 78 Pac. 629; *Gill v. Shurtleff*, 183 Ill. 440, 56 N. E. 164; *McCreery v. Burnsmier*, 293 Ill. 43, 127 N. E. 171; *Major v. Barker*, 99 Ky. 305, 35 S. W. 543; *Pace v. Reed*, 138 Ky. 605, 128 S. W. 891; *Atty. Gen. v. McQuade*, 94 Mich. 439, 53 N. W. 944; *Atty. Gen. v. May*, 99 Mich. 538, 58 N. W. 483, 25 L. R. A. 325; *State ex rel. Braley v. Gay*, 59 Minn. 6, 60 N. W. 676, 50 Am. St. Rep. 389; *McEwen v. Prince*, 125 Minn. 417, 147 N. W. 275; *Board v. Dill*, 26 Okl. 104, 110 Pac. 1107, 29 L. R. A. (N. S.) 1170, Ann. Cas. 1912B, 101. In our opinion there can be no distinction in principle between a statute which permits assistance upon an ordinary parol declaration of disability and one which requires a sworn declaration. There is only a formal difference between the two. Both require that the fact which furnishes occasion for the rendition of assistance shall be first made to appear. In their essence they are the same. A judge of the election has no more right to accompany a voter to the booth where the fact of disability does not appear than has any other person, and if a judge of the election is free to observe the ballot or watch the voting of any person who calls him, or is willing that he shall look on, there is no reason why others may not have the same privilege. Thus the secrecy of the ballot might be destroyed or become dependent upon the whim of the individual voter. Manifestly, this policy would contravene the express statutory prohibition, applicable to the voter himself, against exhibiting the ballot. There is a distinct species of corruption that this provision is designed to prevent. The voter cannot thus exhibit proof to others that he has voted in a particular way. We are of the opinion that the only construction which can be placed upon § 988 of the Compiled Laws of 1913, regarding assistance to voters, which shall make it consistent with the constitutional requirement of secrecy and with the other legislative enactments looking toward the same end, is that it is mandatory in character. Being mandatory, it follows that the failure to ob-

serve the requirements results in an illegal ballot. In the instance of Colville precinct, the number of such ballots cast is at least the number found by the trial court.

Where mandatory requirements are not observed, it will necessarily result in individual cases that the will of the electors may not be effectively carried out, and this, even though there be no fraud or no great blame attaching to any person. However unfortunate this may be in a particular case, it is unimportant compared to the safeguarding of the ballot against insidious attacks to which it would be subject if mandatory requirements could be safely ignored. Such consequences are unavoidable in the enforcement of mandatory statutes; but the apparent harshness of the result is not as great here as in some other situations that occasionally arise. For instance, the mere failure of the election officer to place his initials on the back of the official ballot renders the vote absolutely void by express statutory declaration. Section 1006, Compiled Laws of 1913; *Miller v. Schallern*, 8 N. D. 395, 79 N. W. 865. This is an omission that the voter is in no wise responsible for; yet, in the interest of fair elections in the long run, ballots not so marked must be disregarded. It is for similar reasons that votes must be disregarded where the voters who presumably do not belong to the excepted class and an officer of the election have disregarded wholesome requirements intended to preserve the purity of the ballot.

It follows from what has been said that the judgment is right, and it is affirmed.

CHRISTIANSON, and ROBINSON, JJ., concur.

BRONSON, J., concurs in result.

GRACE, C. J. (concurring in part and dissenting in part). For the reasons sated in my opinion in the case of *Drinkwater v. Nelson*, post., 187 N. W. 152, I am fully convinced that the judgment in this case should be reversed, and the contest proceedings dismissed.

The discussion which is set forth in my opinion of *Drinkwater v. Nelson* is a sufficient discussion of the questions of law and fact which have arisen in this case.

O. L. OLSON, Appellant, v. G. L. HEMSLEY, Respondent.

(187 N. W. 147.)

Statement of facts.

1. Plaintiff brought an action against defendant to recover damages for the death of his son, alleged to have been caused by the negligence of the defendant. Defendant operated a grocery and soft drink parlor at Walhalla, North Dakota, and in the conduct of the business he employed with others, Plaintiff's sons, Clifford Olson age 16 years, 6 months and 12 days, and another boy Herbert Clements, age 13 years and 3 months. The latter while about to cash a check from one of the money drawers in the store called Clifford Olson to assist him, and while the latter was doing so, the Clements boy took from the drawer a loaded revolver, placed there by the defendant, rested it upon the drawer and it was discharged, the bullet entering the abdomen of Clifford Olson, killing him.

Statement of cause of action.

2. This action is to recover damages against the defendant for his negligence in keeping a loaded revolver where it was kept and where he knew it was accessible to the Clements boy who was known to him to be careless and reckless. A second cause of action is based on failure of defendant to comply with the Workmen's Compensation Fund, chap. 162 of the Session Laws of 1919. The plaintiff was required at the trial to elect on which cause of action he relied and elected to rely on the first.

Master and servant — negligence of employer keeping revolver accessible to youthful employee held for jury.

3. At the close of the plaintiff's case, defendant moved for a directed verdict in his favor, which motion was granted, and for reasons stated in the opinion it is *held* that this was reversible error.

Opinion filed Jan. 5, 1922. Rehearing denied Feb. 17, 1922.

Judgment reversed and case remanded for a new trial.

J. F. T. O'Connor and *C. F. Peterson*, for appellant.

If persons chargeable with a duty of care and caution towards them leave exposed to the observation of children anything which would be tempting to them, and which they in their immature judgment might naturally suppose they were at liberty to handle or play with, they should

expect that liberty to be taken. *Powers v. Harlow*, 53 Mich., 507, 31 Am. Rep. 154; *Harriman v. Pittsburgh, C. & St. L. R. Co.* 9 West Rep. 438, 45 Ohio St. 11; *Lane v. Atlantic Works*, 111 Masc. 133.

The law requires of persons having in their custody instruments of danger that they should keep them with the utmost care. *Dixon v. Bell*, 3 Nanlo & S. 198; *Lynch v. Nurdin* 1 Q. B. 29, *Tally v. Ayres*, 3 Snood, 677; *Morgan v. Cox*, 28 Mo. 373, 62 Am. Dec. 623; *Tally v. Ayres*, 3 Snood, 677.

Gray & Myers, for respondent.

"The common law right of action for damages accruing from an injury received by a workman in the course of his employment is abolished except as in the act otherwise provided." *State ex rel. Davis v. Clauses*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466; *Peet v. Mills*, 76 Wash. 437, 136 Pac. 685, L. R. A. 1916A 385, Ann. Cas. 1915D, 154; *Replogle v. Seattle (Wash.)* 147 Pac. 196; *Ross v. Erickson Construction Co.* 89 Wash. 634, 15 p. 153, L. R. A. 1916F, 319; *Stertz v. Industrial Ins. Co.* 91 Wash., 588, 158 p. 256, Ann. Cas. 1918B, 354; *Zenor v. Spokane, etc. (Wash.)* 186 Pac. 848.

GRACE, C. J. This is an appeal from a judgment in favor of defendant. A concise statement of the material facts will give a clearer understanding of the issues.

The defendant, when Clifford Olson was injured in the manner hereinafter stated, and of which injuries he died, was operating a grocery store and soft drink establishment at Walhalla, N. D. Among others, he employed at such place of business one Herbert Clements, age 13 years and 3 months, and Clifford Olson, age 16 years 6 months and 12 days, who discharged the usual duties incident to their employment in the store. They were in charge of the store when defendant was not present. In the store there were three money drawers, where they were authorized to get change. In one of the drawers for about 15 years defendant had kept a 32-caliber revolver, which, for a year or more prior to the time of the injury resulting in death, was loaded.

On the 10th day of August, 1920, and while the defendant was temporarily absent from the store, Herbert Clements went to the money drawer in which the loaded gun lay, and opened that drawer for the purpose of cashing a check. After he had opened the drawer he called

Clifford Olson to cash the check. This was the first time that young Clements had opened the drawer, though he was authorized to use it. While Olson was engaged in cashing the check from the money in this drawer, the Clements boy took the loaded revolver out of the cash drawer, rested it on the edge of the drawer, and it went off, the bullet entered the abdomen of Clifford Olson, who was standing nearby; he died a few minutes later as a result of the injury.

Defendant knew the gun was in the drawer, and had warned Clifford Olson about it, but not Herbert Clements, and knew that the Clements boy was somewhat careless and reckless. The Olson boy was in good health, was in the second year high school at Walhalla, and during vacation was earning \$40 per month, which was contributed to the support of his parents and the family. The plaintiff is the father of Clifford Olson, and besides Clifford there were two other children, whose ages were 11 and 3 years respectively.

Plaintiff's first cause of action is based upon the alleged negligence of the defendant in carelessly and negligently permitting a loaded revolver to remain in one of the cash drawers in his store where he employed two young boys within whose reach in one of the cash drawers was the loaded revolver, and, further, that the defendant was negligent in employing a reckless and careless servant, the Clements boy.

For his second cause of action plaintiff alleges a failure of defendant at any time prior to the 10th day of August, 1919, to apply to the Workmen's Compensation Bureau of the state of North Dakota for classification as an employer, and his failure to comply with the provisions of law in that respect, which is chap. 162 of the Session Laws of 1919, and further sets out his failure to pay a premium as a member of the Compensation Fund to be applied in compensation of injured workmen while engaged in hazardous employment, and further avers that Clifford Olson was killed while engaged in the performance of his duty, and while within the course of business of his employer.

There is one assignment of error only that requires any consideration. It is that the court erred in granting defendant's motion, made at the close of appellant's case, that the jury be directed to return a verdict in defendant's favor for a dismissal of the action. Plaintiff bases his right to maintain the action on § 8323, C. L., as amended by chap. 106 of the Session Laws of 1917, which gives him that right where there is a cause of action under § 8321. But one of the principal questions

in the case is whether the right of action under 8321 is abolished by the enactment of the Workmen's Compensation Act.

That the plaintiff is the father of Clifford Olson is not controverted, and neither are the facts relative to the injury which caused the death of Clifford Olson. Taking all evidence into consideration, and assuming it to be true, and assuming for the present that plaintiff had a right of action under chap. 39, and under §§ 9 and 11 of the Compensation Act, can it be said that the trial court did not err in holding that the defendant, as a matter of law, was not negligent where the proof shows that he permitted a loaded revolver to remain in a cash drawer in his store, which was in charge of Clifford Olson and young Clements during his absence, and where the defendant knew the revolver was loaded, and that it had been loaded for a year or two prior to the fatal shot and injury, and further, where he knew that young Clements was somewhat careless and negligent, and where he knew, or must be held to have known, that a firearm, a revolver, when loaded, is a dangerous instrumentality to leave in any location where it would be accessible to boys of as tender years as these. He knew, or should have known, that their curiosity would have been aroused, and that to boys of their ages a gun or firearm of any kind is usually very attractive—they have an almost uncontrollable desire to handle, examine, and experiment with the same—and we think the testimony is sufficient to show that the defendant knew these things, and that he told Clifford Olson about the gun, and warned him, but did not tell young Clements about the gun, or give him any warning.

We are of the opinion that the court could not say, as a matter of law, in the circumstances in this case, that defendant's acts did not constitute actionable negligence where injury resulted to one by the discharge of the revolver while in the hands of one of the youths, and, further, where it appears the defendant reasonably should have apprehended the consequences which ensued. As was said in the case of *Sullivan v. Creed*, 2 British Ruling Cases, 163:

"All third party cases are difficult, because, in tracing the chain of cause and effect, circumstances often make it almost impossible to distinguish between a flaw and a break, or to say whether the intervention of the third party has not so far predominated in bringing about the injury as to make it right to say that the act of an original party was not an effective cause of the ultimate result."

Likewise, in the case at bar, the shot fired which injured and killed

Clifford Olson was not fired by the defendant, but by young Clements, a third party; but he could not have fired the fatal shot if the plaintiff had not carelessly and negligently permitted the loaded revolver to be where it was, and where young Clements, who was known to defendant to be careless and reckless, had access to it. The carelessness and negligence of the defendant in this respect was in reality the proximate cause of the injury.

The facts above stated are wholly undisputed, and it seems that the defendant should have apprehended that it was dangerous to the public to keep a loaded revolver where this was, knowing that it was a dangerous instrumentality, which, even in the hands of one experienced in its use, must be handled with great care in order to have due regard to the safety of others, and knowing further that instinctively the ordinary youth is attracted to it.

We are of the opinion that there is sufficient evidence of defendant's negligence in the respect hereinbefore stated as to require that question to be submitted to a jury, and that it was for it to determine under all the evidence whether the defendant was negligent, or if he should have apprehended the consequences which did result by his having placed the loaded revolver where he did place it, which, in fact, was in a place where the two youths would be expected at times to resort in the discharge of their duties—that is, in the cash drawer.

At the commencement of the trial defendant objected to the introduction of any evidence on the ground that sufficient facts were not stated in the complaint to constitute a cause of action, for the reason that § 11 of chap. 162 of the Session Laws of 1919 is exclusive, and that it conferred no right on the father, but only on the personal representatives of the deceased, to bring an action. The court overruled the objection, and permitted the trial to proceed, but required plaintiff to elect on which cause of action he based his right to recover. Plaintiff elected to proceed under the first cause of action.

The trial court, at the conclusion of plaintiff's case, found, as a matter of law, that there was insufficient evidence to establish negligence on the part of the defendant, and directed a verdict in his favor. This, we think, was reversible error.

Section 11, in so far as necessary to be here set out at length, provides:

"Employers subject to this act, who shall fail to comply with the provisions of § 6 and § 7 hereof, shall not be entitled to the bene-

fits of this act during the period of such noncompliance, but shall be liable to their employees for damages suffered by reason of injuries sustained in the course of employment, and also to the personal representatives of such employees where death results from such injuries."

The defendant did fail to comply with §§ 6 and 7, and hence was not entitled to the benefits of the act during the period of noncompliance. He thus became liable in an action at law for damages occasioned by his negligence, if any, and that action would be such as is provided by § 8321, C. L. 1913.

If it be so conceded, as we think it must, that such right of action against the employer in the conditions mentioned in § 11 still remains, we think the action may be brought in the manner provided by § 8323, C. L., as amended by chap. 106 of the Session Laws of 1917. In other words, the right of action being preserved, so are the remedies to enforce it: hence we think the father was the proper party to maintain the action.

We are of the opinion that plaintiff's first cause of action is a proper one, that he has legal right to maintain it, and that the question of defendant's negligence, under the evidence, is a question of fact for the jury.

The judgment from which appeal was taken is reversed, and the case is remanded for a new trial. Appellant is entitled to his costs and disbursements on appeal.

BIRDZELL, J., concurs.

BRONSON, J. (concurring specially). Section 1, chap. 162 Laws 1919 (Workmen's Compensation Fund), provides as follows:

"The state of North Dakota, exercising herein its police and sovereign powers, hereby declares that the prosperity of the state depends in a large measure upon the well-being of its wage workers, and, therefore, for workmen injured in hazardous employments, and their families and dependents, sure and certain relief is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided."

Section 11 provides as follows:

"Employers subject to this act, who shall fail to comply with the provisions of §§ 6 and 7 hereof, shall not be entitled to the benefits of this act during the period of such noncompliance but shall be liable to their employees for damages suffered by reason of injuries sustained in the course of employment, and also to the personal representatives of such employees where death results from such injuries, and in such action the defendant shall not avail himself or itself of the following common-law defenses:

"The defense of the fellow-servant rule, the defense of the assumption of risk or the defense of contributory negligence."

Section 20 provides as follows:

"When an injury or death for which compensation is payable under this act shall have been sustained under circumstances creating in some other person than the North Dakota workmen's compensation fund a legal liability to pay damages in respect thereto, the injured employee, or his dependents, may, at his or their option, either claim compensation under this act or obtain damages from or proceed at law against such other person to recover damages."

It is the contention of the defendant that the Compensation Act abrogates all remedies and causes of action theretofore existing by statute for death by unlawful act, and permits only the remedies and causes of action stated in such act; that § 11 of this act denominates only the personal representative as the proper party to maintain an action for death of the employee, against the employer. It may be conceded that the personal representative is a proper party to maintain such action. However, pursuant to the terms of the statute, is the maintenance of an action by one of the dependents excluded? I am of the opinion, pursuant to § 20 thereof, that the maintenance of an action by a dependent of the employee is not excluded, but, on the contrary, is specifically permitted. In this case the father is a dependent, and, pursuant to the evidence introduced, was, in fact, a dependent of his deceased son.

From the record it appears that the defendant, a storekeeper, had in his employ the deceased son, 16 years of age, and another boy, 13 years of age. These boys at times were left in charge of the store. The loaded revolver was left, or permitted to be left, by the employer in a cash drawer to which the boys were directed to resort when necessary in trading operations. There it had not been casually placed; there it had

been for years. Assuredly the inference of fact might be drawn that it was there for purposes of the employer's business. The employer had warned the deceased son about this revolver. He gave no warning to the other boy. On the day when plaintiff's son was killed, then, for the first time, the other boy knew of the presence of this revolver in such cash drawer. It appears in the evidence that the employer knew and stated that this other boy was a little careless and reckless. In view of the relation of master and servant existing between the storekeeper and the boys, and the duties thereby imposed upon such master, may it be said, as a matter of law, upon this record that the master was free from negligence in the performance of his duties? I am of the opinion that it was for the jury to find, as a matter of fact, whether the master, in the performance of his legal duties, exercised reasonable care, in view of the circumstances and the youth of the boys, in permitting such revolver to be left in such cash drawer, accessible to such boys, without warning or instruction to each of the boys, knowing the careless and reckless characteristics of the younger boy. See 40 Cyc. 873; *Ewing v Lanark Fuel Co.*, 65 W. Va. 726, 65 S. E. 200, 29 L. R. A. (N. S.) 487; *Southern Pacific Co. v. Hetzer*, 135 Fed. 272, 68 C. C. A. 26, 1 L. R. A. (N. S.) 288; 18 R. C. L. 565—572. The judgment should be reversed, and a new trial granted.

CHRISTIANSON, J. (concurring specially). As indicated in the opinions prepared by the Chief Justice and Mr. Justice Bronson, one of the two controlling questions presented on this appeal is whether the Workmen's Compensation Act bars the plaintiff from maintaining an action for the death of his son. Both opinions make reference to § 11 of the Workmen's Compensation Act. That section reads as follows:

"Employers subject to this act, who shall fail to comply with the provisions of §§ 6 and 7 hereof, shall not be entitled to the benefits of this act during the period of such noncompliance, but shall be liable to their employees for damages suffered by reason of injuries sustained in the course of employment, and also to the personal representatives of such employees where death results from such injuries, and in such action the defendant shall not avail himself or itself of the following common-law defenses:

"The defense of the fellow-servant rule, the defense of the assumption of risk or the defense of contributory negligence.

"And such employers shall also be subject to the provisions of § 8.

"Any employee whose employer has failed to comply with the provisions of §§ 6 and 7 hereof, who has been injured in the course of his employment, wheresoever such injury has occurred, or his dependents in case death has ensued, may, in lieu of proceedings against his employers by civil action in the court, file his application with the Workmen's Compensation Bureau for compensation in accordance with the terms of this act, and the Bureau shall hear and determine such application for compensation in like manner as in other claims before the Bureau; and the amount of the compensation which said Bureau may ascertain and determine to be due to such injured employee, or to his dependents in case death has ensued, shall be paid by such employer to the person entitled thereto within ten days after receiving notice of the amount thereof as fixed and determined by the Bureau; and in the event of the failure, neglect or refusal of the employer to pay such compensation to the person entitled thereto, within said period of ten days, the same shall constitute a liquidated claim for damages against such employer in the amount so ascertained and fixed by the Bureau, which with an added penalty of fifty per cent., may be recovered in an action in the name of the state for the benefit of the person or persons entitled to the same."

Laws 1919, chap. 162, § 11.

The contention of the defendant is that, by virtue of § 1 of the Compensation Act, all rights of action formerly existing were abolished; that such rights of action, and such only, now exist as are prescribed by that act; that, by virtue of § 11 of the act, the personal representative alone may maintain an action in case the injury results in death. It seems to me that the last contention ignores the portion of § 11 which I have italicized. That portion clearly recognizes that the dependents may maintain an action in case of death. See 25 R. C. L. p. 979. The complaint in this case alleges, and the proof shows, that the father was a dependent of his deceased son within the purview of the Workmen's Compensation Act. In other words, the complaint alleges, and the proof shows, that the action is brought by one whom the Compensation Act expressly recognizes as having the right to maintain such action.

I also agree with my Associates that, under the evidence in this case, it is a question for the jury whether the death of Clifford Olson was

caused by the negligence of the defendant.

ROBINSON, J. (dissenting). In this case there is no occasion for passing the "buck" to the jury. The facts are not in dispute. Defendant kept a loaded revolver in a desk where he had a perfect right to keep it. One of two employees wrongfully took the revolver, and by accident shot the other, a son of the plaintiff. It was purely an accident.

On Petition for Rehearing.

BRONSON, J. The defendant has filed an able petition for rehearing. Among other things he earnestly contends that the writer, in his specially concurring opinion, has misconstrued the meaning and application of § 20, quoted in such opinion. He contends that § 20 confers a right of action upon dependents only in case of an injury or death for which compensation is payable under the act, not in cases where compensation is provided in the act; that compensation is payable under the act only in cases where the employer has contributed his assessment to the Compensation Fund; that, under § 10 of the act, it can only be disbursed to such employees of employers as have paid into the fund the premiums applicable; that this section, therefore, refers to that class of cases where the employer has paid his assessment, and, by reason thereof, compensation has become payable to the employee or his dependents, and, where an injury having occurred through the wilful act or negligence of some other person, a right of action for damages is given against such other person. The contentions are not without merit, and require, by their able presentation, consideration. However, technical reasoning should not override the intent and purview of the act to allow a remedy for a wrongful act. If the defendant had complied with the terms of the Compensation Act, manifestly compensation would have been payable under the act to the dependents of the deceased boy. Section 6 of the act requires every employer to contribute to the fund. It relieves such employer, so contributing, from all liability for personal injuries or death sustained by his employees, and the persons entitled to compensation under the act shall have recourse therefor only to the North Dakota Compensation Fund, and not to the employer. Section 9 of the act likewise relieves employers who comply with the provisions of said § 6 from

liability to respond in damages at common law or by statute for injury or death of any employee, wherever occurred, with the exception that it does not apply to minors employed in violation of law, in which case both remedies shall be applicable. These sections are followed by § 20, quoted in the special concurring opinion. This § 20 provides that, when death for which compensation is payable under the act shall have been sustained under circumstances creating in some other person than the Compensation Fund a legal liability to pay damages in respect thereto, his dependents may, at their option, either claim compensation under the act or obtain damages from, or proceed at law against, such other person to recover damages. It is clear that under the act the defendant is that other person against whom there exists a legal liability to pay damages; that legal liability is provided under the terms of §§ 6, 9, and 11. The only reason why compensation under the act is not payable, if not payable in fact, is because the defendant failed to comply with the terms of the act. In law, compensation is payable under the act because it was a duty of the defendant to comply with the terms thereof. It is unnecessary to determine the liability of the Compensation Fund because it is not involved in the instant case. I therefore adhere to the conclusion that the maintenance of an action by the dependent of the employee is not excluded by the act.

Petition for rehearing should be denied.

NAT'L PETROLEUM MUTUAL FIRE INS. CO. and INTERNATIONAL OIL CO., Appellants, v. JOHN BARTON PAYNE, Director General, as Agt. of the "Soo Ry." and CHARLES PIKE, Respondents.

(187 N. W. 138)

Master and servant — evidence held insufficient to show conductor acted within scope of employment; conductor's negligence causing fire and oil station manager's contributory negligence held for jury.

In an action against a carrier and its conductor for negligence resulting in loss by fire, where some evidence was received to the effect that the conductor carried into an oil station a lighted lantern and a

gasoline can with which to purchase and secure high-test gasoline, it is *held*, for reasons stated in the opinion, that the evidence was insufficient, as a matter of law, to establish that such conductor was then acting within the scope of his employment or was seeking to purchase gasoline for railway purpose, and, further, that the questions of the conductor's negligence and the contributory negligence of the manager of the oil station were questions of fact for the jury.

Opinion filed Feb. 17, 1922.

Action in District court, Ward county; *Leighton, J.*

Plaintiffs have appealed from a judgment entered upon a directed verdict.

Affirmed as to the carrier; reversed and new trial granted as to the conductor.

McGee and *Goss*, for appellant.

"An act is within the scope of the servant's employment where necessary to accomplish the purpose of his employment and intended for that purpose, although in excess of the powers actually conferred on the servant by the master. The purpose of the act, rather than its method of performance is the test of the employment." 26 Cyc. 1534; 18 R. C. L. 795, § 254; *Galehouse v. Soo*, 22 N. D. 615, 135 N. W. 189, 47 L. R. A. (N. S.) 965; *Wingen v. Soo Line*, 42 N. D. 517, 173 N. W. 832; *Froelich v. N. P. Ry. Co.* 42 N. D. 550, 173 N. W. 822.

"Prima facie, when the act is one which the master himself might have done, it will be presumed that it was an act within the scope of the servant's authority, and the burden of proving want of authority rests upon the defendant." *Seybold v. Eisle*, (Iowa) 134 N. W. 578; Citing *Wood on Master and Servant*, p. 559; *Jackson v. Railroad Company*, 47 N. Y. 274, 7 A. R. 448; *Higgins v. Turnjike Co.* 46 N. Y. 23, 7 A. R. 293; *Cosgrove v. Odgen* 49 N. Y. 255, 10 A. R. 361; *Schulte v. Holliday*, 54 Mich. 73, 19 N. W. 752.

Palda & Aaker, for respondents.

"Facts affirmatively established by tangible proofs, not conjectures, are essential to a right of recovery. Evidence that leaves the jury to roam at will in the field of conjecture and speculation to find a verdict

can no more be tolerated by courts of justice than a judgment without evidence." *Bowen v. Ill. C. R. R. Co.* 136 Fed. 306, 69 C. C. A. 448, 70 L. R. A. 815, citing also *Central Coal & Coke Co. v. Hartman*, 111 Fed. Repellent 98, 49 C. C. A. 244.

Another statement of the rule is as follows: "Where a servant steps aside from his masters' business and does an act not connected with the business, which is hurtful to another, manifestly the master is not liable for such act, for the reason that having left his employers business, the relation of master and servant did not exist as to the wrongful act; but if the servant continues about the business of the employer, adopts methods which he deems necessary, expedient or convenient, and the methods adopted prove hurtful to others, the master is liable." *Pittsburg, Cincinnati & St. Louis R. R. Co. v. Kirk*, 102 Ind. 399, 52 Am. Rep. 675, Citing 14 How. 468.

Statement.

BRONSON, J. This is an action to recover damages for negligence. The plaintiffs have appealed from a judgment entered upon a verdict directed for the defendants. The insurance company paid its obligation resulting from the fire and is one of the plaintiffs, through assignment and subrogation. The oil company operated at Parshall, N. D., an oil station for the sale of gasoline and kerosene. There is evidence in the record to the following effect: On October 15, 1918, one Pierce was manager and in charge of the oil station. Pursuant to his testimony, on that day, in the evening, one Pike, a conductor of the Soo Railway, came to this oil station. Pierce had just filled a barrel of gasoline for a farmer and was making out an oil check in the office. The conductor came in and requested some high-test gas for his lantern. Pierce took the can which the conductor had with him and proceeded into the warehouse to a barrel some 40 feet distant. The office in the warehouse was lighted by electric lights of 100 candle power. The conductor followed Pierce. Pierce emptied some gasoline out of the barrel into a filling can. Then, as he was putting a funnel in the can brought, the conductor stepped around, let his lantern down, and the explosion and fire followed. Then for the first time, Pierce noticed that the conductor had a lighted lantern. Pierce gave the lantern a kick and it went outside over the warehouse platform. The warehouse

was destroyed by the fire. Pierce further testified that he had been in the oil business for 12 years; that he never permitted gasoline to be drawn from one container to another when there was any living flame or fire near; that he did not use nor allow lighted lanterns around the plant; that he was always on the lookout for them; that the lantern was an ordinary railroad lantern with a mark of the Soo Line upon the globe; that during the time he had been working there, some 2½ months, the trainmen of the Soo had been there some eight or ten times to get kerosene or gas; that an engineer had gotten some steam cylinder oil there; that some 2 or 3 weeks before one of the trainmen borrowed a five-gallon can, filled with gasoline, which he took down to the train and emptied, returning the empty can. The farmer testified that he saw the conductor walk into the office; then he was standing between two doors watching his team tied outside; that the conductor had a two-gallon can with him and carried a lighted lantern in his hand. He asked in a jolly way if he could get some high-test gas. The farmer got an idea that it was for his lantern. Pierce got up, took his can, and walked to the other end of the building to a barrel. The conductor walked right behind him with his lantern. He saw Pierce tipping a barrel and saw the flames shoot up.

Pursuant to the conductor's testimony, he was in charge of a mixed train that ran from Sanish to Max and return. He lived at Sanish. In his home he had and used a gasoline lamp. On the day in question he left Sanish early in the morning. He took a gasoline can with him. It did not bear a stamp of the Soo Line and did not belong to the Soo Railway. It was painted red with the word "gasoline" thereon. Upon the arrival of the train at Parshall they went to supper, loaded some freight, did some switching, and then he went to the oil station. Upon arrival he saw nobody in sight. He hallooed. Pierce came to the door. He inquired what the chances were to get some gas, and Pierce replied "Good." He put down his gasoline can and his lantern, which he was carrying, on the platform outside. Pierce picked up the can and the lantern and went inside. He requested him, the conductor, to come in. He went in and over to the barrel. He wanted gasoline for this lamp at home. Once before he had been there to get some gasoline which he took home with him on the train. He told Pierce that he was careless in handling oil. He saw him spill some on the plank floor. When he came in Pierce was pouring some oil out of his five-gallon can. The

lantern was sitting about six or seven feet away. Pierce used a funnel too big for the can. The conductor put one hand on the gasoline can and the other on the funnel. The gasoline spilled over the side. While the can was being filled, the flames started. Nothing the conductor did in the oil house had any connection with the Soo Railway. The lantern was not a railroad lantern. He bought and paid for it. It had no mark of the Soo thereupon, unless, perhaps, upon the globe. He did not use gasoline in this lantern. There was no gasoline used on the train, for lighting or heating, by him or any of the employees. He used this lantern for railroad purposes, to give signals. Another brakeman testified that the conductor carried an Adlake lantern; that no gasoline was used on the train for any purpose. Another brakeman testified that he saw a red gasoline can upon the train that morning which the conductor said belonged to him; that he had bought gasoline from Pierce previously, received it in an empty milk can, and took it home with him in the back of the engine tank. A truck driver for the oil company testified that when the fire started he was in a truck shed across the street. He saw the conductor go up to the platform and set down his can and lantern in front of the door. He saw Pierce come out in front, pick up the can and lantern, and go within. In the evening, after the fire, he heard Pierce make the statement that he grabbed up the lantern and the can and started into the warehouse. Another witness testified that he bought the Adlake lantern for the conductor, and that it was customary for trainmen to provide themselves with lanterns. The plaintiff offered in evidence the burned remnants of an Adlake lantern. They offered to prove that Adlake lanterns similar to such lantern introduced in evidence, and of the kind used by conductors and trainmen in service, will burn either gasoline or kerosene successfully and perfectly and are used in such train service burning gasoline successfully and perfectly—all to establish that this Adlake lantern used by the conductor at the time of the fire would burn perfectly and successfully on gasoline fuel or oil, and that the conductor was purchasing the gasoline in question for the Adlake lantern in the performance of his railroad duties as train conductor, and as corroborative of the statement made by the conductor at the time of the purchase that he wanted the gasoline for use in his lantern. This offer was rejected.

The plaintiffs contend that the trial court erred in directing the verdict and in refusing the offer of proof; that the record discloses ques-

tions of fact for the jury as to whether it was negligence for the conductor to take his lighted lantern within the oil station, and as to whether the conductor, while so doing, was acting within the scope of his railway employment, and also whether Pierce was guilty of contributory negligence.

Decision.

We are of the opinion that the record fails to disclose any evidence sufficient to form a question of fact for the jury that the conductor was acting within the scope of his employment or for any railway purpose when he purchased, or sought to purchase the gasoline in question. It may be conceded that there is evidence in the record sufficient to establish in connection with the offer of proof, that the conductor, at the time of the fire, was on duty and carried the lantern in question for use in connection with his duties and for railway purposes, and that, furthermore, he brought to the oil station a gasoline can labeled "Soo Line," and brought within the oil station both this lantern, lighted, and the gasoline can, and, furthermore, that an Adlake lantern may perfectly and successfully burn gasoline as fuel. Nevertheless the admission of the conductor, if so found, or if true, that he wanted to purchase gasoline for his lantern, is wholly insufficient as evidence to establish a finding that this Adlake lantern carried by the conductor burned, or ever burned, gasoline as a fuel while used by this conductor, or that the conductor sought to purchase such gasoline for any railway purpose. This is particularly so in view of the direct evidence offered in the record that the gasoline was purchased for private use. The fact that an Adlake lantern, not distinctly shown to be exactly the same as that used by the conductor, burns gasoline successfully and perfectly is not probative evidence to establish that this conductor did burn gasoline in his lantern, or that gasoline was ever used in this lantern by this conductor for a railway purpose. Likewise, in the absence of proof of the use of gasoline upon the train for any railway purpose, the evidence of purchases of kerosene, cylinder oil, or even gasoline in this oil station by trainmen had no probative force in establishing the use of gasoline by this conductor in his railroad lantern. However, we are of the opinion that the record discloses questions of fact for the determination by a jury concerning acts of negligence by the conductor Pike. If the jury should find, upon the evidence, that this conductor

brought within the warehouse the lighted lantern and proceeded with the same to the gasoline barrel without the notice or knowledge of Pierce, and should otherwise find that Pierce was not guilty of contributory negligence, such finding would support the actionable negligence charged against the defendant conductor.

Accordingly it is ordered that the judgment of the trial court affecting the Director General be affirmed, with costs; otherwise the judgment is reversed, and a new trial granted, with costs.

CHRISTIANSON, ROBINSON, and BIRDZELL, JJ., concur.

GRACE, C. J., concurs in the result.

J. E. BURKE, Respondent, v. MINNEKOTA ELEVATOR COMPANY, Appellant.

(186 N. W. 948)

Dismissal and non-suit — refusal to dismiss for failure to bring action to trial within five years held not error.

1. In an action for conversion of wheat in 1909 where suit was instituted in January, 1914, and was not brought to trial until January, 1920, after a change of venue had been taken by the defendant, in December, 1918, from Ward county to Pierce county, it is *held*, for reasons stated in the opinion, that the trial court did not err in refusing to dismiss the action for failure to bring the same to trial within five years, pursuant to Section 7598 C. L. 1913.

Trover and conversion — verdict for conversion of wheat sustained.

2. In such action, it is *held*, for reasons stated in the opinion, that the special verdict of the jury finds support in the evidence.

Interest — judgment for interest from date of conversion to date of verdict, where jury did not find plaintiff entitled to interest, held erroneous.

3. In such action, where the conversion of wheat occurred in 1909 and a jury, by its special verdict, allowed the market price therefor existing at the time of such conversion without any finding that the plaintiff was entitled to interest upon such amount from the date of conversion, it is *held*, for reasons stated in the opinion, that the trial court erred, in its order for judgment, permitting plaintiff to recover

interest for over ten years upon the amount found by the jury.

Opinion filed Jan. 25, 1922. Rehearing denied Feb. 20, 1922.

Action in District court, Pierce county, *Buttz*, J.

Defendant has appealed from the judgment.

Judgment modified.

Per Curiam opinion.

F. B. Lambert, for appellant.

E. T. Burke, for respondent.

Statement.

PER CURIAM. This is an action for the conversion of wheat. Judgment was entered for the plaintiff upon a special verdict. From such judgment the defendant has appealed. The following facts appear from the record: The plaintiff seeks recovery for wheat converted in September, 1909. This action was started January 26, 1914. The answer was served February 16, 1914. Notice of trial in Ward county was served July 13, 1914. Defendant left with the clerk of the district court in Ward county, on July 18, 1914, an affidavit for change of venue based on the prejudice of the judge and of the county. No papers had then been filed with the clerk, and the defendant states that the motion papers for a change of venue were left with the clerk to be filed immediately upon filing of plaintiff's papers. On the back of these papers is a statement by the clerk: "Case not filed up to date, January 6, 1917. Returned unfiled." Such motion papers were later filed with the clerk in Ward county November 2, 1918. Prior to that time the plaintiff, on November 9, 1917, had served a new notice of trial in Ward county and a note of issue. On December 18, 1918, the trial judge ordered the place of trial of the action to be transferred to Pierce county. The application and order changing the place of trial was made without notice to, or participation by, the plaintiff, as the trial judge subsequently found. On February 7, 1919, the complaint, notice of trial, note of issue (filed in the district court of Ward county, November 9, 1917), and the motion papers

for change of venue, together with the order of the court, were filed with the clerk in Pierce county. The answer was not filed with the clerk in Pierce county until July 2, 1919, and apparently not at all with the clerk in Ward county. On May 24, 1919, the defendant prepared motion papers for dismissal of the action for failure to prosecute, pursuant to the provisions of § 7598, C. L. 1913. By stipulation of the parties, the hearing of this motion was continued from June 2, 1919, until June 30, 1919. On July 2, 1919, Hon. A. G. Burr, district judge, denied the motion. In an extensive memorandum opinion, he stated that neglect on the part of the plaintiff must appear; that it could not be considered neglect on plaintiff's part not to urge the case for trial between the time when defendant first left with the clerk motion papers for change of venue and the time when the application therefor was granted; that the defendant took change of venue before the expiration of the 5-year period, and did not pay his filing fee and get the case on the Pierce county calendar until after the expiration of the five years; that after December, 1918, the delay occasioned was so occasioned by the defendant. In January, 1921, the action came to trial before Hon. C. W. Buttz, trial judge. The defendant again presented the motion for dismissal of the action for failure to prosecute, and again the motion was denied.

At the trial the plaintiff gave testimony to the following effect: He owned one-half section of land about five miles from defendant's elevator at Sawyer. In 1909 the farm was operated under a cropper's contract with one Myatt. This contract reserved title in all crops in the plaintiff until division to secure and repay advances of the plaintiff and an indebtedness owing by Myatt to the plaintiff, stated in the contract to be \$2,500 and interest. Between September 26 and 30, 1909, the wheat was threshed. At that time Myatt owed the plaintiff over \$2,700. Prior to the time of threshing, the plaintiff notified the agent of the defendant concerning his claims to the grain. At the time of threshing, the wheat was hauled direct from the machine, with the exception of two loads. The plaintiff kept track of the wagons as they left the machine, and was driving back and forth from the farm to the elevator. He testified that 1,546 bushels went to the defendant's elevator. Plaintiff had made a memorandum of the wheat delivered, which he secured from examining plaintiff's books. That at that time the agent told him he had paid Myatt for the same number of bushels for which plaintiff

was paid; that he showed him the books where he had made that settlement of the grain. He received payment from the elevator for 557 bushels, 30 pounds. This was No. 1 Nor. wheat and the price then was 88 cents. The memorandum, on the stationery of the defendant, shows 557 bushels, 30 pounds. After threshing was finished he made demand from the defendant. The agent of the defendant advised him that Myatt got his cash ticket. Myatt left September 30th, and the plaintiff has not seen him since. The defendant's answer is in the nature of a general denial. The former agent of the defendant at Sawyer did not testify, having gone, years ago, to British Columbia. The superintendent of the defendant testified. He produced its books of business at Sawyer, its canceled checks and storage tickets for the year 1909 and beyond, but not the scale book, which was lost or taken. The evidence in these books tends to show that the defendant did not receive the grain as testified by the plaintiff, and that the price of the grain, so received by the elevator company, was paid to the plaintiff, excepting one check of \$86.25 for 98 bushels paid to Myatt. The trial court, by reason of the delay in this action, refused to permit the plaintiff to recover a greater price for the wheat than that existing at the time of the conversion. The defendant requested a special verdict. The jury, by its special verdict, found that defendant received 1,115 bushels of wheat; that the price then was 88 cents; that it paid plaintiff for 557 bushels 30 pounds, and another person for the balance; that Myatt then owed the plaintiff \$2,-773.34. Upon this verdict, returned February 3, 1920, the trial judge, on February 10, 1920, ordered judgment for \$490.60, with interest thereon at 6 per cent. from September 30, 1909. Judgment accordingly was entered May 7, 1921, for the total amount of \$891.18. The defendant has specified 34 assignments of error. In general, it contends that the trial court erred in not dismissing the action, pursuant to § 7598, C. L. 1913; that the trial court erroneously received oral testimony concerning ownership of the land; that the cropper's contract was improperly received in evidence; that the evidence of delivery of the grain is insufficient to warrant recovery; that the plaintiff failed to prove indebtedness owing by Myatt to him; that remarks of the court in the presence of the jury were prejudicial; that the market value of the grain was established without proper foundation; that the court erroneously gave general instructions in submitting the special verdict; that the

court erroneously, in its order for judgment, permitted plaintiff to recover interest upon the verdict returned by the jury.

Decision.

Upon review of the record we are of the opinion that the contentions of the defendant are without merit, except as hereinafter noted. We are further of the opinion, upon this record, that the trial judge did not err in overruling defendant's motion to dismiss for neglect, for a period of 5 years after the commencement of the action, to bring the same to trial and to take proceedings for its final determination pursuant to § 7598, C. L. 1913. We in no manner commend the delay in litigation evidenced in this record. It has been needless, and serves, in a manner, as a reproach to the administration of justice. Nevertheless, neglect of the defendant must not be considered plaintiff's neglect. Apparently, much of the delay occasioned in this action has arisen through needless and improper, so termed, legal sparring of the attorneys. The defendant could have avoided much of the delay if it had so desired. At any time after 10 days from the time of the service of the summons and complaint, the defendant could have secured an order from the trial judge, without notice, requiring the same to be filed within a specified time, or in default of compliance, that the action be deemed abandoned. § 7958, C. L. 1913. At any time after issue was joined, the defendant could have placed the action upon the calendar for trial, by serving a notice of trial and filing a note of issue. § 7610, C. L. 1913. As easily, in July, 1914, could the defendant have secured the consideration and determination of the trial court upon its application for change of venue, as it did, in December, 1918. It deemed it expedient to wait, and it did wait until November, 1918. The 5-year period of time had not then elapsed since the institution of the action. It then delayed securing the change of venue, which apparently was made *ex parte* without notice to the plaintiff, from November, 1918, until February 2, 1919, when the transfer was made to Pierce county. The defendant was securing the transfer, and it was his duty to see that it was made and the necessary prerequisite fees paid to the clerk to whom the case was transferred. §§ 3499—3548, C. L. 1913. Under all the circumstances we are not inclined to disturb the findings of the trial court that there was not an unreasonable neglect or a *prima facie* neglect on the part of the plaintiff

which should cause dismissal under the statute. § 7598, C. L. 1913. See *Lambert v. Brown*, 22 N. D. 107, 132 N. W. 781; *Donovan v. Jordan*, 25 N. D. 617, 142 N. W. 42; *Miller Co. v. Minckler*, 30 N. D. 360, 152 N. W. 664.

The evidence submitted was sufficient to sustain the special findings of the jury. We are of the opinion, however, that the trial court erred in permitting the plaintiff to recover interest upon the verdict returned by the jury. The issue of interest was not submitted to the jury. Previously the trial court had refused the plaintiff the right to recover the highest price for wheat existing between the time of the conversion and the time of the trial by reason of the delay in this action. Upon the record, it was improper for the trial court, as a matter of law, to award interest to the plaintiff. Section 7143, C. L. 1913; *Johnson v. Nor. Pac. Ry. Co.*, 1 N. D. 354, 364, 48 N. W. 227; *Ell v. Nor. Pac. Ry. Co.*, 1 N. D. 336, 353, 48 N. W. 222, 12 L. R. A. 97, 26 Am. St. Rep. 621; *Seckerson v. Sinclair*, 24 N. D. 625, 638, 140 N. W. 246. The plaintiff is not in a position to complain because the question of interest was not submitted to the jury as a question of fact. Accordingly, the order for judgment should permit recovery of the plaintiff in the sum of \$490.60, with the interest thereon at 6 per cent. from the date of the verdict. It is ordered that judgment be entered accordingly, without costs to either party upon this appeal.

GRACE, C. J. (specially concurring). I am of the opinion that the trial court did not err in overruling defendant's motion to dismiss the action. In my opinion the defendant failed to show that the plaintiff took no action to bring the case to trial within the 5-year period specified in § 7598, C. L. 1913.

I am also of the opinion that the evidence was sufficient to sustain the special finding of the jury, and that the judgment as modified should be affirmed.

ROBINSON, J. (dissenting). This is an action for the conversion of wheat on September 30, 1909. On a special verdict the plaintiff recovered a judgment against defendant for the value of 557½ bushels of wheat at 88 cents a bushel, being \$490.60. The interest and costs made it \$891.18. The verdict is dated February 3, 1921.

Defendant made two motions to dismiss the action because it was not brought to trial in 5 years. The motions were under the statute, which is, in effect, that when a party neglects or fails for 5 years to bring an action to trial, it is deemed to be dismissed and abandoned, and the court shall make an order dismissing the action. Code, § 7958. Here is the chronology of the case: November 2, 1908. Cropper's lease by plaintiff for 1909. September 30, 1909. Alleged conversion of cropper's share of wheat. January 26, 1914. Action commenced. November 9, 1917. After the lapse of 3 years and 9½ months, complaint filed. June 30, 1919. Five years and 5 months after the action was commenced, first motion was made to dismiss. June 19, 1921. Second motion to dismiss. February 2, 1921. Date of trial, which was 7 years after the commencement of the action.

There is no claim that defendant stipulated or in any way consented to a continuance of the action. It is true that on December 9, 1918, defendant obtained an order changing the place of trial from Ward county to Pierce county, and it is claimed that he thereby delayed the trial, but there was a lapse of 4 years and 10 months from the commencement of the action until the change of venue. The statute is peremptory. It is that an action shall be dismissed for a neglect or failure to bring it to trial within 5 years. The court has held the statute to be analogous to an ordinary statute of limitations; that it is a statute of repose; also, that an inexcusable delay during 3 of the 5 years would warrant a dismissal under the statute. *Miller v. Minckler*, 30 N. D. 367, 152 N. W. 664.

In his brief, on p. 6, counsel for plaintiff says:

"The first motion to dismiss was made before the 5-year period had expired."

That is not true, because the action was commenced by personal service of the summons and complaint on January 26, 1914, and the first motion to dismiss was on June 2, 1919, and to accommodate counsel for plaintiff, it was continued until June 30, 1919. That was 5 years and 5 months after the commencement of the action. Then it is said:

"The next term of court was reached after the 5-year period, so plaintiff brought the action for trial at the first opportunity."

"Doubtless counsel means the first opportunity after the first motion to dismiss, but not the first, the second, nor the third opportunity during the first 5 years. Then he says:

"Proceedings were on for a trial of the action when the motion to dismiss was renewed."

But the second motion was made on January 19, 1921, and the trial was on February 2, 1921, 7 years after the commencement of the action, and nearly 11 years after the cause of action accrued. If the 5-year limitation statute does not apply in this case, then it is a practical nullity.

The wheat was grown under a cropper's lease dated November 2, 1908, acknowledged by the lessor, but not by the lessee, and recorded in the office of the register of deeds in August, 1909. The land described is 80 acres of N. W. $\frac{1}{4}$ 31, and 242 acres in N. W. $\frac{1}{4}$ of 32, 153, 81. The lease was in the nature of a chattel mortgage on all the crops to secure an estimated debt of \$2,500 and interest. It should have been filed and indexed as a chattel mortgage. The record was not notice to the defendant. Wheat is grown to be sold. Croppers are poor, and must sell their share promptly after threshing to pay labor, liens, expenses, and chattel mortgages. Hence the time for a lessor to look after his interest in crops is immediately after the threshing, and not after the lapse of nearly 4 years. And when an action is commenced against an elevator company to make it pay a second time for grain purchased and paid for in good faith, there are good reasons against delay in the prosecution of the action. It is well known that croppers and elevator agents are of a movable class. They are here this year and away next year. They are gone and not to be found. In the course of 5 or 10 years some die, some remove to parts unknown, and some forget about matters in which they have no interest. In such a case if the plaintiff may delay the commencement of an action for 4 years and then delay the trial for 7 years, defendant will be at his mercy, because he may then safely testify to anything to win his case. Of course the presumption is that every man is honest and truthful, but the policy of the law is not to lead men into temptation.

The plaintiff does not present an appeal to equity. At about the date of making the cropping contract he took from the cropper a chattel mortgage on his whole farming outfit, 12 horses, farm machinery, and such like, worth probably \$3,000, to secure \$1,754, and in October, 1909, he foreclosed the mortgage and sold all of the property to himself for \$1,863, charging an attorney's fee, \$75. Was it a wonder that the cropper ran off and quit the country?

There is no occasion for considering the alleged errors. For the

failure to move or bring the case to trial within 5 years, the judgment should be reversed, and the action dismissed.

THE STATE OF NORTH DAKOTA, EX REL., FARMERS STATE BANK OF PAGE, a domestic corporation and FARMERS STATE BANK OF PAGE, a domestic corporation individually, Petitioner v. GEORGE E. WALLACE, as Tax Commissioner of the State of North Dakota, F. C. EDDY as Treasurer of Cass County, North Dakota and FRED A. KRAEMER, as Sheriff of Cass County, North Dakota, Respondents.

(187 N. W. 728)

Statutes — where words are plain and unambiguous, the statute is not subject to construction.

1. Where plain and unambiguous words are used in a statute the statute is not rendered subject to construction, especially where the words have long been employed in similar legislation in their ordinary sense and where the attempt to find a different meaning requires a resort to speculation.

Statutes — where the same words used in concurrent legislation resorted to are not inconsistent with their ordinary meaning, use in a qualified sense cannot be ascribed thereto.

2. Where concurrent legislation is resorted to in an effort to show that ordinary words were used in a qualified sense, the limited meaning will not be ascribed to the legislature where the concurrent legislation is not inconsistent with the ordinary meaning of the words in question.

Constitutional law — statutes should be construed to make them constitutional if possible.

3. Statutes should be construed, if possible, so as to be constitutional in their operation and if, where ordinary words are given their ordinary meaning, the statute may operate constitutionally whereas, if given a restricted meaning, it would operate unconstitutionally as to a portion of the subject matter affected, it must be *held* that the legislature intended the ordinary meaning to attach.

Constitutional law — courts not concerned with legislative policy.

4. Courts are not concerned with the policy reflected in legislation or with the motives of the legislature.

Taxation — “bonds” and “stocks” as used in tax law held to include all bonds and stocks which would otherwise be subject to taxation.

5. Chap. 230 of the Session Laws of 1917, which provides for a uniform tax of three mills on the dollar upon moneys and credits “including bonds and stocks” and exempts the property embraced from other taxation, is construed and it is *held* that the term “bonds and stocks” includes all bonds and stocks which would otherwise be subject to taxation in some other form.

Taxation — statutes construed as exempt, and all bank stocks and bonds from taxation other than that provided in act.

6. Chap. 62 of the Laws of the Special Session of 1919, which repeals Chap. 230 of the Session Laws of 1917 and which affirmatively exempts moneys and credits “including bonds and stocks” from taxation—exempting from the exemption income derived therefrom and providing that “stocks and bonds” shall remain subject to a capital stock tax—, is construed and it is held to exempt all stocks and bonds from taxation other than that provided for in the Act.

Opinion filed Feb. 21, 1922

Original application for injunction. Writ granted.

Engerud, Divet, Holt & Frame, and R. C. Morton, for petitioners.

George E. Wallace, for respondents.

BIRDZELL, J. This is an action instituted in this court for the purpose of obtaining relief against certain taxes for the years 1920 and 1921, assessed against the shares of stock of banks. Equitable grounds for such relief are set forth in the complaint, provided the plaintiffs' contentions based upon the law applicable to the taxation of such property are well founded. The contention is that, since the passage of chap. 62 of the Laws of the Special Session of the Legislature for 1919, bank stock is not subject to taxation in the manner attempted, but that it comes under the exemption accorded to credits generally, being included in “bonds and stocks” which are expressly declared to be exempt. It is conceded, however, that banking corporations are subject to the tax provided by chap. 222 of the Laws of 1919 (a capital stock tax), and to taxation upon their personal and real property, other than credits to the same extent as other individuals and corporations. The contentions center about the construction of chap. 62 of the Laws of the Special

Session for 1919, in connection with other tax legislation—principally chap. 230 of the Session Laws of 1917. For convenience in following the discussion of the main features of the legislation in question, the various acts will be referred to in terms descriptive of their subject-matter, with the necessary references in parentheses, and to facilitate a ready understanding of the matter in controversy it is deemed proper to make a brief general historical statement in the margin showing the methods employed at various times and the results achieved in the taxation of corporate stock and moneys and credits generally.

Under the Constitution as it stood prior to an amendment adopted in 1914 (article 20; see Laws 1915, p. 404), all property was required to be assessed and taxed uniformly according to its value (§ 176). This included property of every description, though of course it did not require double taxation of credits, so creditors have been allowed, at times, to deduct their bona fide indebtedness from their credits (chap. 132, Session Laws of 1890), and moneys and credits belonging to banks have uniformly been exempted from taxation, though the stock has always been taxable to the holders at the place where the bank is located (Session Laws of 1890, chap. 132, §§ 2, 16 and 24; §§ 2075, 2103, ¶ 19 and 20, Compiled Laws of 1913). Individual owners of stocks in banks or other corporations (domestic) required to report were not required to list such stock. § 2102, Compiled Laws of 1913. As a consequence bank stock was listed to the stockholder by the accounting officer of the bank, other domestic corporations were taxed upon their property the same as individuals, and the stockholders were not taxed on the shares. If it was found that an excess value attached to the stock, above the value of the taxable property, it was taxed to the corporation, or, if not, at least theoretically it should have been, as "bonds or stocks." Section 2110, Compiled Laws of 1913. Such a valuation was listed under an item (¶ 23, § 2103) set apart for the value of the shares of capital stock. While the law was in this condition moneys and intangible property practically ceased to be an actual subject of taxation in the state (First Report, N. D. Tax Commission 1912, chap. 4), the aggregate amount of money and credits listed for the entire state being about three-fourths of a million dollars. When the Constitution was so amended as to permit property to be classified for taxation, the Legislature immediately sought to subject moneys and credits to a tax that could be applied in practice. It adopted such a measure in 1915, but the

act proved to be invalid. *State ex rel. Linde v. Packard*, 32 N. D. 301, 155 N. W. 666. It repeated the attempt in 1917, only to retrace its steps later, and specifically repeal this law in 1919 at the special session. As showing, however, the extent to which moneys and credits had evaded taxation before the change in the law, it is significant that under the 1917 act over \$100,000,000 of moneys and credits were rendered subject to taxation at the 3-mill rate (Report, N. D. Tax Commission 1919, chap. 8).

During the period prior to the attempted classification of moneys and credits for the purpose of levying the 3-mill tax, "bonds and stocks," both of domestic and foreign corporations, other than bank stock, were practically not taxed at all; the valuation of these items for the entire state being less than \$75,000. See Report of the Tax Commission for 1912, p. 186.

The 1917 Money and Credits Law (chap. 230) provides (§ 1):

"'Money' and 'credits' as the same are defined in § 2074 of the Compiled Laws of 1913, *including bonds and stocks*, are hereby exempted from taxation other than that imposed by this act, and shall hereafter be subject to an annual tax of three mills on each dollar of the fair cash value thereof. But nothing in this act shall apply to money or credits belonging to incorporated banks or building and loan associations situated in this state, nor to any indebtedness on which the tax is paid under a mortgage registration act, or is exempted by statute." (*Italics are ours.*)

The act of the Special Session of 1919 (chap. 62, Laws of the Special Session), which expressly repeals the chapter of which the foregoing is a part, reads in part as follows (§ 1):

"Money and credits, as the same are defined in § 2074 of the Compiled Laws of North Dakota for the year 1913, *including bonds and stocks*, are hereby exempted from taxation; provided, however, that the income therefrom except as to income derived from loans on North Dakota real property shall be taxable under the provisions of chap. 224 of the laws of North Dakota for the year 1919 except as therein exempted; provided, further, that stocks and bonds shall be subject to taxation in the manner provided by chap. 222 of the Laws of North Dakota for the year 1919. Provided that nothing in this act contained shall affect the validity of any tax upon transfers of property by will, gift, or in-

testate law, under the provisions of chap. 225, Laws of North Dakota, 1919." (*Italics are ours.*)

The complaint alleges that notwithstanding the passage of the foregoing laws, the taxing officers have continued to tax bank stock according to the rate of levy prevailing in the district where the bank is situated. The contention in support of the practice complained of is that bank stock was not exempted from other taxation under the money and credits statute of 1917, and was not rendered subject to the tax therein imposed; that the term "bonds and stocks" used in the definition of moneys and credits for the purpose of applying that law does not mean bonds and stocks generally, but certain kinds of bonds and stocks, excluding bank stock from the category; in short that the term was used in a special sense not embracing bank stock at all, and that again in 1919, when the special session repealed the money and credits tax, it used the terms "bonds and stocks" in the same sense, and therefore did not include bank stock within the exemption from taxation therein granted.

The term "bonds and stocks" is an ordinary term easily capable of comparatively accurate definition. To the mind of the layman and lawyer alike it clearly embraces bonds and stocks of every sort that represents a money investment. It is as applicable to corporate stocks of one kind as to any other. There is no indication of a legislative intention to limit the meaning so as to make it applicable to certain stocks only, nor does the other legislation enacted concurrently with it point to its use in any limited sense. And, if it were used in a limited sense, there is no guide to its true meaning by which it could be ascertained what stocks would be included and what would not. It is only by sheer speculation it can be said that bank stock was not exempted from taxation at the local rate of levy by the Money and Credits Act of 1917, and the uncertainty of such construction is even greater with respect to the repeal act of the 1919 special session.

A few observations relative to the condition of the tax law applicable to stocks and bonds at the time of the passage of the Money and Credits Act in 1917 will demonstrate the truth of the foregoing statement. § 2102, C. L. 1913, says:

"No person shall be required to include in his statement any share or portion of the capital stock or property of any company or corporation which such company or corporation is required to list or return as its capital or property for taxation in this state."

Section 2094 requires the listing of the property of a corporation by the president, agent, or officer thereof. Section 2110 requires the listing of the paid-up capital, and also prescribes a method for arriving at any excess value attaching to it above its taxable property, and for listing it as "bonds or stocks" under subdivision 23 of § 2103. Clearly this section is only applicable to domestic corporations, since that is the extent of the taxing jurisdiction of the state with reference to this species of property. These statutory provisions clearly require the property of corporations generally to be listed and taxed the same as that of individuals, and, to avoid double taxation, they relieve individuals from returning their shares in corporations so taxed. But in the case of banks the stock is listed in the name of the individual owner (§ 2115) in harmony with the requirements of the National Banking Act (13 Stat. 99), as will be noted more particularly later. These provisions are not applicable to stock in foreign corporations, which must, of course, be listed by the owner. Section 2103 which specifies the items of the assessment list carries out the plan of the foregoing substantive requirements in the following paragraphs.

"19. The amount of moneys other than of banks, bankers, brokers or stock jobbers.

"20. The amount of credits other than of banks, bankers, brokers and stock jobbers.

"21. The amount and value of bonds and stocks, other than bank stock.

"22. The number of shares of bank stock and the value thereof.

"23. The amount and value of shares of capital stock of companies and associations not incorporated by the laws of the state."

By way of emphasis we repeat that under § 2110, corporate excess of domestic corporations is required to be listed under item 23, quoted above, which item would otherwise normally contain only the shares of stock owned by individuals in foreign corporations. This was the condition of the law at the time of the adoption of the Money and Credits Act of 1917 (Laws 1917, chap. 230), and it is only in the light of the pre-existing laws that it can be properly construed. Now this act, consistent with ¶ 19 and 20 quoted above (see, also, § 2075), excepts the moneys and credits of banks from the imposition of the mill tax but it exempts money and credits generally, "including bonds and stocks," from all other taxes than the mill tax thereby imposed, and repeals all

other legislation in so far as in conflict with the provisions (§ 14). Clearly a share of stock in a foreign corporation, owned by a resident, and the corporate excess of a domestic corporation were thus rendered subject to the mill tax, and exempted from other taxes. Thus a resident of this state owning shares of stock in a state bank in Minnesota or in any other foreign corporation, was taxable on such stock at the rate of three mills on the dollar of its valuation, whereas formerly he was taxable on account of such stock according to the rate of levy in the taxing district of his domicile. So, beyond the peradventure of a doubt, through the definition employed in the Money and Credits Act, considered in its relation to the existing legislation, money and credits included "bonds and stocks" owned by individuals; also the corporate excess of domestic corporations; and after its passage it is certain that no resident of the state could have been lawfully taxed on stock owned in foreign corporations, including banks, at any greater rate than three mills on the dollar, whereas formerly he was taxable according to the local levy.

The sections of the statute (§§ 2110 and 2115), one of which provides a method for arriving at the corporate excess of corporations generally, and the other for computing the value of bank stock, do not, in our opinion, have any bearing upon the question of the taxability or exemption of the stocks referred to in either section under a general description of stocks. These sections never existed for the purpose of differentiating between the kinds of stocks, and subjecting each to a different share of the tax burden. They merely subserved official convenience in valuing and equalizing properties of the same general species to the end that each might in the end be subjected to its full, uniform legal burden as required by the Constitution before its amendment. They were aids to a complete and full assessment; not vehicles for discrimination. Hence, since the term "bonds and stocks" as used in the Money and Credits Act refers just as appropriately to the valuation reached by applying one section as it does to that reached by applying the other, we can see no basis for saying that it included one and excluded the other.

An examination of the legislation passed concurrently with this 1917 act does not disclose an intention to exclude bank stock from its operation. Chap. 61 of the Laws of 1917, approved on the same day as the Money and Credits Act, amended the statute governing the assessment

of bank stock, but only in respect to the method of arriving at its value for tax purposes. Obviously the moneys and credits tax is an *ad valorem* tax, and it is as important to arrive at the value for purposes of levying the 3-mill tax as for subjecting the property to a tax levied according to the local rate. So there is no inconsistency between chap. 61 and the Money and Credits Act.

Chap. 59 of the laws of the same session, which was also approved on the same day, provides a classification scheme by virtue of which bank stock falls in the class subjected to the highest valuation. Class 1 reads in part:

"All land, town and city lots, railroads, bank stock, express and telegraph property, shall constitute class one," etc.

And in providing for class 3 we find this language:

"All household goods, and house equipment and wearing apparel, structures and improvements upon farm land, stocks other than banks, bonds, money and credits, provided that such stocks, bonds, money and credits are not otherwise assessed under a mill or flat rate law, shall constitute class three," etc.

Clearly the Legislature was impressed with the desirability of distinguishing between bank stock and other stocks for purposes of classifying property for taxation, and, to make the distinction effective, it spoke of bank stock alone in one place and of "stocks other than banks" in another. Similarly the distinction has always been made in the listing law, previously quoted in this opinion, showing that, where bonds and stocks generally were listed, bank stock would be included were it not for the expression "bonds and stocks, other than bank stock." ¶ 21, § 2103, C. L. 1913. Not only throughout the history of tax legislation have appropriate words been used to exclude bank stock from bonds and stocks generally where that term has been employed, but indeed in the very session of the legislature which passed the Money and Credits Act the same distinction was made for classification purposes—only to be ignored, however, in levying the mill tax. While it may be true that this section discloses an intention to tax bank stock according to a higher rate of valuation than other stocks, it affords conclusive proof that the legislature was familiar with the terminology employed in the Money and Credits Act, and we cannot with propriety speculate as to why it failed to make the exception as it had always done before. From the fact that the exception was not made it must be inferred that it was

thought desirable to treat bank stock at parity with all other stock for purposes of this tax.

It is not the duty of this court to legislate nor to search for a hidden meaning of plain and hitherto unambiguous words employed by the legislature. We are not free to enter into the realm of speculation. Clearly the expression "bonds and stocks" employed in the Money and Credits Act included stocks, and was intended to include stocks, of the very character of those in question here. Had it been desired to limit its application so that it would not embrace a distinct class of stocks of the same character as those unquestionably included, such intention could readily have been expressed as it formerly had been. The duty of the court ends when it determines the legal meaning of the words employed. If the words are not ambiguous there is no room for construction.

"This is so, even though the statute so understood 'leads to absurd and mischievous results * * * ; for courts are not to inquire as to the motive of the legislature, nor to depart from a meaning clearly conveyed in unambiguous words, because the statute, as literally understood, appears to lead to unwise consequences or to contravene public policy.' 26 Am. Eng. Ency. of Law 599." *State ex rel. Linde v. Taylor*, 33 N. D. 76, 98, 156 N. W. 561, 569 (L. R. A. 1918B, 156, Am. Cas. 1918A, 583).

Though the court may find a particular statute offensive to its sense of justice in public affairs, it is powerless to relieve against the consequences if the act were enacted in pursuance of constitutional authority. We are aware of no rule of statutory construction that would justify an effort to except bank stock from the operation of the money and credits statute of 1917.

If construction might be legitimately resorted to in this case, however, we are of the opinion that it would point to the use of the term "bonds and stocks" in its general signification rather than to any possible limited meaning, such as is contended for by the defendants here. There is, perhaps, no rule of construction that equals in potency that which requires an act to be construed, where possible, so as to make it constitutional in its operation. The actual meaning of the legislature is perhaps more often sacrificed to a presumed constitutional meaning at variance with it through the application of this rule of construction than in any other way. Thus this court has held that a statute purporting to extend the period of redemption from mortgage foreclosure was not applicable to existing mortgages and contracts where to have construed

it as applicable would have rendered it unconstitutional as impairing the obligation of contracts (*Lander v. Deemy*, N. D. 176 N. W. 922). This principle or rule of construction is necessarily involved here, since the taxes on national bank stock are affected. The power of the state to tax the stock in national banks is derivative. A national bank, being created by the federal government, may not be taxed on its franchise nor the stockholder taxed on his stock by the states, except as permitted by Congress. *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579; *Osborn v. Bank*, 9 Wheat. 738, 6 L. ed. 204; *Weston v. Charleston*, 2 Pet. 449, 7 L. ed. 481; *People of the State of New York v. Weaver*, 100 U. S. 539, 25 L. ed. 705; *Owensboro National Bank v. Owensboro*, 173 U. S. 666, 19 Sup. Ct. 537, 43 L. ed. 850. Congress has given such consent by providing that the stock may be taxed to the stockholders subject to two restrictions, viz.:

"That the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by non-residents of any state shall be taxed in the city or town where the bank is located, and not elsewhere." R. S. § 5219; U. S. Comp. St. § 9784.

Under this act of Congress national bank stock may not be taxed according to the local rate of levy while other moneyed capital invested in forms of securities generally denominated as credits is taxed in the same locality at a flat rate much less than the rate applicable to such national bank stock. *Boyer v. Boyer*, 113 U. S. 689, 5 Sup. Ct. 706, 28 L. ed. 1089; *Evansville National Bank v. Britton*, 105 U. S. 322, 26 L. ed. 1053; *Merchants' National Bank v. City of Richmond*, 256 U. S. 635, 41 Sup. Ct. 619, 65 L. ed. 1135. Therefore, if it be assumed that the legislature intended to exclude stock of national banks, along with state banks, from the operation of the Money and Credits Act of 1917, and to continue taxing such stock at the local rate of levy, the statute would be unconstitutional as taxing the stock of national banks beyond the authority granted. Of course it cannot be contended that the legislature contemplated taxing national bank stock as a credit at 3 mills on the dollar and state bank stock at the local rate. The decisions of the United States Supreme Court are controlling upon the federal question presented by such tax legislation (*Des Moines National Bank et al. v. City of Des Moines*, 153 Iowa, 336, 133 N. W. 767), and it is the duty of state courts to so construe acts of the legislature, if possible,

as to make them harmonize with the act of Congress dealing with the same subject as construed by the federal courts. *First National Bank of St. Joseph v. St. Joseph*, 46 Mich. 526, 9 N. W. 838. It follows that, in the light of the decisions of the United States Supreme Court construing the act of Congress with reference to the taxation of national bank stock, the Money and Credits Act of 1917 must be held to have embraced the stock of national banks as a credit; otherwise such stock would have been entirely exempted from taxation.

Even if it be assumed that the Money and Credits Act of 1917 might properly be construed, in connection with the concurrent legislation, as excluding bank stock from its operation, still it is manifest beyond a doubt that the repeal act of the special session of 1919, which contains affirmative language of exemption, cannot possibly be so construed as to render bank stock liable to taxation at the local rate, while credits and stocks generally are not so liable. The repeal act says affirmatively that moneys and credits, "including bonds and stocks," are "hereby exempted" from taxation; but it is provided that the income therefrom shall be taxable, and that "stocks and bonds" shall be subject to taxation in the manner provided by chap. 222 of the Laws of 1919 (the capital stock tax). The term "bonds and stocks" as used in this act clearly embraces, by its express language, stocks from which income may be derived, and such as may be subject to the capital stock tax under chap. 222 of the Laws of 1919. This gives it a broader meaning than mere "corporate excess" listed as "bonds or stocks" under subdivision 23 of § 2103, for such property is neither "capital stock" nor income producing. The Income Tax Law (chap. 224, Laws of 1919) apparently taxes the individual upon income derived from bank stock, and state banks are liable for the capital stock tax to the same extent as other corporations. Hence bank stocks are within the class to which the taxes that were saved out of the exemption are applicable. There was no occasion to save these enumerated taxes unless it was conceived that the exemption of "bonds and stocks" in the fore part of the act would have rendered bonds and stocks generally immune from all taxes. Clearly the term "bonds and stocks" was used in this act in its ordinary sense, and there is not the slightest ground for implying an exception of bank stock. Where the legislature has spoken thus clearly it would be nothing short of judicial legislation for us to write the exception into the statute. Prior to the passage of this act (chap. 62 of the Laws of the Special Ses-

sion of 1919) the legislature had authority to exempt personal property from taxation if it so desired (article 29, Amendments to the Constitution; see Laws 1919, p. 507).

Here again we might observe that the legislature could not, by reason of the federal constitution and the Act of Congress relative to the taxing of national bank stocks, exempt moneys and credits generally from taxation, and continue to subject national bank stock to taxation at the local rate of levy or at any rate differing from that applicable to other moneyed capital. It is not probable that the legislature would relinquish altogether the tax on national bank stock while continuing to tax that of state banks at the local rate. On the contrary, whatever reasons were potent enough to cause it to exempt "moneys and credits, including bonds and stocks," which of necessity embraced the stock of national banks, would naturally operate likewise favorably upon that of competing state banks. This impels us to the conclusion that the legislature has in fact exempted all stock, including bank stock, from all taxation, except that expressly retained by chap. 62 of the Laws of the Special Session of 1919. It follows that the complaint states a cause of action, and that the writ should issue as prayed for.

ROBINSON, J., and NUESSELE and BERRY, District Judges, concur.

CHRISTIANSON and BRONSON, JJ., disqualified.

GRACE, C. J. (dissenting). This is a proceeding where the original jurisdiction of this court has been invoked on the ground that the matters involved and presented for decision are of real and great public interest, affecting the state materially in its sovereignty and prerogatives. The object of the proceeding is to procure this court, on final hearing of the matters involved, to exercise its original jurisdiction and permanently enjoin the collection of or the attempt to collect certain taxes assessed and levied against certain specific property hereinafter mentioned. This court in the first instance issued an appropriate writ, which was duly served upon the defendants, directing them to show cause why they should not be temporarily prohibited and enjoined from taking any further proceedings for the collection of the tax, and why, upon final hearing, they should not be permanently enjoined from collecting or at-

tempting to collect the tax. The question of whether this court should take jurisdiction will be considered later in this opinion.

The petition is far too lengthy to be here set out. The material and necessary facts therein stated will, however, be mentioned, and are in substance as follows: That there are in the state of North Dakota more than 700 state banking associations, several of which are located in each of the several counties of the state, and in several different taxing divisions of each of the counties, and that said banking associations have a large number of individual stockholders aggregating more than 10,000; that 300 or more of such banking associations have refused to pay the tax assessed against their shares of stock for the year 1920; that their stockholders have likewise refused; that about 300 of such banking associations have paid, under protest, the taxes assessed against their shares of stock for the year 1920, and are claiming and asserting the right to recover back the amounts so paid; that plaintiff and its stockholders refused to pay the tax; in addition to the banks, there are approximately 20 trust companies organized and existing under and by virtue of chap. 31 of the Compiled Laws of North Dakota which have a large number of individual stockholders, which have assumed the same attitude toward the collection of the tax as that of the banking associations, viz. a refusal to pay it or have paid it under protest. The petition further shows that the banking associations and trust companies refusing to pay the tax, or those paying it under protest, base their refusal and protest on the contention that chap. 62 of the Laws of the Special Session of 1919 exempted all their stock from taxation, and that their stockholders make a similar claim.

The plaintiff asserts its willingness to pay the capital stock or franchise tax provided by chap. 222 of the Laws of 1919, but also asserts that the taxing officers of the counties and state do not recognize that the tax provided for in that chapter is applicable to the plaintiff. Plaintiff further shows its willingness to be assessed and taxed for the year 1920 for certain personal property in the form of furniture and banking fixtures, but that no tax appears on the records of the county of Cass against said property or the plaintiff. It further appears that the aggregate amount of all taxes for the year 1920 against bank and trust company stock is about \$500,000, about one-half of which was paid under protest, and one-half has not been paid, and the validity thereof is in controversy. It further appears from the petition that the taxes as-

sessed and to be levied and charged against shares of stock of state banks and trust companies within the state for the year 1921 will be more than \$600,000, 25 per cent. of which will be paid under protest, and the payment of 75 per cent. thereof will be resisted.

The petition further shows that the capital stock of the plaintiff's bank is \$10,000; that during the month of April, 1920, while chap. 62 of the Laws of the Special Session of the Legislature for 1919 was in force and effect, the duly and legally qualified and acting taxing authorities of the village of Page, county of Cass, state of North Dakota, and George E. Wallace, as tax commissioner, claimed and asserted that the shares of capital stock of the plaintiff were subject to assessment for the purpose of taxation, and, acting under color of the law for the taxation of shares of bank stock as contained in § 2115 of the Compiled Laws, they demanded that plaintiff make return and furnish a statement to the assessor accordingly; that the plaintiff thereupon, through its proper officers, did make such statement and return, disclosing and showing the value of its shares of stock on the 1st day of April, 1920; that such statement showed the amount and number of its shares of capital stock, the amount of surplus, reserve fund, and undivided profits in excess of the amount equal to 5 per cent. of the loans and discounts of the bank, and the amount of its net investment in real estate, and which showed that the amount of the capital stock was \$10,000, and the surplus and undivided profits \$21,066.65, and that it had no real estate; it further showed a list of the plaintiff's stockholders; that, acting upon the statement and return other information, the assessing officers assessed and returned against the shares of capital stock of the various owners thereof a valuation of \$31,066.65; that, upon the assessment so made and returned, the various district, county, and state taxing officers in conformity to the procedure of laws for the perfection of a tax claim against such shares of stock, did take, in due form of law, such steps for the assessment, equalization, levy, spreading, and charging of the tax against such shares of stock, and did take all such other proceedings, and did such other things as were necessary for the perfection of a tax against such shares of stock, taking all such steps, and doing all such things in exact conformity to the provisions of the law, and, if the said shares of stock were taxable under the laws of the state then existing, the tax thereafter mentioned would be a valid and existing tax charge against such shares of stock and against the

owners thereof, and would constitute a lien upon the said stock itself, and any dividends due the owners thereof, and upon all the assets of the plaintiff, under provisions of § 2117, C. L. 1913, which said tax so spread and made a charge was in the aggregate, at the time it became due, \$699.01.

It further appears from the petition that the taxing officers of Cass county have treated the taxes so assessed, levied, and spread as a valid and existing tax charge, and as collectible; that the treasurer, as provided by law, has given notice to the plaintiff of the delinquency of the personal property tax, and has notified plaintiff that, if said taxes are not paid by October 15, 1921, he will deliver a statement of the taxes to the sheriff of Cass county as a part of the delinquent personal property tax list to be collected by distraint of plaintiff's property, and that in this the treasurer and sheriff are counseled and advised by George E. Wallace, as tax commissioner, and, unless restrained by the order of the court, will continue to do so; that the total amount of the tax, including penalty and interest, aggregates \$782.89, which appears as a lien against plaintiff, though assessed against its individual stockholders. This, we think, is a sufficient statement in substance of the matter set forth in plaintiff's petition. The proceeding is brought by plaintiff for himself, and on behalf of all other banking corporations similarly situated.

To the petition the defendants interposed a demurrer, on the ground and for the reason that it does not state facts sufficient to constitute a cause of action.

There are several questions for decision presented in this proceeding; one of them is: Is the bank stock of state bank associations of this state, under the provisions of chap. 62 of the Laws of the Special Session of 1919, exempt from taxation as against either the bank as a corporate entity or the individual owners of the bank stock? Chap. 62 so far as material here provides:

Section 1. "Money and credits, as the same are defined in § 2074 of the Compiled Laws of North Dakota for the year 1913, including bonds and stocks, are hereby exempted from taxation; provided, however, that the income therefrom except as to income derived from loans on North Dakota real property shall be taxable under the provisions of chap. 224 of the Laws of North Dakota, for the year 1919 except as therein exempted; provided, further, that stocks and bonds shall be

subject to taxation in the manner provided by chap. 222 of the Laws of North Dakota for the year 1919."

Section 3. "Chap. 255 of the Laws of North Dakota for the year 1915 and chap. 230 of the Laws of North Dakota for the year 1917 as amended by chap. 226 of the Laws of North Dakota for the year 1919 and all other acts and parts of acts in conflict herewith are hereby repealed."

In order to arrive at the intent of the legislature in the enactment of chap. 62, it will be necessary to examine the context of several legislative enactments, and if, after such examination, it appears that it was clearly the intent of the legislature by that chapter to exempt state bank stock from the tax, here sought to be charged against it—unless there are other reasons knowing the tax is valid—then it should be so exempted, but if, on the contrary, it should clearly appear that the Legislature did not so intend, then the tax should be held to be a valid one.

It will perhaps assist in arriving at a definite conclusion with reference to the intent of the legislature in the enactment of chap. 62 to determine upon examination of other legislative enactments with reference to taxation whether the taxation of state bank stock has been dealt with in common with the taxation of the stock of other domestic companies or associations, or whether it has been segregated from them, and placed in a separate and distinct class, and then taxed under provisions of law specifically applicable to it; if it should appear that by the various legislative enactments which imposed a tax upon the stock of domestic companies and associations the stock of state banks is excepted from the operation of them, or if it appear that its taxation has been specially provided for by separate and specific laws, it would seem to follow as a natural conclusion that a law which in general terms exempts the stock of companies or associates from taxation, but which does not specifically provide that the terms of the law shall apply to the stock of state banks, applies to the stock of companies or associations exclusive of state banks.

The first provision of law to be examined in this respect is § 2103, C. L., which makes it the duty of the assessor to determine and fix the true and full value of all items of personal property, included in the personal property statement to the assessor. That statement under the provisions of said section sets out 27 different items of personal

property to be valued for taxation. Amongst others are the following:

(19) The amounts of moneys other than of banks, bankers, brokers, or stock jobbers.

(20) The amount or credits other than of banks, bankers, brokers, and stock jobbers.

(21) The amount and value of bonds and stocks, other than bank stock.

(22) The number of shares of bank stock, and the value thereof.

(23) The amount and value of shares of capital stock of companies and associations not incorporated by the laws of the state.

That section discloses a clear intent to deal with moneys and credits of banks and bank stock, with reference to ascertaining their value for the purpose of taxation, separately and apart from ascertaining the same thing as to the stock of other companies, corporations, or associations.

Section 2110, relative to when and by whom the property of companies or associations other than banks is listed, so far as material here provides:

"The president, secretary or principal accounting officer of any company or association, whether incorporated or unincorporated, except banking corporations whose taxation is especially provided for in this article, shall make out and deliver to the assessor a sworn statement of the amount of its capital stock."

This statement must also give the name and location of the company or association, the amount of capital stock authorized, the amount thereof paid up, the market or actual value of it, and other information not necessary here to mention.

It is clear that the stock of banking corporations is excepted from the operations of that section. It specifically says that the stock of banking corporations is especially provided for. In other words, for the purpose of taxation it is placed in a class by itself; the section is one providing for classification and listing for the purpose of taxation of the property of companies and associations exclusive of state banks. It has reference to the taxation of what is commonly known as the corporate excess of corporations, companies, and associations other than state banks. It was amended by chap. 221 of the Session Laws of 1919, and as amended provided as follows:

"The president, secretary or other principal accounting officer of

any corporation, joint-stock company or association, whether incorporated or not, except banking corporations; whose taxation is especially provided for in this article, shall make out and deliver to the assessor a sworn statement of the amount of its capital stock, setting forth particularly."

Then follows the same number of subdivisions as were contained in the original section, with some changes inserted therein not necessary here to mention. It will be noticed, however, that, in the language of the amendment, above set forth, it includes more than the section did as it originally stood. It contains the additional words "corporations" and "joint-stock company." These and other changes in the amendment show that the legislature gave consideration to every part of it, and hence must necessarily have determined that it was necessary to except banking corporations from its operation, as it was specifically there recognized that the taxation of banking corporations had been especially provided for.

The same section, as amended by chap. 221, supra, was again amended by chap. 119 of the Session Laws of 1921, where again banking corporations are excepted from the operation of the section as thus amended, and where again it is mentioned that the taxation of banking corporations is especially provided for. This is the third legislative recognition of this fact.

It is now proper to notice what provisions have been made with reference to the taxation of stock and property of banks, and in this connection § 2115 may be considered. By it, for the purpose of taxation, the valuation of stock of banks located in this state is specifically provided for.

By chap. 61 of the Session Laws of 1917, § 2115 was amended, and as amended is now the law, providing for the assessment of bank or trust company stock. It is the law which is now in force, and prescribes the manner of ascertaining the valuation of bank or trust company stock for the purpose of taxation. It provides:

"Section 1. That § 2115 of the Compiled Laws of North Dakota for the year 1913 is hereby amended and re-enacted so as to read as follows:

"Section 2115. *Bank and Trust Company Stock, Where and at What Valuation to be Listed.* The stockholders of every bank, and of every trust company, located in this state, whether such bank or trust

company has been organized under the banking laws of this state, or of the United States, shall be assessed and taxed on the value of the shares of stock, in the county, town, district, city or village where such bank or trust company is located, and not elsewhere, whether such stockholders reside in such places or not; such shares shall be listed and assessed annually with regard to the ownership and value thereof on the first day of April of each year. To aid the assessor in determining the value of such shares of stock, the accounting officer of every bank and trust company shall furnish a statement in duplicate to the assessor, verified by oath, showing the amount and number of such shares of capital stock of such bank or trust company, the amount of its surplus or reserve fund and undivided profits; the amount of its net investment in real estate, which real estate shall be returned in the name of the bank or trust company and shall be assessed and taxed as other real estate is under this article. To determine the real values of such real estate * * * which said bank or trust company has sold to any party or parties under any contract whereby the party or parties purchasing agrees to pay all taxes levied against such property. The assessor shall deduct the net amount of said investment in real estate from the aggregate amount of such capital stock, surplus and undivided profits and the remainder shall be taken as a basis for valuation of such shares of stock in the hands of the stockholders subject to the provisions of law requiring all property to be assessed at its true and full value, or as such property may be by law classified for assessment. Provided, however, no bank or trust company shall be permitted a deduction for net investment in real estate of more than sixty per cent. of its capital stock, surplus and undivided profits; and provided further, that upon written request of the accounting officer any solvent bank or trust company may have the total amount of the assessment herein provided for as against each shareholder to be assessed against the bank or trust company in its corporate name and the taxes accruing thereon paid as other expenses of the bank or trust company are paid. The shares of capital stock in national banks, not located in this state, held in this state, shall not be required to be listed under this article.

"Approved, March 9, 1917."

Thus it is manifest that the Legislature has definitely and distinctly prescribed one method for ascertaining the value of the shares of stock of corporations, joint-stock companies and other associations for the pur-

pose of taxing their corporate excess, and has prescribed an entirely separate and distinct method for obtaining the valuation of bank stock for the purpose of its taxation.

The valuation of each having thus been ascertained, unless exempted as the stock of corporations, joint-stock companies and associations other than banks, by chap. 62 as it now is, it is subject to taxation the same as other personal property, unless a different tax is by law specified.

It may further be observed that at the same legislative session that enacted chap. 61 there was also enacted chap. 230, and that both were approved on the same day, to wit, March 9th. Neither of these laws contained an emergency clause, and hence became effective on the same date, July 1, 1917.

Section 1 of chap. 230 provides that—

“‘Money’ and ‘credits’ as the same are defined in § 2074 of the Compiled Laws of 1913, including bonds and stocks, are hereby exempted from taxation other than that imposed by this act, and shall hereafter be subject to an annual tax of three mills on each dollar of the fair cash value thereof. But nothing in this act shall apply to money or credits belonging to incorporated banks or building and loan associations situated in this state, nor to any indebtedness on which the tax is paid under a mortgage registration act, or is exempted by statute.”

It will be noticed that the legislature by this section was careful to except banks from the operation of that law.

It is too clear to admit of any controversy that the policy and intent of the legislature to deal with the taxation of bank stock, and that of other companies or associations separately, is clearly manifested by the enactment of the two chapters last mentioned at the same session, where by one the stock of state banks, as had theretofore always been done, was placed in a separate and distinct class for the purpose of assessment and taxation, and by the other the stock of companies and associations other than state banks were placed in an equally separate and distinct class.

If this were not true chap. 61 would not, we assume, have been enacted. It cannot be successfully contended that it was enacted inadvertently. It cannot be said that the Legislature did not have a distinct purpose in its enactment.

Section 1 of chap. 255, Session Laws of 1915, provides:

“‘Money’ and ‘credits’ as the same are defined in § 2074 of the

Compiled Laws of 1913, are hereby exempted from taxation other than that imposed by this Act, and shall hereafter be subject to an annual tax of two mills on each dollar of the fair cash value thereof. But nothing in this act shall apply to money and credits belonging to incorporated banks situated in this state."

Again do we see that the legislature has disclosed the same plain policy and intent in harmony with that theretofore and thereafter continuously manifested. This chapter was likewise repealed by chap. 62. Its consideration here is for the same purpose as that of 230, to wit, to ascertain the policy and intent of the legislature in the enactment of 62.

We think it must be evident from a thorough examination of all of the chapters and sections above mentioned, that the legislature dealt with the taxation of the stock of companies and associations separately, from the taxation of the stock of banking corporations; that it is clear that it has enacted certain laws relative to the taxation of stock of companies and associations, and likewise has enacted certain other and distinct laws relative to the taxation of banking associations which have no application to other companies or associations, and that it was the clear intent of the legislature to deal with banking corporations, with reference to the taxation of their stock in a particular manner; in short, it would seem that it has continuously been the policy and intent of the Legislature to deal with the taxation of the stock of companies and associations and the taxation of stock and banks by entirely separate and distinct laws.

This being true, we think the same policy and intent was present with the legislature when it enacted chap. 62, and that, as there is no expressed intent in that act, and no particular language there used, which makes it applicable to banking corporations, in the light of its past clear purpose and intent to deal with the taxation of banking corporations and of their property separately, the act should be held to apply only to companies and associations other than banking, and this even though § 1 of chap. 62, hereinbefore set out in full, be considered in part an affirmative enactment.

If that section be affirmative legislation, it relates only to companies and associations other than banking, for, as the legislative policy and intent prior to the enactment of chap. 62 was to deal with the taxation of corporations, companies and associations in a separate and distinct manner than it dealt with the taxation of banking corporations, and

that policy and intent being clearly manifested in the enactment of separate legislation for the taxation of such corporations, companies and associations on one side, and that of banks on the other, and that policy and intent being further distinctly manifested as late as the enactment of chap. 230 and chap. 61 of the Laws of 1917, where, by the former, money and credits, including stocks and bonds of companies and associations other than banks, were listed for taxation in one specific manner, while by the latter that of banking associations was listed for taxation in another equally distinct and specific manner, it would seem to follow as a natural and uncontrovertible conclusion that, if there had been any change in the prior policy and intent of the Legislature at the time of the enactment of chap. 62, it would have expressed it in the enactment of that chapter, not having done so, it seems certain that its theretofore universal policy and intent in this respect still remained, and that in the enactment of chap. 62 it dealt with companies and associations other than state banks.

Plaintiff contends that that part of § 4 of chap. 62, which provides that "All other acts and parts of acts in conflict herewith are hereby repealed" is broad enough to include the repeal of all laws relative to the taxation of bank stock. In view of what we have above said, we do not agree with this contention. As we view the enactments with reference to the taxation of bank stock, they are not in conflict with chap. 62, because they are not included within it. We are convinced that chap. 62 refers only to stocks and bonds of corporations, joint-stock companies and associations other than banks, and this appears the more clearly when it is considered that the various chapters specifically repealed by § 3—viz. chap. 255 of the Session Laws of 1915, chap. 230 for 1917—as amended by chap. 226 of the Laws of 1919, all relate to the taxation of the stock and bonds, etc., of corporations or companies other than banks, and necessarily it would seem to follow that the expression, "All other acts and parts of acts in conflict herewith are repealed," refers to any other laws of like nature which related to the taxation of certain corporations, companies, or associations not including banks.

Having thus concluded that chap. 62 has no application to banks, a definition of the terms, "moneys and credits" and "stocks and bonds," or the legal interpretation of those terms as there used, becomes entirely unnecessary. Counsel for plaintiffs have compiled an able brief

which deals extensively with the interpretation of those terms, citing therein at length the decisions of many courts dealing with their interpretations; but, if we are correct in the conclusion at which we have arrived—and of that we are quite certain—such reasoning has no application to this case.

I will at this point give some consideration to the majority opinion, which we think gives no effect to chap. 61. Section 176 of the Consitution as amended, which as we understand its meaning, permits personal property to be classified for the purpose of taxation, requiring, however, the tax to be uniform on the same class of property. Bank stock has been so classified. Chap. 61, we contend, deals with the valuation and assessment of that class, while chap. 230 relates, as we claim, to the taxation of the stock of corporations and associations generally other than banks.

It cannot be contemplated nor successfully contended that the legislature was engaged in an idle act in passing chap. 61, especially in view of the fact that it was passed at the identical time as was chap. 230.

The majority opinion is to the effect that the meaning of chap. 62 is plain. It is, however, very clear that its meaning and intent is not deducible from that act alone, but from all of the laws and statutes which we have heretofore mentioned. We think also that state banks of this state have always construed chap. 61, or § 2115, C. L. 1913, as applicable to banks only, and that they were placed in a special class for the purpose of taxation; that, even during the time that the money and credit acts of 1915 and 1917 (chap. 255, Laws 1915, and chap. 230, Laws 1917) were in force, we think it a matter of common knowledge that they paid the taxes on their stock by virtue of the provisions of chap. 61 and § 2115.

Let us look a little further to find additional proof that the legislature in the enactment of chaps. 61 and 230 at the same time had placed bank stock in one class and the stock of other corporations in another and distinct class for the purpose of taxation. Under chap. 61 bank stock is assessed in the county, town, district, city, or village where the bank or trust company is located, and not elsewhere, and this whether such stockholders reside in such place or not; they are there assessed with regard to their ownership and value on the 1st day of April each year. The statute thus fixes the situs of taxation of bank stock; those who own bank stock must pay a tax at the situs fixed by the statute; as to nonresident owners of bank stock, if it should be contended that

they cannot be bound by the statute, nevertheless it is a rule of law well established by the decisions that it must be taxed in the city or town in which the bank is located. *McHenry v. Downer*, 116 Cal. 20, 47 Pac. 779, 45 L. R. A. 737. This case states the true rule, which is that bank stock is taxable in the city or town where the bank is located. See note to this case for a lengthy discussion of the whole subject. Hence it seems clear that all bank stock on its valuation as ascertained under chap. 61 is taxed locally, and at the local rate of taxation. In other words, it is taxed just the same as a local stock of goods, machinery, a herd of horses or cows, or any other local property is taxed. This, however, is not true of the property mentioned in chap. 230. By the provisions of that law the property therein mentioned is to be listed for the purpose of taxation under the provisions of § 2095, which provides that the capital stock and franchises of corporations and persons shall be listed in the county, town or district where the principal office or place of business of such corporation or person is located in this state; and, if there be no such principal office or place of business, then personal property pertaining to the business of a merchant or manufacturer or corporation shall be listed in the town or district where the business is carried on. Thus the legislature, in the enactment of chaps. 61 and 230, clearly distinguishes banking corporations from all other corporations.

The majority opinion, in endeavoring to show there is no inconsistency between chaps. 61 and 230, which, as we have seen, were both enacted at the same time at the 1917 legislative session, contains the following:

"Chap. 59 of the laws of the same session, which was also approved on the same day, provides a classification scheme by virtue of which bank stock falls in the class subjected to the highest valuation. Class 1 reads in part: 'All land, town and city lots, railroads, bank stock, express and telegraph property shall constitute class 1,' etc. And in providing for class 3 we find this language: 'All household goods, and household equipment and wearing apparel, structures and improvements upon farm land, stocks other than banks, bonds, money and credits, provided that such stocks, bonds, money and credits are not otherwise assessed under a mill or flat rate law, shall constitute class 3,' " etc.

Continuing the majority opinion states as follows:

"Clearly the legislature was impressed with the desirability of dis-

tinguishing between bank stock and other stocks for purposes of classifying property for taxation, and, to make the distinction effective, it spoke of bank stock alone in one place and of 'stocks other than banks' in another. Similarly the distinction has always been made in the listing law, previously quoted in this opinion, showing that, where bonds and stocks generally were listed, bank stock would be included were it not for the expression 'bonds and stocks other than bank stock.' "

We respectfully desire to call the majority's attention to the fact that chap. 59 is no longer a law, but it has entirely ceased to exist, having been amended by chap. 220 of the Session Laws of 1919, which classifies property for assessment into two classes. Section 1 provides:

"All real and personal property subject to a general property tax, not exempt by law, not subject to any gross sales or other lieu tax, is hereby classified for purposes of assessment for taxation as follows:

"Class 1. Class one shall include the following which shall be valued and assessed at one hundred per cent. of the full and true value thereof:

"(a) All railroads and other public utilities, together with franchises, and all real and personal property employed in connection therewith.

"(b) All land, exclusive of structures and improvements thereon.

"(c) All bank stocks.

"(d) All flour mills, elevators, warehouses and storehouses of all kinds; buildings and improvements upon railway rights of way or sites leased from railway companies or other public utility corporations, and structures and improvements on town and city lots used for public purposes.

"Class 2. Class two shall include the following, which shall be valued and assessed at fifty per cent. of the full and true value thereof:

"All live stock, agricultural and other tools and machinery; gas and other engines and boilers; threshing machines and outfits used therewith; all vehicles, automobiles, motor trucks, and other power driven cars; boats and all water craft, harness, saddlery and robes, structures and improvements used for homes upon town and city lots; and all property not herein specifically mentioned."

It will be seen that the expression so much emphasized in the majority opinion, and which was contained in chap. 59, to wit:

"Stocks other than banks, bonds, money and credits, provided that such stocks, bonds, money and credits are not otherwise assessed under a mill or flat rate law, shall constitute class three"

—has entirely disappeared from the law and was not retained in chap. 220, a very potent fact, as it demonstrates that the legislature knew that this character of stock and money and credits were assessed and taxed under chap. 230, and therefore could not be classified under chap. 220. It further shows that the legislature knew that they were taxed at 3 per cent. of the value; it shows further that bank stock was subject to the general tax to be assessed and levied on its value and collected in the county, city, town, or district where the bank is located, just in the same manner as a similar tax is assessed and collected against flour mills, elevators, warehouses, or land. It throws much light upon the intent of the legislature in passing chap. 62; it reasonably shows that bank stock is in a class by itself, and that other stocks, bonds, moneys, and credits are those which are included in chap. 230, and in § 3 of chap. 59. It must be kept in mind that at the time chap. 220 was passed chap. 230 was still in force. We think chap. 220 clearly indicates the legislative intent as to what kind of stocks were dealt with in chap. 230 and in chap. 62. As to the specifically repealing clause of chap. 62, it seems certain that refers to chap. 230 and 255, and, if bank stock is not of the class of stocks mentioned in either of those chapters, it could not have been affected by the repeal of them, nor by the exemption from taxation of the character of stock mentioned in them.

The majority opinion lays much stress on the decision of the United State Supreme Court in the case of *Merchants' National Bank of Richmond v. City of Richmond* and other decisions of that court which are to the same effect, and all cited in their opinion. The principal point determined in that case is that a state cannot place a rate of taxation on national bank stock which is higher than that placed upon moneyed capital in the hands of individual citizens invested in loans on securities for a permanent or temporary purpose, where such moneyed capital is in competition with national banks, or the money of national banks, and this for the reason that the imposition of the tax in such a manner would be contrary to the provisions of § 5219, Revised Statutes U. S. We agree with those decisions, and by reason of them the taxing officers of this state can impose no tax upon the stock of national banks. This, however, does not determine one of the material questions presented in this case, viz. the validity of the tax imposed upon state bank stock. We have no hesitancy in stating that the fact that state bank stock is taxed, and that national bank stock will be untaxed is immaterial here. It is not

the business of this court by its decision to place state banks on par with national banks, with reference to the taxation of their stock. Is the tax imposed on the stock of state banks valid? is the question we must decide, together with questions of jurisdiction and other vital questions which we will soon reach. The United States Supreme Court has made its determination with reference to the taxation of national bank stock, but that is as far as it can go; it can determine nothing with reference to the validity of tax on state bank stock, for that is a matter entirely within the jurisdiction of the state and of the state court, and, as we have seen, the state can classify personal property in the state for taxation, and can impose a higher tax on one class than another.

Perhaps national banks whose stock cannot now be taxed for the reasons above stated will have an advantage over state banks whose stock is taxed, but to put them on a plane of equality by annulling the tax on state bank stock is not here the business of this court, and the majority cannot point to a law which authorizes them to do so. The fact that national banks will thus gain an advantage is no reason why state bank stock should escape paying a valid tax, nor should the fact of that advantage in favor of the national banks be allowed to obscure the real questions here presented. Let the majority compare the disadvantage thus suffered by the state banks with the loss and injury the state will suffer if the valid tax on state bank stock is judicially cancelled.

Another point which is of vital importance to this case, and which must be kept steadily in mind, is that, if any tribunal or body of officials has any jurisdiction of the matters herein involved at this time, which we very much doubt, it is the county commissioners.

The petition for the writ shows that plaintiffs had full knowledge of all that the taxing officers did with reference to the taxation of their stock. It shows that the plaintiffs, through its proper officers, under § 2115 (chap. 61) did furnish a statement showing the value of its shares of stock on April 1st; the statement also shows the amount of its surplus, reserve fund, and undivided profits, as required by law. This statement was verified by oath. It further shows that various district, county, and state taxing officers proceeded in exact conformity to law for the perfection of the tax claim against the shares of stock, and did take in due form of law such steps for the assessment, equalization, levying, spreading, and charging of the tax against such shares of stock, and did all such other things as were necessary for the perfec-

tion of the tax claim against such shares of stock. It further shows that at the time of making this statement the owners of the shares of stock claimed that the stock was not liable to taxation, but that they were exempt from the year 1920.

It is clear, therefore, that the plaintiffs concede that every step necessary has been taken by the respective taxing officers—that is, that there was a proper assessment made; that the county equalization board, at its regular meeting in July of 1920 and 1921 properly equalized the assessment, and gave proper notice of review thereof under § 2138, C. L. 1913. It is also clear that the plaintiffs did not appear at the July meeting of either year to object to the taxation of their stock. If there were any objections to the assessment of the stock, which it is conceded has been properly made, or any to the taxation of their stock, they should have been made to the board of county commissioners at their annual July meeting for equalization and review of assessments and levy of taxes, and, if plaintiffs were dissatisfied with the determination there made by the county commissioners, they could have appealed from their decision to the district court, and this under the provisions of § 3298, C. L. 1913. They did not do this, but remained quiet for about two years, and permitted the different taxing officers, the state, and the governmental subdivisions and school district to believe the tax against their stock was available as part of the public revenues, and permitted them to take it into consideration in the determination of the amount of public revenues necessary to be raised. It would seem that they should not now be permitted to question the validity of the tax. They claim to have served a demand at the time of commencing this action on the county commissioners to abate the tax. This did not aid them. Under chap. 172 of the Constitution, and § 3276, C. L., and under laws which have been or may be enacted under the provisions of chap. 173 of the Constitution prescribing the duties of county commissioners, the board of county commissioners have control of the fiscal affairs of the county. After the meeting on the first Monday in July of each year, the meeting at which the board acts as a board of equalization and a board of review, and levies the tax, all proceedings of the meeting must be legally published. Thus again have plaintiffs had full notice of all proceedings.

The determination of whether a tax is valid or invalid is a fiscal affair, of which the board of county commissioners has jurisdiction, and objections, if any, should have been presented to that board at the July meeting. *First National Bank v. Steenson*, 25 N. D. 629, 146 N. W.

1061. It was there that a state bank desiring to challenge the validity of the tax should have made its claim. The county commissioners of each county of this state must first have an opportunity to determine the validity of the tax on the stock of state banks located within their respective counties, and, unless that has been afforded them, and within the time and at the place specified by law, it would seem plaintiffs and others similarly situated have no cause of action, for, having had knowledge of the assessment and of the tax levied, and having made no objection at the July meeting, they cannot be heard thereafter to complain as we shall hereafter show.

A matter to which we desire at this point to call attention, and which the majority opinion entirely overlooked, is chap. 118 of the Session Laws of 1921. It was enacted, we believe, particularly to prohibit the kind of action here brought as well as all actions seeking to prohibit the collection of a tax validly assessed until there is a compliance with its terms. It was also enacted to repudiate and wholly nullify the rule announced by this court in *Bismarck Water Supply Co. v. Burleigh County*, 36 N. D. 191, 161 N. W. 1009, in so far as the rule there announced asserted the power of the court to grant relief against the collection of an unfair or an unequal tax, or one that is claimed to be void, without the matter having been first submitted to the jurisdiction of the county commissioners for determination. The title of the act is:

"An act restricting rights of litigants to bring actions in courts to set aside taxes or assessments or to recover taxes before submitting their claims to the board of county commissioners for adjustment, and dismissing actions, heretofore brought."

The act provides:

"Section 1. *Actions Not Allowed—When.* No action shall be brought in the courts of this state to annul any taxes or tax assessments or to recover back taxes erroneously paid, or any part thereof, until the same shall first have been submitted to the board of county commissioners for adjustment in accordance with the existing law, and all actions hereinafter brought, or heretofore brought which have not been prosecuted to judgment, shall, on motion be dismissed without prejudice, provided, that this act shall not apply to special assessments."

This action was brought since the above statute has been in effect, and it would seem by its terms that the plaintiff is without authority or right at this time to bring this action.

We think we have clearly shown that the tax on state bank stock is valid, and that the plaintiff has no cause of action. Before the majority by their opinion prevent from being collected over \$1,000,000 of taxes now due from state banks, who are the best able financially of any in the state to pay those taxes, and thus cripple the schools, municipalities, and state to such an extent that it will make it very difficult for them to function as they should function, they should give very serious consideration to what has here been stated.

But let it be assumed that the Legislature had not enacted chap. 118, prohibiting the bringing of action of this character without first having submitted the matter to the county commissioners; we still maintain that the plaintiffs have no legal standing in this or any other court. It avers that in this proceeding it is acting in its own behalf, and all other corporations similarly situated. It further shows that the capital stock of the bank is \$10,000, and its surplus and undivided profits \$21,066.65, an aggregate of \$31,066.65, and that the assessment made and returned was against the shares of capital stock and the various owners thereof at that valuation. It appears further that the tax was levied against these shares of stock, and that it was spread and charged against them. and that all steps were taken to make a valid tax against them under the provisions of § 2117, C. L., and that the aggregate of the tax was \$699.01 for the year 1920.

It is now proper to notice that none of its stockholders are a party to the action; none of them are here complaining, and, under the law, who else has a right to complain. There is no showing here that plaintiff has any authority to represent them. There is some statement to the effect that the stockholders are claiming to the plaintiff that the tax against their stock is illegal and void; but that is of no consequence, as they might tell the same thing to any one. The plaintiffs also state in the petition that the sheriff will collect the taxes by distraint against its property, but that statement is without any force or effect, as there is no tax levied against any of its property, but a tax is levied only against the property of stockholders. The shares of stock were properly assessed to their owners respectively as individuals. Plaintiff has no right to complain if the personal property of others is seized to pay their taxes; the only property that the sheriff is empowered to seize in satisfaction of personal property, is the property charged with the tax. *First National Bank v. Steenson*, 25 N. D. 629, 146 N. W. 1061. It is true since that decision § 26 of chap. 132 of the Session Laws of 1890 has

been amended, but that does not destroy the reasoning of that case.

Under § 2117, C. L., to secure the payment of taxes on bank stock or banking capital it is the duty of every bank or managing officer or officers thereof to retain so much of any dividend or dividends belonging to such stockholders or owners as shall be necessary to pay any taxes levied on their shares of stock or interest respectively, and the amount of such taxes shall be a lien on the dividends, the capital stock, and the assets of the bank, and, until it shall be made to appear to the county treasurer that such taxes have been paid, any officer of any such bank or its officers, who shall pay or authorize to pay over, or authorize the paying over of any such dividends or portion thereof, contrary to the provisions of this section, shall thereby become liable for such tax. It is clear that the bank can have no liability if it obeys the law; if it disregards the law, and pays over the dividends, then it may become liable, but that would be its own fault and not that of the law. In this case it has paid over no dividends, and therefore is under no liability. If the tax is not paid, what is the procedure? What is to be done? Very plain is the answer. The county treasurer where the bank is located simply sells the shares of stock or interest of each stockholder to pay the same, just the same as any other personal property would be sold, and, in case of sale, transfers the stock just the same as if it had been sold under execution. It must be kept in mind in this case that the stockholders own all the shares of stock, the capital, the surplus, and undivided profits.

Under § 2116, at all times in every bank there must be kept a full and correct list of the names and residences of the stockholders, the number of shares owned and controlled by each party in interest; this is subject to the inspection of the officers making the assessment, and the cashier of each bank must furnish the assessor with a duplicate copy of all that is required under that section, all of which further shows the plaintiff has no cause of action. Can any one contend that, if the shares of stock, all of which belong to the stockholders, were sold, as provided by law, sufficient would not be realized to pay the taxes? The answer is, Certainly not.

We further say that no other sound or tenable conclusion can be reached than that, even if the law were the same as before chap. 118 was enacted, plaintiff has no cause of action.

Whether the capital stock of state banks is subject to the franchise or excise tax provided by chap. 222 of the Session Laws of 1919, or whe-

ther state banks are subject to the tax provided by chap. 224 of the Laws of 1919, are not questions here presented. The majority opinion contains the following:

"It is not the duty of this court to legislate nor to search for a hidden meaning of plain and hitherto unambiguous words employed by the Legislature. We are not free to enter into the realm of speculation."

If that language is applicable to any opinion, in this case it is that of the majority, for their opinion would seem to in effect judicially repeal and nullify chap. 118 of the Session Laws of 1921. It would seem also to judicially legislate that a taxpayer is not bound to object to his assessment within the time and in a manner fixed by law, in that he can wait until the taxes are placed into the hands of the sheriff for collection, and then assert reasons for nonpayment, which should have been presented to the board of county commissioners, and there is much more that we might say in just criticism of the majority opinion.

It seems clear from all we have above stated that this court should not attempt to assert or assume original jurisdiction herein.

J. V. McCORMICK, Trustee of the Estate of Max Schultze, a bankrupt, Appellant, v. THE UNION FARMERS STATE BANK of New Salem, N. Dak., a corporation and THE FARMERS & MERCHANTS STATE BANK of New Salem, N. Dak., a corporation, Respondents.

(187 N. W. 421)

Appeal and error — action to declare a payment a preference under the bankruptcy law is not triable de novo on appeal.

1. An action, instituted for purposes of declaring a deposit or payment of moneys to constitute a preference pursuant to the Federal Bankruptcy Act, and, as such, tried in the District Court without a jury, is not triable, upon appeal, de novo in the Supreme Court.

Appeal and error — on appeal from judgment as to preference under Bankruptcy Act, the findings are presumed correct.

2. In such action, the findings of the trial court are presumed to be correct unless clearly opposed to the preponderance of the evidence.

Appeal and error — appellant may not complain of failure to make findings on alleged cause of action, not separately alleged and not supported by evidence.

3. For reasons stated in the opinion, it is *held*, that the trial court did not commit error in its findings and conclusions.

Opinion filed March 6th, 1922

Action in District court, Morton county, *Pugh*, J. Plaintiff has appealed from a judgment and has demanded a trial de novo.

Affirmed.

Norton & Kelsch, for appellant.

"The law provides that in order that a payment shall be voidable as a preference, it is necessary that a creditor should have been insolvent at the time it was made." 7 C. J. Bankruptcy, p. 150, § 247, and authorities cited.

"The Courts have held that the petition filed is competent evidence to prove the insolvency of the bankrupt at any time within the four months to the filing thereof." *Utah Credit Association v. Boyle Furniture Co.* 26 Am. Bank. Rep. 867.

Newton, Dullam & Young, for respondents.

"To establish a voidable preference or a fraudulent conveyance it is necessary that the debtor shall have transferred to a creditor some portion of his own property. This is elementary of course, and is laid down in § 266, 7 C. J. 165 cited by plaintiff's counsel." *Newport Nat'l Bank v. National Herkimer County Bank*, 255 U. S. 178, 56 L. ed. 1042; *Goode v. Elwood Lodge*, 160 Ind. 251, 66 N. E. 742; *Aiello v. Crampton*, 120 C. C. A. 189, 201 Fed. 891.

In the last case the following is quoted with approval:

"The one thing absolutely essential to a preference is that the bankrupt transfers some portion of his property to the creditor. If the creditor received none of the bankrupt's property there is no preference."

The question arises: What constitutes reasonable cause to believe that a preference would be effected? It must be positive evidence. Language of the same import has been most clearly discussed in *Grant v. National Bank*, 97 U. S. 80, 81, 24 L. ed. 971.

Whether such 'reasonable cause to believe' existed is a question of fact and the burden of proof is upon the trustee. *Pyle v. Texas Transportation & Terminal Co.*, 238 U. S. 90; 59 L. ed. 1215,

There must be an actual intent to hinder, delay and defraud unlawfully and not merely an intent to prevent from collecting claims. *Collier Bankruptcy*, 8 ed. p. 776; *Coder v. Arts*, 82 C. C. A. 91-95.

And in *Sargent v. Blake*, 87 C. C. A. 213, 217, Judge Sanborn says:

"It is every intent to hinder, delay and defraud creditors unlawfully only, not every intent to hinder or delay them in collecting or prevent them from collecting their claims, that avails to avoid a transfer under that section."

Statement.

BRONSON, J. On January 23, 1918, Max Schultze filed a voluntary petition in bankruptcy. Prior thereto, on October 23, 1917, he and one Goeschel had made a written agreement, which provides that the balance due upon the purchase price of two sections of land in Montana, namely, \$2,050, should be deposited in the First National Bank of New Salem, now reorganized as the defendant bank, that \$400 out of such deposit should be paid to one Pierson, and the remainder to the intervenor herein dependent upon the determination of litigation, then pending in Montana, concerning the lands. The First National Bank of New Salem accepted the terms of the deposit; the amount of such deposit was paid by Goeschel into the bank. The plaintiff is the trustee of the bankrupt's estate. He instituted this action against the depository bank. His complaint alleges that such deposit constitutes a preference under the terms of the Bankruptcy Act (U. S. Comp. St. §§ 9585—9656), and was made for the purposes of hindering, delaying, and defrauding the bankrupt's creditors. The trustee seeks to recover the amount of the deposit. The defendant, in its answer, requests permission to pay the money into court for disposition under the court's order. The parties stipulated that the Farmers' & Merchants' State Bank might intervene and defend in this action. For its complaint in intervention the intervenor asserts that the deposit so made was not the property of the bankrupt, but that of his son. It denies the allegations of the complaint concerning the creation of a preference and a deposit made to defraud creditors. The action was tried to the court without a jury. The

bankrupt testified that Goeschel was not indebted to him on October 23, 1917; that prior to that time he had transferred two sections of Montana land (sections 10 and 11) to Goeschel; that he had owned section 11, and his wife section 10; his son, Fred, had owned section 34. Goeschel desired two sections together. His son, Fred, had agreed to transfer section 34 to his mother and to receive therefor the deposit of \$2,050. The bankrupt had contemplated paying some of this deposit money on his son's note, upon which he was surety, at another bank, but such bank did not accept the offer, and accordingly he made this agreement of deposit acting as agent for his son. The bankrupt then owed the intervener an amount, unsecured, considerably in excess of \$1,650. He made this arrangement to pay \$400 to Pierson which was for attorney's fees, for services rendered and to be rendered in a Montana litigation; also the arrangement to pay the intervener, upon an understanding with his son that he would pay him later out of his own property, to take care of the note that he had signed at the other bank with his son. The son, as a witness, testified similarly concerning the transaction, and that his father acted as his agent with his consent. The trustee testified that the assets of the bankrupt had been converted into cash excepting a section of land in Montana; that such assets were insufficient, in any event, to pay the creditors an amount exceeding 10 per cent. of their claims. The cashier of the intervener testified that the bank had an unsecured note for about \$2,000 against the bankrupt. He knew something about the property of the bankrupt; he knew that he was hard-pressed for money and unable to pay the bank; that the bank had renewed Schultze's notes from year to year and had not pressed him for money. It was stipulated that the deposit still remains in the depository bank. It appears from the schedules of the bankrupt that there was listed a secured indebtedness amounting to \$1,894.71 owing intervener; also, an unsecured claim of \$1,500 and one of \$120, evidenced by notes not signed by the bankrupt, but upon which the bankrupt assigned a partnership obligation owing the intervener. It also appears, from a certified copy of a judgment rendered in Montana, that the trustee herein was entitled to a conveyance of section 34 upon the ground that the wife of the bankrupt held such land in trust for him.

The trial court found that the litigation in Montana resulted in a determination that Goeschel was the owner of the land; that the intervener did not have knowledge of the insolvency of the bankrupt when

the agreement was executed, nor of facts relative thereto so as to afford reasonable grounds of belief that the deposit would constitute a preference; further, that the preponderance of the evidence does not show that the money deposited was the property of the bankrupt, nor that the bankrupt's estate was diminished by the deposit. The trial court determined that no preference was created, and that the intervener was entitled to the benefit of such deposit. Judgment was entered accordingly. The plaintiff has appealed from such judgment. The plaintiff demands an entire review and trial de novo of the action. He contends that the trial court erred in finding that the intervener did not possess knowledge of the bankrupt's insolvency and of such facts relative thereto so as to afford reasonable grounds of belief that the payment of the deposit would create a preference; also in its findings that the evidence does not establish the deposit to be the property of the bankrupt, and that the bankrupt's estate was not diminished by such deposit; further, that the trial court erred in concluding, upon the evidence, that a preference was not created, and in failing to make findings and conclusions upon the issue presented that the deposit was made for the purpose of cheating and defrauding the bankrupt's creditors.

Decision.

Plaintiff's cause of action is founded upon the provisions of the federal Bankruptcy Act concerning the creation of a preference (7 C. J. 148), and concerning transfers made for the purpose of hindering or defrauding creditors (7 C. J. 170). Such cause of action presents questions of fact for determination by a jury. The plaintiff, in his prayer for relief, seeks a money judgment against the defendant and intervener. This cause of action sounds in law and not in equity. Accordingly this court, upon appeal from the judgment concerning such cause of action, does not try the action de novo. The so-termed Newman Act, as heretofore existing or as now amended, does not apply. Section 7846, C. L. 1913; chap. 8, Laws 1919; *Novak v. Lovin*, 33 N. D. 424, 157 N. W. 297; *St. A. & Dak. Elev. Co. v. Martineau*, 30 N. D. 425, 153 N. W. 416; *Barnum v. Land Co.*, 13 N. D. 359, 100 N. W. 1079; *Laffy v. Gordon*, 15 N. D. 282, 107 N. W. 969.

The appeal, therefore, is before this court for review upon specifications of error. The findings of the trial court are presumed to be

correct, unless clearly opposed to the preponderance of the evidence. *Richards v. N. P. Ry. Co.*, 42 N. D. 472, 173 N. W. 778; *Stavens v. Nat. Elev. Co.*, 36 N. D. 9, 161 N. W. 558; *McLennan v. Plummer*, 34 N. D. 269, 158 N. W. 269.

Upon a review of the entire record we are of the opinion that the findings of the trial court should not be disturbed. The plaintiff is not in a position to complain concerning the failure of the trial court to make findings, upon the allegations of the complaint, that the deposit was made for the purpose of hindering or defrauding creditors. The trial court permitted the plaintiff, at the trial, to amend his complaint so as to state a cause of action: Parts of the pleadings were read into the record at the trial. The plaintiff in open court stated the nature of the action to be one to recover on an alleged preference. The alleged cause of action, that the transfer was made for hindering and defrauding creditors, was not separately stated as a cause of action. The record does not establish evidence to support the same as a separate cause of action. Evidently the trial court regarded such allegations to be in connection with the cause of action for an alleged preference, and not to be a separate cause of action. The findings cover the issues presented upon the evidence.

The judgment is affirmed, with costs.

ROBINSON, J., concurs.

CHRISTIANSON, J. (concurring). This is an action brought by a trustee in bankruptcy to set aside an alleged preferential or fraudulent transfer.

It is alleged in the complaint:

(1) That such transfer was made by the bankrupt while insolvent, and within four months before the filing of the petition in bankruptcy, for the purpose and with the intent to prefer the intervenor and enable it to obtain a greater percentage of its debt than any other creditors of the same class.

(2) That such transfer was made "by said Max Schultze with the purpose and intent on his part to hinder, delay, and defraud his creditors, or some of them, in the collection of their just debts, and with the purpose and intent to hinder, delay, defraud, and prevent all of his

creditors from receiving the same or an equal share in, from, and out of the assets of his estate, in violation of the Bankruptcy Act."

The trial court made findings to the effect:

(1) That it was not established by a preponderance of the evidence that the moneys transferred to the intervener belonged to the bankrupt, or that his estate had been diminished by the deposit and payment thereof.

(2) That the intervener did not know, and had no reasonable cause to believe, that the transfer or payment of the moneys to it would effect a preference.

These findings are based upon the testimony of witnesses who were called and testified orally in the trial court, so the trial judge had opportunity, not only to hear their testimony but to observe their demeanor while testifying. And in my opinion both findings are correct. The first finding is decisive of the action, for manifestly there can be neither disposition of property with the intent to hinder, delay, or defraud creditors, nor a preferential transfer, within the purview of the Bankruptcy Act, unless the property transferred was something belonging to the bankrupt, which his other creditors had a right to subject to the payment of their claims. 7 C. J. 165, 166. The burden was upon the plaintiff, trustee, to establish that the moneys sought to be recovered belonged to the bankrupt, and were by him transferred in violation of the provisions of the Bankruptcy Act. 7 C. J. 269. This burden was not sustained. On the contrary, the preponderance of the evidence sustains the contention of the intervener that the moneys in controversy did not belong to the bankrupt, but belonged to Fred Schultze.

GRACE, C. J., and BIRDZELL, J., concur.

STATE OF NORTH DAKOTA, Respondent, v. DAVID H. UGLAND,
Appellant.

(187 N. W. 237)

Criminal Law — verdict based on substantial evidence is binding on Supreme Court.

1. The verdict of the jury, based upon substantial competent evidence, is binding on the court. Following *State v. Cray* 31 N. D. 67, 153 N. W. 425.

Embezzlement — conditions as to "possession" of property defined.

2. To constitute the crime of embezzlement, the possession of the property appropriated must have been, by the owner or for or in his behalf, intrusted to the accused so that a relation of trust and confidence relative to the thing appropriated is created, and it must appear that the accused had access to or possession of the property embezzled by virtue of such relation of trust and confidence.

Embezzlement-Larceny — taking of grain by party hired at monthly salary to assist in handling held larceny.

3. The owner of grain hired accused on a monthly salary to assist in harvesting, threshing, caring for and transporting said grain to market. *Held*, that the possession of said grain, under such circumstances, remains in the owner thereof; and if accused having access to and custody of the grain, for such purposes, stealthily takes and carries away the same, or a portion thereof, without the consent of the owner, and stealthily converts the same to his own use he takes it from the possession of the owner, and is properly informed against for the larceny thereof.

Opinion filed Mar. 6. 1922.

Appeal from the District court of Ramsey county, N. D., *Buttz*, J.

David H. Uglund was convicted of the crime of grand larceny and appeals.

Affirmed.

Palda & Aaker, for appellant.

Embezzlement under § 9929 C. L. 1913 is "The fraudulent appropriation of property by a person to whom it has been intrusted."

To constitute larceny there must be a trespass in the original taking.

One who has acquired possession bona fide cannot thereafter commit larceny of the thing so possessed. 25 Cyc. 22.

On the same principle, where an owner of property assigned it to another but retained possession and afterwards converted it to his own use, this was not larceny. 25 Cyc. 493.

It has ever been held that the same rules with reference to the property embezzled, and the ownership thereof, and the fraudulent intent to convert the property apply in cases of embezzlement that apply in cases of larceny. On this point Wharton says: "Unless the pleader is relieved from this exactness by special statute, the goods and ownership must be set out and proved with the same exact completeness as in larceny." See Wharton Crim. Law 1044; See also State v. Lyon, 45 N. J. Law 272; Livingstone v. State, 16 Tex. App. 652; State v. Collins, 4 N. D. 433; 15 Cyc. 491; State v. Lindley, (S. D.) 83 N. W. 257.

Under an indictment for larceny one cannot at common law be found guilty of a different offense such as embezzlement. 25 Cyc. 104.

Sveinbjorn Johnson, Attorney General, (*Spalding & Shure* of Counsel), for respondent.

"In the case of State v. Vincent for grand larceny, the accused in the indictment was charged with stealing the property of one D. H. Murphy,—the proof established the ownership of property in South Dakota Cattle Company, Murphy being only foreman for corporation, and that he had no interest or lien upon the property and was only hired by the month, Held, the indictment sufficient. State v. Vincent, 16 S. D. 62, 91 N. W. 347.

In the case of Ward v. People, 3 Hill 395, the accused was indicted for stealing the property of one Flagg,—proof established the fact that Flagg himself had stolen the property from the true owner. It was held by the New York Court "*that the possession of the property in the thief was sufficient to make it the subject of larceny.*"

In Sharp v. State, 85 N. W. 39, the information alleged the goods stolen were the property of the railway company. The evidence established a special ownership only, the goods being stolen from the railway company while in transit. Held sufficient to sustain a conviction for larceny.

"Wherein a prosecution for stealing hogs, there was no evidence that defendant had any right to property alleged to have been stolen, failure

to establish ownership in persons alleged to be owners in indictment is not fatal, where there was evidence tending to identify property as being property described in indictment. *People v. Bolanger*, 71 Cal. 17, 11 Pac. 799.

"Proof that person alleged to be owner had special property or that he held it to do some act upon it or for purpose of carriage or *in trust* for the benefit of another, would be sufficient to support allegation of ownership in indictment." *People v. Nelson*, 56 Cal. 77.

"Fact that property stolen was in possession of person alleged to be owner at time of taking sufficient to establish ownership." *People v. David*, 97 Cal. 194; *People v. Oldham*, 111 Cal. 652, 44 Pac. 312.

It is proper in a prosecution for larceny to describe the property as that of the real owner or of the person in possession and it may be alleged to be the property of one who is in possession as bailee, agent, *trustee*, executor or administrator, and such *bailee, trustee, etc., may be alleged to be the owner thereof by name without describing his trust connection*. *State v. Tillett*, (Ind.) 89 N. E. 589; Wharton's *Crim. Law*. 10th ed. 750; McLain's *Criminal Law*, 546, 22 Cyc. 462; *United States v. Barlow*, 24 Fed. Cas. 1007; *State v. Summerville*, 21 Me. 14, 38 Am. Dec. 248; *State v. Stanley*, 48 Iowa, 221; *Edison v. State* 47 N. E. 625.

It is well settled that the ownership may be laid either in the real owner or in the person in whose possession the property was at the time of the theft as bailee, agent, *trustee*, executor or administrator. 17 R. C. L. 66; 17 R. C. L. 68; *Hildebrand v. People*, 56 N. Y. 394, 15 Amer. Rep. 435; Wharton's *Crim. Procedure*, 10th ed., 861.

A person obtaining possession of money for a pretended purpose of betting on a sham race, and converting it, has been held guilty of larceny. *State v. Ryan*, Ore. 1 L. R. A. (N. S.) 862.

If the defendant, with a design to steal the property, obtains possession of it by fraud, the taking of it is larceny. Gillett *Crim. Law*, 2nd ed. 540; *Crum v. State*, 148 Ind. 401, 47 N. E. 833.

Where any person, whether servant or not, has the bare charge or care of another's effects, the legal possession remaining in the owner, the party is guilty of larceny who fraudulently converts it to his own use. *Johan Williams v. State of Ind.* 75 N. E. 875, 2 L. R. A. (N. S.) 248.

PUGH, J. Defendant was convicted of the crime of grand larceny, and, from the judgment entered on the verdict, he appeals to this court.

August 10, 1918, and October 12, 1918, to satisfy creditors and avoid bankruptcy proceedings, the defendant executed certain agreements, whereby for the benefit of his creditors, he assigned and delivered to W. H. Shure, as trustee, all his property, both real and personal (excepting household goods and homestead). The real property consisted of upwards of 13,000 acres of land.

Surrounded by lands owned by defendant was a quarter section of land formerly owned by B. G. Johnson, against which was a second mortgage. The mortgagee therein sold the same to the defendant, the assignment running to the bank of which Uglund was then cashier. The mortgage was foreclosed, the land sold, and sheriff's certificate issued in the name of the bank February 2, 1918, and prior to the assignment for the benefit of creditors made to Shure. Thereafter and prior to the assignment to Shure, defendant entered into an agreement with Johnson whereby defendant agreed to farm said quarter section of land during the farming season of 1918 and to apply one-third of the crop raised and harvested and threshed from the land, that being Johnson's share of the crop, after deducting one-third of the threshing bill, to the payment of the sheriff's certificate aforesaid; the remaining two-thirds to be defendant's share of the crop. A crop of flax was raised on the land, and it is a portion of this crop, to wit, 112 bushels thereof, which is the subject of the alleged larceny. After the execution of the trust agreements, the trustee, Shure, hired defendant in August, 1918, and agreed to pay him \$100 per month wages, to assist in caring for the crops.

During the threshing of the crops on the so-called Johnson land, in the temporary absence of the trustee, Shure, and, without the knowledge of Johnson or the trustee, Shure, defendant directed one of the workmen, who was hauling grain from the threshing machine, to haul a portion of the flax from the machine and place it in a granary situated some distance from the Johnson land, but which granary was situated on land which defendant had theretofore transferred to Shure, as trustee, as aforesaid. One hundred twelve bushels of said flax was placed in said granary, where it was permitted to remain two weeks. The remainder of the flax on the Johnson land was hauled to an elevator at Knox and there placed in a special bin, and report thereof given by de-

fendant to Shure. Shure had given directions that all flax threshed from the land which defendant had transferred to him, including the Johnson quarter, be hauled to an elevator at Knox and placed in special bin. The flax placed in the granary, as aforesaid, to wit, 112 bushels, was thereafter, by direction of defendant, without the knowledge of Shure or Johnson, hauled to the St. Anthony & Dakota Elevator at Pleasant Lake, N. D., by one Weaver, an employe of the trustee, Shure, and there stored in the name of one E. N. Dokken of Knox, N. D., with whom defendant had had business dealings for many years. About six days later it was sold by, or by direction of, the defendant without the knowledge of Shure or Johnson. The draft or check issued in payment therefor was delivered to defendant and by him handed to Dokken with the request that he indorse the same. Dokken indorsed it by writing his name on the back thereof and handed it back to the defendant, who received the money for it.

The evidence further shows that during absences of the trustee, Shure, from the farm, defendant gave instructions to the workmen.

The grounds and reasons which defendant urges for a reversal of the judgment are:

(a) The evidence is insufficient to justify the verdict, in that he alleges there was no proof of ownership in the trustee of the flax taken by defendant; and

(b) The offense, if any, for which the defendant might have been prosecuted, under the facts in the case, was embezzlement, not larceny.

1. It was the contention of the defendant that the flax in question was the property of Johnson. There is no contention, by either party, that the bank, in whose name the assignment of the mortgage was, and to which the sheriff's certificate was later issued, had any interest in this flax. Johnson's right to possession of the flax depends upon the terms of his agreement with defendant, and the question of whether the verdict of the jury is based upon substantial, competent testimony, in turn, rests upon the testimony relative to the agreement between the defendant and Johnson, and, is in brief, as follows: Shure testified as a witness in the case that defendant informed him that he had agreed with Johnson to farm this land during the season of 1918, sow the cultivated land to flax, and in case of redemption from the foreclosure was to get a share of the crop. He further testifies that Johnson was present during all the time this flax was being threshed; that he knew it

was being threshed; that he knew it was being delivered to the elevator at Knox. The record is silent as to whether Johnson made any objection thereto.

The agreement between Johnson and defendant is further evidenced by letter written by defendant to Johnson, care of Attorney Siver Serumgard, in which he says:

"Mr. J. E. McCarthy has just showed me your letter of the 7th inst. regarding renting your land foreclosed on by Security Bank of Knox, and I accept your terms stated therein and will apply one-third of the proceeds of the flax crop after payment of one-third of the thresh bill by you on the above foreclosure."

The defendant testified the agreement with Johnson was to the effect that, if there was not sufficient money derived from the one-third of the crop to take up the certificate, then the proceeds of such one-third were to be paid over to Mr. Johnson. Neither the state nor defendant called Johnson as a witness.

From this evidence, somewhat conflicting, the jury might reasonably find, as they did find, in arriving at their verdict, that Shure was the owner, as trustee, of the flax in question, or that as such trustee he was entitled to the possession thereof.

The question of ownership or right to possession of the flax was fairly submitted to the jury by the instructions of the trial court. In his instructions the court said:

"It is the claim of Mr. Ugland that he took this property, not intending to steal it, but that he took, as he claims, in good faith; on behalf of Mr. Johnson, or in order to protect the rights of Mr. Johnson, as he claims; and, in passing on the guilt or innocence of the defendant, you shall carefully consider the claims of the defendant in that respect, as well as all other claims he makes in this lawsuit."

That the question of the ownership or right to possession of this flax was actually considered by the jury is further shown by the request of the jury, after retiring, for further instructions concerning this phase of the case. The jury was brought into court, and, after a colloquy between members thereof and the judge, the following additional instruction was given:

"To make the taking larceny, the grain must either have been the property of Mr. Shure in his capacity as trustee, or else in his possession as trustee of the Ugland estate under the farming agreement of

Ugland with Johnson, and the taking must have been by Mr. Ugland with the intent and purpose in Ugland's mind to steal it. If Mr. Ugland took it from the Shure's possession in good faith and with the intent to protect Johnson's interest, he would not be guilty of larceny, etc."

No complaint is made with reference to these instructions.

The finding of the jury is binding on this court when based upon substantial, competent evidence that, in any reasonable view thereof which the jury has the right to take, justifies the verdict. *State v. Cray*, 31 N. D. 67, 153 N. W. 425; *State v. Wheeler*, 38 N. D. 456, 165 N. W. 574; *State v. Burcham* (N. D.) 176 N. W. 657; *State v. Paper-nak* (S. D.) 181 N. W. 955; *Fink v. State*, 173 Wis. 264, 180 N. W. 812.

2. The defendant insists, secondly, that if the evidence shows the commission of a crime by him in connection with this flax, is that of embezzlement, not larceny, and for that reason the judgment should be reversed and he be discharged. Section 9913, C. L. 1913, defines "larceny" as "the taking of personal property accomplished by fraud or stealth, with intent to deprive the owner thereof." Section 9929, C. L., defines "embezzlement" as "the fraudulent appropriation of property by a person to whom it has been intrusted."

The distinction between these two crimes is at once apparent, and relates chiefly to the manner of acquiring the possession of the property stolen or appropriated. In larceny there must appear the trespass and the appropriation of the property; while in embezzlement there is a fraudulent conversion after its possession has been intrusted to the accused, or after it has lawfully come into the possession of the accused by virtue of his employment with the owner thereof. It is the essence of the crime of embezzlement that the misappropriation be of property intrusted to the defendant.

The word "intrusted" means something more than naked possession or custody of or access to the property appropriated. Webster's New Int. Dic. defines it: To confer a trust upon; to deliver to another something in trust, or to commit something to another with a certain confidence regarding his care, use or disposal of it. See, also, *State v. Collins*, 4 N. D. 433, 61 N. W. 467; *People v. Ehle*, 273 Ill. 424, 112 N. E. 970; *Colip v. State*, 153 Ind. 584, 55 N. E. 740, 74 Am. St. Rep. 322; *People v. Dougherty*, 143 Cal. 593, 77 Pac. 466.

Something more than mere physical access or opportunity to ap-

proach or take the property is intended by the statute in order to make the appropriation embezzlement. There must be a relation of trust and confidence reposed in the recipient of the thing appropriated, and it must be by virtue of such relation of trust and confidence that the accused has access to or possession or control of the property embezzled.

"There is a well-settled distinction in law between the possession of goods and the mere charge or custody and this distinction plays an important part in the law of larceny. The owner of goods may deliver them to another in such manner or under such circumstances as to give the other the bare custody without changing the possession in the eye of the law. The possession in such case remains constructively in the owner, and if the person having the custody converts the goods to his own use, with felonious intent, he takes them from the constructive possession of the owner, and commits a trespass and larceny." Clark and Marshall on the law of Crimes, pp. 451, 455; *Chanock v. United States*, 267 Fed. 612, 50 App. D. C. 54, 11 A. L. R. 799, and note to the case; note to 888 Am. St. Rep. 566; 17 R. C. L. 10; R. C. L. 9; R. C. L. 1273; 25 Cyc. 20; 20 C. J. 418; 13 A. L. R. 314, note.

Defendant insists that he was agent of the trustee, and that as such he was intrusted with, or had in his control, the crops aforesaid, for the use of the trustee, and that therefore, under § 9933, C. L., the crime committed, if a crime was committed, was embezzlement, not larceny.

In our opinion the evidence in this case does not establish the proposition that the flax in question, or, indeed, any of the crops raised on the land transferred by the defendant to Shure, as trustee, was placed in the "possession" of the defendant and "intrusted" to him by Shure, within the legal contemplation of those terms. In other words, we are of the opinion that there is sufficient legal evidence from which the jury could reasonably find that the defendant did take, steal, and carry away said flax, by fraud and stealth, with the intent then and there to deprive the owner thereof. As we read the record, the uncontradicted evidence is that Shure took possession of all the real estate and personal property formerly belonging to defendant and wife, including the Johnson land. The defendant was employed by the trustee to assist in harvesting, caring for, and threshing of the grain, and delivery thereof to the elevator designated by the trustee. The defendant, it is true, looked up prices, elevators, and had the elevator buy portions of the grain; but this was all done under the direction of the trustee, and as

the servant of the trustee. When grain was delivered to the elevator, storage tickets were issued in the name of Shure; when sales were made, the checks or drafts given by the elevator agent in payment of such sales were made out payable to Shure; the 112 bushels of flax taken and sold by defendant when threshed was placed in Shure's granary; said flax was in his possession while in the granary; it did not leave his possession until the defendant took it in the manner hereinbefore recited. Shure did not, by any act of his, divest himself of such possession.

Following the well-established principles of law herein set forth, it must be held that the defendant in taking and carrying away said flax, to an elevator other than that designated by the master, in storing it in the name of Dokken, and selling and disposing of it stealthily, committed a trespass, and he was properly charged with the larceny of the grain.

The judgment of the district court is affirmed.

GRACE, C. J., and CHRISTIANSON, and BIRDZELL, JJ., concur.

ROBINSON, J. (specially concurring). In March, 1920, in the district court of Ramsey county, before Hon. C. W. Buttz, presiding judge, defendant and appellant was convicted of the crime of grand larceny and sentenced to imprisonment in the state's prison for the term of one year. The information charges that on November 2, 1918, in Benson county, the defendant did commit the crime of grand larceny; that he did then and there feloniously take, steal, and carry away by fraud and stealth, 112 bushels of flax of the value of \$406.58, the property of W. H. Shure, with intent to deprive the owner thereof. Appellant claims that the evidence does not justify the verdict.

(1) That there is no evidence that the complaining witness, W. H. Shure, had any title to the flax.

(2) That the flax was the property of one Johnson.

(3) That defendant has in his possession the proceeds of the flax and is able and willing to pay the same to Johnson or to Shure, as their right may be determined in a civil action.

(4) That the offense alleged was in the nature of embezzlement, and not larceny.

The information avers the facts constituting the offense which is

justly named "grand larceny." If it please the defendant, he may call it "grand embezzlement." The name is of little consequence, as the offenses are alike and the penalty for either offense is precisely the same. The evidence shows that defendant committed the offense as alleged in the information. He became insolvent and to avoid bankruptcy proceedings and to satisfy claims of his creditors he conveyed to W. H. Shure his interest in about 13,000 acres of land with the crops thereon, and, with the exception of his homestead, he conveyed all his other property of every name and nature. And then he went with Shure and pointed out the property. He pointed out a quarter section known as the Johnson land, which the defendant held under a cropping lease and on which he had 100 acres of growing flax. Shure took possession of all the property. He paid for the harvesting and for the threshing of the flax. He hired defendant at \$100 a month to look after the harvesting and threshing of the crops on the land. In time defendant gave Shure a statement showing 1,661 bushels of flax threshed and put in a special bin in the elevator at Knox. It included 770.42 bushels of flax grown and threshed on the Johnson land; but it did not include 112 bushels of the flax which defendant had caused Harvey Weaver to carry away from the Johnson land and put in his own granary and keep for two weeks and then to haul and deliver to the St. Anthony elevator at Pleasant Lake and to the order of defendant. Then, on November 13, 1918, defendant called at the elevator and obtained for the 112 bushels of flax a check for \$406.58, payable to the order of E. N. Dokken, a merchant at Pleasant Lake, who knew nothing of the flax and who had no interest in it. Defendant took the check to Dokken and asked him to indorse it, which he did, and returned it to defendant asking no questions. Then defendant cashed the check and gave no account of it. The whole affair was done so well and stealthily that Shure did not learn of it for over a year. The party who hauled the flax to Pleasant Lake elevator was given a jag for himself. He did not tell or make a fuss. No person told. No person knew anything of it only a mere circumstance—a link in the chain. The record does not show how Shure came to discover it; but sure he did it. The discovery makes one think of the powerful Sampson and his riddle. He wedded a daughter of the Philistines and at the marriage feast put forth a riddle to 30 of his Philistine guests. It was this: "Out of the eater came forth meat and out of the strong came forth sweetness." Though the riddle was deep and obscure, in due time the correct answer was given thus:

"What is sweeter than honey and what is stronger than a lion?" The answer of Sampson was: "If ye had not plowed with my heifer, ye had not found out my riddle." With the consent, of Ugland, when in the penitentiary on conviction for embezzlement, Shure obtained for his wife a divorce. Those who cunningly steal flax do not always keep in mind the verse of Robert Burns:

"Go tell the secrets of your breast
When you meet with your bosom crony.
But always keep a something left
You'll never tell to ony."

Concerning the guilt of the defendant there is not a particle of doubt.

BRONSON, J., being disqualified, did not participate.

ANN NICOLINE CHARLSON, Appellant, v. T. E. CHARLSON,
et al., Respondents.

(187 N. W. 418.)

Executors and administrators—statute held to permit \$1,500.00 exemption in addition to widow's absolute exemptions.

1. Section 8725 C. L. 1913 construed and held to permit an exemption of \$1500.00 to the surviving widow in addition to the absolute exemptions.

• **Husband and wife**—complaint to set aside antenuptial agreements made without disclosure of husband's wealth held to state cause of action.

2. A complaint alleging the making of antenuptial and postnuptial agreements without disclosure of large property interests of the husband is *held*, for reasons stated in the opinion, to state a cause of action in equity to invalidate the same.

Husband and wife—complaint alleging fraudulent conspiracy and misrepresentations by heirs concerning antenuptial and postnuptial agreements held to state cause of action in equity.

3. A complaint alleging fraudulent conspiracy and misrepresentation by the heirs of a deceased person concerning widow's rights in antenuptial and postnuptial agreements and the allowance of exemptions is *held*, for reasons stated in the opinion, to state a cause of action in equity for the allowance of her exemptions out of the estate.

Opinion filed March 11, 1922.

Equitable action in District court, Williams county, *Lowe, J.* to set aside ante-nuptial and post-nuptial agreements and the final decree in an estate. The plaintiff has appealed from an order sustaining a demurrer to the complaint.

Reversed.

Kvello & Adams, for appellant.

"In a proceeding for the administration of the property of a decedent, a county court is without jurisdiction to determine the validity of an ante-nuptial settlement had between deceased and his widow." *Wilson v. Wilson*, 132 Pac. 67.

"Ante-nuptial agreements made prior to marriage between the parties about to be married, concerning and representing their individual and separate property may be upheld as valid as to property exclusive of the homestead exemption as defined by the laws of North Dakota, but of the homestead exemption such ante-nuptial agreements are void as being contrary to public policy and welfare and protection of the home, and such homestead exemptions cannot be waived before the arrival of the appropriate time of claiming it." *Swingle v. Swingle*, 36 N. D. 610, 162 N. W. 912; Cyc. Vol. 21 p. 1250.

"All parties having or claiming an interest in real property must be made parties to actions concerning the title thereof." *Murdock v. Hanson*, 23 N. D. 280, 136 N. W. 236.

The further fact that all the defendants may not be equally affected makes no difference. Section 256, Vol. 1 Corpus Juris, p. 1093.

"In those states whose statutes provide a complete system of probate procedure and confer exclusive jurisdiction of estates of deceased persons upon probate courts during the administration of the estate. It becomes necessary to invoke the aid of equity to accomplish some particular thing that tribunal will after the accomplishment of the particular purpose send the case or cause back to the probate court for further administration rather than take the entire proceedings away from the usual form. The jurisdiction of equity should cease with its necessity." *Reinholdt v. Gartile*, 33 Ark. 727; *Burton v. Burton*, 21 Pac 847, (Calif.) *Cawdrey v. Hitchcock*, 103 Ill. 262; *Domestic Missionary Society, etc. v. Pells*, 54 Am. St. Rep. 888 (Vermont) 35 Atlantic, 467.

Craven & Converse, for respondents.

"A party who seeks the aid of equity in relieving against a judgment on the ground of fraud must set forth the specific facts constituting the alleged fraud, and it is not sufficient to incorporate a general allegation of fraud in the complaint." *Bergen Twp. v. Nelson Co.* 33 N. D. 247; *Marshall-McCarthy Co. v. Holloran*, 15 N. D. 71; 9 *Ency. Pl. & Pr.* p. 691; 16 *Cyc.* 231; 22 *Cyc.* 929; 23 *Cyc.* 1041; 9 *Ency. Pl. & Pr.* pp. 691, 692; *Boyd v. Wyley*, 18 *Fed.* 355.

With the knowledge possessed by plaintiffs, due diligence required that they should make some inquiry and investigation as to what disposition their father had made of his property. See also as bearing upon the question general the following cases. *Shain v. Sresouich*, 104 *Cal.* 405, 38 *Pac.* 51; *Mulcahey v. Dow*; *Estate of Davis*, 136 *Cal.* 595, 65 *Pac.* 412; *Estate of Townbley*, 120 *Cal.* 350, 52 *Pac.* 815; *Goodrich v. Ferris*, (C. C.) 145 *Fed.* 884.

The final decree pleaded recites notice was given and served, the complaint conclusively, therefore charges plaintiff with actual notice of the distribution and final decree, such being the facts pleaded she is estopped to come into a court of equity and ask the said final judgment be vacated. *Fisher v. Dolwig*, 39 N. D. 161; *Rickert v. Wardell*, *Minn.* 170 N. W. 915.

Within the limitations incident to the subject matter specified in the constitution, our probate court possesses superior and general jurisdiction, and have implied power to do whatever is reasonably necessary to carry out the powers expressly given." *State v. Brown*, 113 *Minn.* 1, 129 N. W. 136, 139; *State ex rel. Benz v. Probate Court*, (*Minn.*) 158 N. W. 234; *In re Prebost Estate*, S. D. 168 N. W. 630.

Statement.

BRONSON, J. This is an equitable action to invalidate antenuptial and postnuptial agreements and to set aside a final decree in the estate of a deceased person. The plaintiff, the widow, has appealed from an order sustaining a demurrer to the complaint.

The facts, appearing in the complaint, and necessary to be stated, are as follows: The plaintiff, aged 59 years, married the deceased on February 19, 1916. Prior thereto she had acted as his housekeeper. On August 15, 1914, a former wife of the deceased had died leaving him

and five children surviving. In order to obviate objections of the children to the marriage of the plaintiff and deceased, an antenuptial agreement was made. This agreement gave to the plaintiff during their married life the use and occupancy of the deceased's home in Ray, the same upon her death to be the property of the deceased and his heirs. The deceased agreed to maintain the plaintiff as his wife in a manner suitable to his means and station in life; further, that upon the death of the deceased the home should pass to the plaintiff in the event that she should survive him. The deceased released all interest in property owned by the plaintiff; the plaintiff released any and all claims to property of the deceased and any property that might go to her by the death of the deceased, including any statutory allowances. This agreement was made four days before their marriage. Plaintiff alleges that this agreement was secretly prepared; that she knew nothing of the financial worth of the deceased; was not represented by any counsel nor by any friend; that she did not fully understand the contract; that the deceased, her prospective husband, did not inform her of his financial worth, but stated that everything would be all right and urged her to sign so that they could be married and he would see that she would be treated all right; further, that she had no business experience and had only gone to school until about 12 years of age; that then her property interests did not exceed \$1,000, which fact was known to the deceased; that then, he was worth in excess of \$100,000; that during their married life the deceased had been kind and courteous to her and that they lived happily together until his death, which occurred in Ray, August 27, 1917; that, while the deceased was lying on his deathbed an amendment to this antenuptial agreement was made. This agreement provides that, whereas it is the desire of the deceased to give to the plaintiff more of the property than is contemplated in the antenuptial agreement, therefore, it is understood that, in the event the plaintiff survives the deceased, she shall have, in addition to the home, as further consideration for such agreement, the sum of \$1,500 out of the deceased's estate. This agreement is dated the day upon which the deceased died. Plaintiff alleges that she was not represented by counsel nor by any friend when this agreement was signed; that she made no inquiry concerning its meaning, being then concerned wholly in the serious illness of her husband; that during their married life she did not become acquainted with the property interests nor the financial worth of her husband and that

he did not inform her as to the extent thereof; that he provided for her liberally; that a daughter lived with them as a member of the family; that after the death of her husband one of his sons was appointed as administrator; that he treated her kindly; that he was interested with the deceased in the mercantile business at Ray and that she had every confidence in his honesty and relied implicitly thereon; that she was not advised of the nature nor extent of her husband's estate or of her rights therein; that she never attended any of the probate proceedings; that all papers signed by her in the course of the probate proceedings were signed with understanding that the plaintiff's interests would be protected; that she was at all times ignorant of her rights in the estate and of her exemptions therein. The inventory and appraisal, attached to the complaint, state the amount of the estate, not including the homestead, to be approximately \$30,000. Plaintiff alleges that the value of the lands so appraised is far below their true value; that in addition the deceased had lands and other property in Minnesota and Washington. The final decree attached to the complaint dated September 27, 1919, awards to the plaintiff the home and \$1,500. The remainder of the property is divided among the heirs.

Plaintiff alleges that she had no notice of the contents of this final decree until December, 1920, when, upon visiting her daughter at Lisbon and consulting counsel, she ascertained the extent and value of the deceased's property, the probate proceedings had, and her right to exemptions. Further, she alleges that the administrator, the children, the attorney, and agents conspired to deprive her of a fair property settlement in the two agreements and by fraud and undue influence and misrepresentation conspired to prevent her from ascertaining the true facts, and, since the death of her husband, through undue influence prevented her from ascertaining and determining the true facts concerning the estate and her rights that she signed the exhibits through a mistake as to the legal effect of the same and without knowledge of the facts or of her rights; that, during the course of probate, she signed various documents through mistake as to their legal effect and meaning and without knowledge of the facts or of her rights; that she failed to claim her statutory exemptions through mistake and without knowledge of her rights; that the home received by her is not of greater value than \$2,500. She demands that the agreements be declared null and void; that the final decree be opened and set aside; that her exemptions be legally set aside

to her; that by a new final decree she be awarded her interests in the estate and the administrator and defendants be enjoined from disposing of estate property pending final hearing.

To this complaint a demurrer was interposed upon the grounds that the court has no jurisdiction of the subject of the action; that the complaint does not state facts sufficient to constitute a cause of action; and that several causes of action are improperly united.

Decision.

Does the complaint set forth a cause of action, in equity, to set aside the antenuptial and postnuptial agreements? In this regard, the gist of plaintiff's cause of action, apparently, is that the antenuptial agreement was secretly prepared; that she was unaware of the financial worth of the deceased and that he did not inform her of his financial worth; that, furthermore, the antenuptial agreement awarded to her nothing beyond her exemptions excepting the remainder of the homestead estate when, then, the prospective husband was worth over \$100,000. The plaintiff makes no direct allegations nor contention that deceased fraudulently represented or fraudulently concealed concerning his property either before or after the marriage. The complaint fully shows that the relations between the plaintiff and her husband were happy; that he treated her courteously and kindly and well provided for her. If she was misled, or did not understand concerning his property, apparently it was by reason of her actions, not the actions of the deceased. Nevertheless, the relation of husband and wife is one of special confidence and trust requiring the utmost good faith, and equity closely and rigidly scrutinizes transactions between them to the end that injustice and oppression may not result. In such cases the principle of law is often applied that fraudulent concealment will be presumed and the burden of proof thrown on him, or those claiming under him, to show that full disclosure had been made where the provision made for the wife is grossly disproportionate to the value of the estate. 21 Cyc. 1269; Herr v. Herr (N. D.) 178 N. W. 443, 444; In re Warner's Estate, 210 Pa. 431, 59 Atl. 1113; In re Enyart's Estate, 100 Neb. 337, 160 N. W. 120; Keith v. Keith, 37 S. D. 132, 156 N. W. 910. It is true that in this state dower rights do not obtain. The husband, by his will, might have excluded the wife from any participation in his estate excepting the

statutory allowances and exemptions. The complaint is weak in its allegations to set aside the agreements, nevertheless, under liberal rules of construction applied to pleadings, we are not prepared to say, as a matter of law, that the complaint does not present a cause of action sufficient to support findings in equity of failure to disclose fairly the property of the deceased and of injustice and overreaching thereby resulting.

We are of the opinion, further, that the complaint states a cause of action in equity for allowance of the widow's exemptions. To secure such allowance, this action in equity, based upon grounds of fraud, deception, or misrepresentation, is available and not an action or proceeding in the county court to vacate the final decree after the lapse of one year. *Reichert v. Reichert*, 41 N. D. 253, 170 N. W. 621. The defendants admit that the county court should have allowed the widow her exemptions. Their contention is that the county court may now do so by correcting the final decree, *nunc pro tunc*.

In this appeal a question has arisen concerning the amount of exemptions to which the widow is entitled. The construction of § 8725, C. L. 1913, is involved. This statute provides:

"There shall also be set apart absolutely to the surviving wife or husband or minor children all the personal property of the testator or intestate which would be exempt from execution, if he were living, including all property absolutely exempt and other property selected by the person or persons entitled thereto to amount in value of \$1,500.00 according to the appraisement," etc.

Is the widow entitled to receive, in addition to property absolutely exempt, only \$1,500 in other property, or is she entitled to an additional \$500?

Section 7730, C. L. 1913, provides for the absolute exemptions allowed the head of the family, while alive, from levy and sale upon execution, etc. Section 7731, C. L. 1913, provides that such head of the family may select, from all other of his personal property not absolutely exempt, property not to exceed \$500 in value. This statute was in force when the husband died. The present statute amending § 7731 now allows \$1,000. Chap. 128, Laws 1919. It is apparent that there are two different statutes; one applying to the property of a person, the head of a family and while alive; the other applying to the property of a person upon his death. *Woods v. Teeson*, 31 N. D. 610, 154 N. W. 797. Formerly, \$1,500 was allowed, as an additional exemption, to the head of a

family. Section 5518, R. C. 1895. Formerly, the same allowance in amount was made concerning exempt property of a deceased person as § 8725, C. L. 1913, now provides. Section 6391, R. C. 1895. If the construction should obtain that the surviving wife should be entitled to receive \$1,500 under § 8725 and, in addition, the amount of additional exemptions allowed the head of a family, then, under former statutes, the surviving wife would have been entitled to a total of \$3,000 besides her absolute exemptions. We do not believe that § 8725 contemplates the entire incorporation of the exemptions allowed the head of a family, while alive, and, in addition, the allowance of \$1,500. It is apparent that § 7730, referring to the absolute exemptions to the head of a family, while alive, should not wholly be incorporated in the provisions of § 8725. Among the absolute exemptions provided in § 7730 is the homestead as created, defined, and limited by law. This is not contemplated within the provisions of § 8725 for the reason that § 8723 specifically provides for the exemption of a homestead of a deceased person. It would accordingly seem to have been the legislative intent, when these different statutes were enacted, to accord to the head of a family \$1,500 as exempt property, and likewise, the same amount to the surviving widow out of the property of a deceased person, all in addition to absolutely exempt property. This court has heretofore held that the surviving widow is entitled to receive the property of the deceased absolutely exempt, in addition to other property of the value of \$1,500. *Fore v. Fore*, 2 N. D. 260, 50 N. W. 712; *Woods v. Teeson*, 31 N. D. 610, 154 N. W. 797. We are of the opinion that § 8725 is not a cumulative statute and does not award to the surviving widow \$1,500 in addition to what the husband would have been entitled if he were living. In other words, the exemption allowed the surviving widow, pursuant to § 8725, is \$1,500, plus property absolutely exempt. See *Woods v. Teeson*, 31 N. D. 610, 154 N. W. 797; *Krumenacker v. Andis*, 38 N. D. 500, 516, 165 N. W. 524.

We are further of the opinion that the cause of action should be sustained against the demurrer that the court has no jurisdiction of the subject of the action and that several causes of action have been improperly united. Upon these phases of the demurrer, the defendants have made no contentions before this court.

The order is reversed, with costs.

ROBINSON, BIRDZELL, and CHRISTIANSON, JJ., concur.

GRACE, C. J. (concurring in part and dissenting in part). I agree that the complaint sets forth a cause of action in equity, to set aside the antenuptial and postnuptial marital agreements.

I dissent from the conclusion arrived at by the majority as to the construction of 8725, C. L. 1913, which provides as follows:

*"Exempt Personal Property. Disposition of,—*There shall also be set apart absolutely to the surviving wife or husband or minor children all the personal property of the testator or intestate which would be exempt from execution, if he were living, including all property absolutely exempt and other property selected by the person or persons entitled thereto to the amount in value of fifteen hundred dollars according to the appraisement and such property shall not be liable for any prior debt of the decedent except the necessary charges of his last sickness and funeral and expenses of the administration when there are no other assets available for the payment of such charges."

I adhere to the interpretation of the foregoing section, as I gave to it in the case of *Krumenacker v. Andis*, 38 N. D. 512, 165 N. W. 524.

NELS K. MOGAARD, Appellant, v. W. M. ROBINSON, individually and as mayor of the City of Garrison, J. A. REUTER, JOE FITZGERALD, JOE MAHOWALD, and W. E. RICHARDS, individually and as members of the City Council of the City of Garrison, Respondents.

(187 N. W. 142.)

Municipal corporations — sewer "outlet" extending on unplatted lands within proviso of statute for exclusion of such territory, held limited to sewer serving no purpose except to connect system with point of discharge.

Certiorari to review proceedings to exclude territory from a city. Chap. 32 of the Session Laws of 1921 provides for the exclusion of territory upon petition showing the absence of municipal improvements and that the land is unplatted; but it is provided that, "where a sewer outlet

extends upon or over said unplatted lands," it shall be the duty of the council to exclude the territory. It is *held*:

A sewer outlet extending upon or over lands within the proviso of the statute is that portion of a sewer which serves no other purpose than to connect the sewer system with the point of discharge.

Municipal corporations—sewer extending across petitioner's land held an outlet within the proviso of statute relating to excluding territory.

2. The evidence, including the resolution of the city council in disposing of the petition for exclusion, is examined and it is *held* that the portion of the sewer constructed upon the petitioner's land is used as an outlet extending upon and over the same within the proviso of the statute.

Opinion filed Feb. 18, 1922. Rehearing denied Mar. 11, 1922.

Appealed from the District court of McLean county, *Nuessle, J.*

Reversed and remanded.

Benton Baker, for appellant.

The propriety of the remedy selected. This proceeding for a writ of certiorari is a proper proceeding for the relief demanded. Section 8445, C. L. 1913. State ex rel. Mayo v. Thursby-Butte Special School Dist. 178 N. W. (N. D.) 787; State ex rel. Johnson v. Clark, 21 N. D. 516, 131 N. W. 715; Red River Brick Co. v. Grand Forks, 27 N. D. 8, 145 N. W. 725; Hieneman v. Alexandria, 32 S. D. 368, 143 N. W. 291; Pelletier v. Ashton, 12 S. D. 366, 81 N. W. 735, 11 C. J. 104; Public Service Co. v. Board of Public Utility Commissioners, 87 N. J. L., L. R. A. 1918A, 421.

Failure to perform a duty imposed by law constitutes an excess of jurisdiction of the council and renders the action of the council reviewable by a writ of certiorari. State ex rel. Mayo v. Thursby-Butte Special School Dist. *supra*; Younger v. Santa Cruz, 136 Cal. Supr. Ct. 682, 687, 69 p. 485; McClatchey v. Sacramento 119 Cal. Sup. Ct. 413, 51 p. 696, 39 L. R. A. 691, 11 C. J. 94.

Any departure from the recognized and standard requirements of law, however close the apparent adherence to mere form in method of procedure, which has the effect to deprive one of a constitutional right is as much an excess of jurisdiction as where there is an inceptive lack of power. Younger v. Santa Cruz, Sup. Ct., *supra*; McClatchey v. Sac-

ramento Sup. Ct., *supra*; Chatterham v. Davis, 183 Ill. A. 506, 11 C. J. 106.

J. E. Nelson and E. T. Burke for respondents.

BIRDZELL, J. This case is a sequel to *Mogaard v. City of Garrison*, et al. 47 N. D. 468, 182 N. W. 758. It comes here upon an appeal from an order dissolving an order to show cause and dismissing plaintiff's petition for a writ of certiorari. The petition seeks a review of proceedings had in the city council of said city upon a formal request to disconnect and exclude certain territory. Upon the filing of the petition for a writ of certiorari, an order to show cause was issued, and, upon the return day, counsel stipulated that the record of proceedings of the city council, as set forth in the plaintiff's petition, was correct, and further stipulated that the questions involved should be determined as fully and finally as if the court had issued its writ. The record facts are as follows: The plaintiff is the owner of the S. E. quarter of the S. E. quarter of section 7 in township 148 north of range 84 west of the Fifth meridian, lying within the corporate limits of the city of Garrison. The city and this 40-acre tract have common boundaries on two sides of the tract for a distance of 80 rods on each side, the tract being situated in one corner and extending for half the width of the city and one-fourth its length.

The petition to exclude this territory complies with the statute in every respect. Upon a hearing had before the city council, it appeared that the tract was not platted or laid out in city lots or blocks; that there were no streets or alleys upon the property, no water mains, pavements, sidewalks, or other municipal improvements of any kind, except a sewer pipe extending across the land about 60 feet from the southern boundary; that the sewer extends about 40 rods beyond the tract in question and beyond the city limits, where it discharges its contents upon other land purchased by the city for that purpose; that the city has a right (presumably an easement) to go upon the petitioner's land for the purpose of caring for the sewer and preventing interference with the same; that the sewer is approximately 60 rods from any building on the plaintiff's land; that there are no sewer connections on the land in question and no house connections for a distance of about 100 rods above the land; but that there is a connection for a creamery which is apparently some-

what closer, though the record leaves it indefinite as to its location. It appears that the sewer is so constructed as to admit of connections being made, although it does not appear that blind connections have in fact been inserted. At the conclusion of the hearing, the following resolution was passed:

"Whereas, the petition of Nels K. Mogaard and others, praying for the exclusion of the southeast quarter of the southeast quarter (S. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$) of section seven (7) in township number one hundred forty-eight (148), range eighty-four (84) McLean county, North Dakota, from the limits of the city of Garrison, North Dakota, and,

"Whereas, the said petitioner, Nels K. Mogaard, and his counsel R. L. Fraser, appeared before this council at its adjourned regular meeting, this 10th day of September, 1921, and before this council presented testimony with reference to the said petition, and,

"Whereas from the testimony presented and from the personal knowledge of each and every member of this council, it is determined and decided that there has been established and now maintained, upon the said tract of land, a portion of the main line of the sewer system of said city, so constructed as to admit of sewer connection at any point thereon for the use and benefit of any person or persons so desiring, and,

"Whereas, the outlet of the said sewer system of the city of Garrison, does not extend upon or over the tract of land mentioned and described in the petition filed, but does extend over and upon other land belonging to the said city, and,

"Whereas, the best interests of the city of Garrison and its future development require that said proposed land be not excluded from the limits thereof:

"Therefore it is resolved:

"That the said petition be and the same is in all things hereby denied.

"On roll call the following named councilmen voted aye: J. A. Reuter, Joe Fitzgerald, Joe Mahowald, W. F. Richards. Nay:

"W. M. Robinson, Mayor.

"Attest: E. E. Wacker, City Auditor."

After the decision of this court holding adversely to the petitioner upon his attempt to exclude 35 acres of the tract in question so arbitrar-

ily shaped as to leave the sewer strip within the city, the Legislature amended the controlling statute by adding a proviso as follows:

"And, provided further, that where a sewer outlet extends upon or over said unplatted lands, it shall be the duty of the city council, commission or board of trustees to disconnect and exclude such territory from such city, town or village, provided, that this act shall not in any way repeal or otherwise affect the provisions of § 3697 of the Compiled Laws of 1913." Chap. 32, Session Laws 1921.

Under the statute as it existed prior to the foregoing amendment, unplatted property could not be excluded if municipal sewer, water mains, pavements, sidewalks, or other improvements had been made or constructed therein but the proviso quoted above directs the exclusion of unplatted lands, though a "sewer outlet extends upon or over" the same. In other words, where the only municipal improvement upon the land is a sewer outlet and where the other conditions warranting exclusion exist, the lands must be excluded.

In the order entered by the trial court dissolving the order to show cause and dismissing the petition, the court held that—

The "proceedings were in all respects legal, and that the plaintiff's tract of land in his said petition described does not come within the provisions of § 3969 of the Compiled Laws of North Dakota, for the year 1913, as amended by chap. 32 of the Laws of 1921, in that there extends upon and over the said tract of land a portion of the main line trunk sewer of the city of Garrison, but the outlet, or mouth thereof, is on lands not embraced in this tract."

We do not understand that any question of procedure is involved upon this appeal, for upon oral argument respondents disclaimed any contention as to the remedy and in their brief it is stated:

"It is plain that but one point is involved: Should the city council have excluded this tract *upon the showing made*. We were willing that this decision should be *reviewed* by Judge Nuessle, and we now submit to the judgment of the Supreme Court the same question." (Italics are ours.)

It thus appears that the respondents are desirous of terminating the controversy through a construction of the controlling legislation applied to undisputed facts. In this state of the record we must regard the case as turning upon the meaning of the words employed in the statute, "where a sewer outlet extends upon or over said unplatted lands," and

upon the facts adduced with reference to the character of that portion of the sewer construction upon the petitioner's land. Counsel for the appellant contend that this language is descriptive of a sewer of any length which is used only as an outlet for the system. On the other hand, counsel for the respondent insist that it is descriptive only of that part of a sewer known as the mouth or end of the sewer, and, possibly, land lying some distance beyond the point where the contents are discharged.

We are of the opinion that the proviso of the statute refers to that portion of the sewer which is so constructed as to be of service for outlet purposes. The statute refers to an outlet as extending, and it makes an exception to the requirement laid down in the preceding paragraph which prevents exclusion where a sewer is constructed in the land sought to be excluded. So an outlet extending must be considered to be some part of the constructed sewer.

Does it appear from the record facts that the portion of the sewer upon the petitioner's land is an outlet for the system, extending to the mouth? It appears that this is an extension of the main sewer and affords the only outlet for the system; that there are no connections upon the petitioner's land; so it is not in fact being used by him or by any one upon his land as any part of the system; nor is it capable of being of any practical benefit to the petitioner or any one residing upon his land without the construction of a lateral approximately 60 rods in length. While it is stated in the evidence and in the resolution of the city council that the sewer is so constructed as to admit of connections at any point thereon for the use and benefit of any person or persons so desiring, such fact does not negative the showing made by the other evidence to the effect that this 80 rods of sewer pipe across the petitioner's land is in fact nothing more or less than an extension from the sewer system proper for outlet purposes. The character of the construction is not disclosed, and the evidence and the finding as to connection facilities would be applicable to any kind of a sewer throughout its whole length; for all sewers are so constructed as to admit of connections being made. The outstanding fact, which clearly appears from the evidence and which is not disputed in the resolution of the city council, is that the sewer pipe on plaintiff's land is used solely for outlet purposes. It follows that it was the duty of the city council to exclude the territory in question.

The order appealed from is reversed, and the case remanded, with directions to enter an appropriate judgment to that effect.

BRONSON and ROBINSON, JJ., concur.

GRACE, C. J. (specially concurring). This case was recently before this court in an appeal prior to this. See, 182 N. W. 758. In that case the plaintiff had judgment. The defendant city took an appeal to this court and the members of the court, except myself, agreed in their opinion to a reversal of the judgment. It was accordingly reversed; I dissented and wrote an opinion, setting forth my reasons.

After that decision, the statute referred to in the main opinion was amended, as there stated. After that amendment, the plaintiff again petitioned to have the tract of land involved excluded from the city limits, and from the jurisdiction of the city. The main opinion sets out the history of the proceedings in the court below, and it is unnecessary to here restate them. The effect of the decision in the present appeal is to disconnect and exclude plaintiff's land from the city limits. This is what I contended should have been done in the prior case, as an examination of my dissenting opinion there will show.

I now agree with the conclusion reached in the main opinion in the present case, and this for the same reasons contained in my dissenting opinion in the former case, and for other reasons which presented themselves in the present case, which need no specification or elaboration.

CHRISTIANSON, J. (dissenting in part). I agree with the interpretation which my associates place upon the term "sewer outlet" in chap. 32, Laws 1921. I do not, however, agree with them that the order made by the city council should be adjudged invalid.

The plaintiff predicates his alleged rights in this proceeding upon chap. 32, Laws 1921. That statute reads as follows:

"On petition, in writing, signed by not less than three-fourths of the legal voters and by property owners of not less than three-fourths in value of the property in any territory, within any incorporated city, town or village, and being upon the border and within the limits thereof, the city council of the city, or the board of trustees of the town or village, as the case may be, may disconnect and exclude such territory from such

city, town or village; provided, that the provisions of this section shall only apply to lands not laid out into city, town or village lots or blocks.

"Provided, further, that when the property or lands described in such petition bordering upon and within the limits of any such incorporated city, town or village are wholly unplatted, and no municipal sewers, water mains, pavements, sidewalks or other city, town or village improvements have been made or constructed therein, except as hereinafter provided, and this is made to appear upon the hearing upon such petition by the city council, commission or board of trustees of the town or village, as the case may be, it shall be the duty of the city council, commission or board of trustees to disconnect and exclude such territory from the city, town or village.

"And, provided further, that where a sewer outlet extends upon or over said unplatted lands, it shall be the duty of the city council, commission or board of trustees to disconnect and exclude such territory from such city, town or village, provided, that this act shall not in any way repeal or otherwise affect the provisions of § 3697 of the Compiled Laws of 1913."

It will be noted that the first proviso in this section states that the unplatted territory shall not be detached from a city where there are municipal sewers, water mains, pavements or sidewalks constructed thereon. The second proviso says that, "where a sewer outlet extends upon or over such unplatted lands," it shall be the duty of the city council or commission to exclude the territory. The second proviso was an amendment added by the Legislature in 1921, and the obvious purpose thereof was to distinguish between that portion of a sewer system which is denominated the "sewer outlet" and the remainder of the system. So as the law now stands it is only in case the "outlet" of a sewer is upon unplatted lands that such lands may be excluded; if any part of the municipal sewer system except the "outlet" had been constructed therein, the lands may not be excluded.

In this case it is sought to review the action of the city council by writ of certiorari. In the petition it is averred:

"That on the 11th day of July, 1921, the plaintiff duly filed in the office of the city auditor of the said city of Garrison, his petition in writing, a copy of which, marked 'Exhibit A,' is hereto attached and made a part hereof, and thereafter caused notice of the filing of the said petition to be duly published according to law.

"That thereafter and on the 10th day of September, 1921, a hearing upon the said petition was held by the defendants sitting as the city council of the said city of Garrison, whereat witnesses were examined by R. L. Fraser, Esq., in behalf of the plaintiff and J. E. Nelson, Esq., in behalf of the city of Garrison, a transcript of the evidence received at such hearing, marked 'Exhibit B,' being hereto attached and made a part hereof, and thereafter and on the same day the said mayor and city council of the said city of Garrison by resolution, a copy of which, marked 'Exhibit C,' being hereto attached and made a part hereof, denied the aforesaid petition of the plaintiff in all things."

Exhibit B referred to in, and attached to, the petition, is a transcript of the testimony of the plaintiff, Mogaard, and one Reuter. Upon the petition and an affidavit of the plaintiff the district court issued an order citing the defendants to show cause why a writ of certiorari should not issue. Upon the hearing in the district court the defendants moved to quash, upon the following grounds, among others:

"1. That the complaint does not state facts sufficient to constitute a cause of action, and does not warrant the issuance of the writ of certiorari.

"2. That the application for the writ shows upon its face that the city council have not exceeded their jurisdiction.

"3. That Exhibit C (copy of city council's order denying the application to detach) attached to the complaint of the plaintiff shows upon its face that the outlet of the sewer in question does not extend upon or over the petitioner's described land, but that the main body of the sewer does, and the resolution of the city council stating that fact is conclusive as against the petitioner."

The trial court made an order vacating the order to show cause and denied the petition. In such order it is said:

"Counsel for all parties having stipulated the correctness of the record of the proceedings of the city council of the city of Garrison as set forth in the plaintiff's petition and consented that all matters herein be decided and determined as fully and finally as if the court had issued its writ of certiorari in accordance with the prayer of the plaintiff's petition, and the defendants by their return having alleged the legality of the proceedings of the city council of the city of Garrison as set forth in the plaintiff's petition, and the court being of the opinion that such proceedings were in all respects legal and that the plaintiff's tract of land

in his said petition described does not come with the provisions of § 3969 of the Compiled Laws of North Dakota for the year 1913 as amended by chap. 32 of the Laws of 1921, in that there extends upon and over the said tract of land a portion to the main line trunk sewer of the city of Garrison, but the outlet or mouth thereof is on lands not embraced in this tract, it is hereby ordered that the order to show cause heretofore issued in this proceeding and the same is hereby vacated, and that the prayer of the plaintiff's petition be and the same is hereby dismissed."

It is settled law in this state that questions relating to the change of boundaries of cities are legislative questions. *Glaspell v. Jamestown*, 11 N. D. 86, 88 N. W. 1023. See, also, 19 R. C. L. p. 732. By chap. 32, Laws 1921, the Legislature fixed and specified all the conditions and facts upon which the exclusion of certain territory from a city should depend, and constituted the city council the body to ascertain and determine the existence of these facts and conditions. In this case the city council conducted a hearing; witnesses were sworn and testified. At the conclusion of the hearing the city council made the determination which is set forth in the majority opinion. It will be noted that that determination was based, not only upon the evidence introduced at the hearing, but upon "the personal knowledge of each and every member of the city council * * * that there has been established and now maintained, upon the said tract of land, a portion of the main line of the sewer system of said city, so constructed as to admit of sewer connection at any point thereon for the use and benefit of any person or persons so desiring," and, further, that "the outlet of the said sewer system of the city of Garrison does not extend upon or over the tract of land maintained and described in the petition filed, but does extend over and upon other land belonging to the said city." It seems to me that this finding of the city council is one of fact that the tract of land sought to be excluded by the petition has constructed thereon a municipal sewer other than the sewer outlet. The statute confers upon the city council the power to determine the facts. The law provides for no appeal from the decision of the city council, and under well-settled rules of law applicable to other boards empowered to determine facts the decision of the city council as to the facts is, in the absence of fraud, final and conclusive upon the courts. See *State v. Fisk*, 15 N. D. 219, 107 N. W. 191. See, also, *State ex rel. Little v. Langlie*, 5 N. D. 594, 600, 601, 67 N. W. 958, 32 L. R. A. 723; *Greenfield School Dist. v.*

Hannaford Special School Dist., 20 N. D. 393, 397, 127 N. W. 499.

As already stated in this case, a review is sought by certiorari, under our law "a writ of certiorari may be granted by the Supreme and district courts, when inferior courts, officers, boards or tribunals have exceeded their jurisdiction and there is no appeal, nor, in the judgment of the court, any other plain, speedy and adequate remedy, and also when in the judgment of the court it is deemed necessary to prevent miscarriage of justice." Section 8445, C. L., as amended by chap. 76, Laws 1919. And "the review upon this writ cannot be extended further than to determine whether the inferior court, tribunal, board or officer has regularly pursued the authority of such court, tribunal, board or officer." Section 8453, C. L. 1913. In construing similar provisions the Supreme Court of California has ruled that this latter section, which prescribes the extent of the review, has substantially the same meaning as the phrase in § 8445, *supra*, authorizing the court to inquire whether the "inferior courts, officers, boards or tribunals have exceeded their jurisdiction," and that under neither section can anything but jurisdiction be inquired into. See *Central Pac. R. Co. v. Board of Equalization*, 43 Cal. 365. See, also, *Farmers' & Merchants' Bank v. Board of Equalization*, 97 Cal. 318, 32 Pac. 312; *Security Sav. Bank v. Board of Sup'rs*, 4 Cal. Unrep. 222, 34 Pac. 437; *Johnston v. Board of Sup'rs*, 104 Cal. 390, 37 Pac. 1046; *Fickert v. Zemansky*, 176 Cal. 443, 168 Pac. 891; *Henshaw v. Board of Sup'rs*, 19 Cal. 150; *Whitney v. Board*, 14 Cal. 499.

Corpus Juris (11 C. J. 103) says:

"In most of the Western States, the writ (certiorari) lies only when there is a want or excess of jurisdiction in the proceeding complained of. * * * This rule that want or excess of jurisdiction is the only ground prevails in Arizona, California, Colorado, Idaho, Montana, Nevada, North Dakota, Oklahoma, the Philippines, South Dakota and Utah."

In *Whitney v. Board*, *supra*, the California court said:

"We have already seen that the writ can be granted only where the jurisdiction of the inferior tribunal has been exceeded, and * * * it is clear that the courts are confined to the determination of the question of jurisdiction. Beyond this, they have no right or authority to go; and they have nothing whatever to do with the proceedings before the inferior tribunal, except so far as an examination of such proceedings is necessary for the determination of this question. * * * It brings up

no issue of law or fact not involved in the question of jurisdiction. Under no circumstances can the review be extended to the merits. Upon every question, except the mere question of power, the action of the inferior tribunal is final and conclusive."

There can be no doubt but that the question whether the territory sought to be detached should or should not be detached was one properly within the jurisdiction of the city council. And there is no question but that the city council afforded the petitioner a full hearing, and that after such hearing they made a determination. The petitioner invoked the jurisdiction of the council, and attended, and participated in, the hearing. And it would seem that he is not now in position to invoke the aid of a writ of certiorari, which reviews only questions of jurisdiction. As was said by this court in *Albrecht v. Zimmerly*, 23 N. D. 337, 344, 136 N. W. 240, 242:

"With jurisdiction thereby invoked by defendants, they have no standing in this court on an application for certiorari in which they must assert and establish as a prerequisite of their right thereto the absence or want of jurisdiction of the lower court over the same matter. They cannot at the same time in the same action invoke and establish jurisdiction and then deny its legal effect."

Jurisdiction relates to the power of the tribunal, and not to the rights of the parties. *Dahlgren v. Superior Court*, 8 Cal. App. 622, 97 Pac. 681. "The test of the jurisdiction of a court is whether or not it had power to enter upon the inquiry; not whether its conclusion in the course of it is right or wrong." *Board of Com'rs of Lake County v. Platt*, 79 Fed. 567, 25 C. C. A. 87. "Excess of jurisdiction is to be distinguished from errors of law or of fact committed by the inferior tribunal within the limits of its jurisdiction. Such an error does not constitute an excess of jurisdiction. If a court acts in the exercise of its lawful jurisdiction, and not in excess of such jurisdiction, the mere fact that its conclusion is wrong does not make its action an excess of jurisdiction." 4 Cal. Juris pp. 1036—1039.

The sole contention of the petitioner in this case is that the order of the city council is contrary to the evidence, and the decision of the majority of the court is devoted largely to a consideration of the sufficiency of the evidence. It seems clear that under a statute like ours the court may not consider the sufficiency of the evidence or review the findings made by the inferior tribunal except for the sole purpose of determining whether such tribunal has exceeded its jurisdiction. See, §§ 8445-

8453, C. L. 1913. *State v. Thursby-Butte Special School Dist.* 178 N. W. 787. See, also, 11 C. J. pp. 202-203. In other words, "the reviewing court has nothing to do with the proceedings before the inferior tribunal, except so far as an examination of such proceedings is necessary for the determination of the question of its jurisdiction. If such tribunal has regularly pursued its authority, the inquiry stops. Errors of law committed by the inferior court in the exercise of its authority, cannot be considered; and in such case, no matter how erroneous the decision may be, even on the face of the record, the reviewing court has no power to change, annul or reverse it in a proceeding in certiorari." 4 Cal. Juris. pp. 1106—1107.

It seems to me that the trial court was entirely correct in dismissing the proceeding.

ED DRINKWATER, Respondent, v. ANDREW NELSON, Appellant.

(187 N. W. 152.)

Elections — evidence held to show that notice of contest filed within twenty days after canvass.

1. The evidence sufficiently shows that the notice of contest was served within twenty days after the canvassing of the votes.

Elections — ballots held admissible under ordinary rules of evidence, though election officers and custodians may have omitted some duty.

2. Chap. 121 of the Session Laws of 1919 which provides for the return and care of the ballots cast at an election for use in case of contest is construed and *held* to render the ballots admissible under ordinary rules of evidence in an election contest though election officers and the county judge, who is made the custodian may have omitted some duty.

Elections — trial judge's admission of ballots objected to as having been tampered with will not be reversed, unless clearly erroneous.

3. Where the admissibility of ballots is objected to on the ground that the bundles show that the seals are broken and that they bear other evidences of having been disturbed, the trial court having an opportunity to inspect the bundles is in a more advantageous position to determine whether they had been tampered with than is an appellate court, and its ruling will not be reversed unless clearly erroneous.

Evidence — opinion evidence as to likelihood of error in counting ballots is inadmissible.

4. Opinion evidence as to the likelihood of error in the counting of ballots by election officials is inadmissible.

Elections — evidence held to support findings of a difference of four votes in favor of contestant.

5. The evidence in regard to individual votes excluded on the ground of nonresidence and alienage is examined and it is *held* to support the findings of the trial court to the extent of a difference of at least four votes in favor of the contestant.

Elections — where two contests are tried together, evidence in one not relating to issues in the other may not be considered in such other, and denial of motion to amend answer to broaden issues not error.

6. Where two election contests are tried together, partly upon the same evidence, the separate notice of contest and the answers determine the issues, and evidence admitted in one contest which has no relation to the issues presented in the other cannot be considered in connection with the latter, and the denial of a motion made at the close of the contestant's case to amend the answer so as to broaden the issues is not error.

Opinion filed Feb. 14, 1922. Rehearing denied Mar. 11, 1922.

Appeal from the District court of Burke county, *Cooley*, Special J. *McGee & Goss*, for appellants.

The ballots should not have been received in evidence and if received should have been stricken on the testimony offered. *Davenport v. Ole-rich*, (Iowa) 73 N. W. 603; *Delong v. Brown*, (Iowa) 85 N. W. 624; *Doak v. Briggs*, (Iowa) 116 N. W. 115; *Keith v. Wendt*, (Mich.) 107 N. W. 443; *State v. Widule* (Wis.) 157 N. W. 769.

Where statutes providing for the preservation and protection of ballots to be used in a contest have not been complied with, or where it appears that the integrity of the ballots has not been preserved, such ballots are not competent evidence to impeach the determination of the board of canvassers. *Farrell v. Larson*, 26 Utah, 283, 73 Pac. 227; *People ex rel. Williams v. Cicott*, 16 Mich. 283, 97 Am. Dec. 141; *Martin v. Miles*, 40 Neb. 135, 52 N. W. 732; *Fenton v. Scott*, 17 Or. 189, 20 Pac. 95, 11 Am. St. Rep. 801; *Beall v. Albert*, 159 Ill. 127, 42 N. E. 166; *Thornhill v. Wear*, 131 La. 739, 603 South 228; *Delong v. Brown*, 113 Iowa 370, 85 N. W. 624; *Edwards v. Logan*, 114 Ky. 312, 70 S. W.

852, 75 S. W. 257; *People v. McClellan*, 124 App. Div. 215, 108 N. Y. Supp. 765.

Bangs & Robbins, for respondents.

The rule supported by the overwhelming weight of authority is that the votes shall be rejected proportionately according to the votes cast in the precinct for the two candidates.

That the votes should be deducted proportionately see: *McCrary on Elec.* (4th ed.) 495; § 1005 C. L. 1913; *People v. Cicott*, 16 Mich. 283, at 322, 97 Am. Dec. 941; *Ellis v. May*, 99 Mich. 538 at 555; 48 N. W. 483 at 488, 25 L. R. A. 325 at 331; *Moore v. Sharp*, 98 Tenn. 491, 41 S. W. 587; *Parker v. Hughes*, 64 Kan. 216, 67 Pac. 637, 91 A. S. R. 216, 56 L. R. A. 275; *Heyfron v. Mahoney*, 9 Mont., 497, 24 Pac. 93, 18 A. S. R. 216; *Choisser v. York*, 211 Ill., 56 at 66, 71 N. E. 940; *Briggs v. Christ*, 28 S. D. 562, 134 N. W. 321; *Berg v. Beit*, 136 Minn. 443, 162 N. W. 522.

Ballots case with assistance in violation of statute void: Constitution § 129; §§ 986, 988 and 990 C. L. 1913; *Perry v. Hackney*, 11 N. D. 148, 90 N. W. 483; *Atty. Gen'l. v. McQuade*, 94 Mich. 439, 53 N. W. 944; *Atty. Gen'l. v. May*, 99 Mich. 538, 58 N. W. 483; *Major v. Barker*, 99 Ky. 305, 35 S. W. 543; *State v. Gay*, 59 Minn. 6, 60 N. W. 676; *McEwen v. Prince*, 125 Minn. 417; 147 N. W. 275; *Huston v. Anderson*, 145 Cal. 329, 78 Pac. 626; *Tebbe v. Smith*, 108 Cal. 101, 41 Pac. 454, 49 A. S. R. 68, 29 L. R. A. 673; *Patrick v. Runyon*, 20 Ky. L. R. 1914, 50 S. W. 538; *Gill v. Shuretleff*, 183 Ill. 440, 56 N. E. 164; *McCreery v. Burnsmeir*, 293 Ill. 43, 127 N. E. 171; *Rampendahl v. Crump*, 24 Okla. 873, 105 Pac. 201; *Westville v. Stillwell*, 24 Okla. 892, 105 Pac. 664; *Ryan v. Waurika*, 29 Okla. 655, 119 Pac. 220; *Board v. Dill*, 20 Okla. 104, 110 Pac. 1107, Ann. Cas. 1912B, 101, 29 L. R. A. (N. S.) 1170.

BIRDZELL, J. Election contest. This is an appeal from a judgment rendered in favor of the contestant. The contest was instituted by the service of notice under § 1046 of the Compiled Laws of 1913. Proceedings were instituted not only against the defendant and appellant named in the title hereto, but against a number of other contestees holding certificates of election. Upon motion of the contestees, made during the trial, all contests except the one involved herein and another were

dismissed. All were tried together and at the conclusion of the trial a judgment was rendered finding that the contestant, Drinkwater, had been duly elected to the office of sheriff. On the face of the returns Nelson received 1619 votes and Drinkwater 1595 votes. Upon a recount of eighteen precincts it was found by the trial court that there were 1597 votes for Drinkwater as against 1599 for the defendant, Nelson. It was further found that certain ballots were cast in favor of the defendant by persons who were not residents of the precinct in which they voted and some by persons who were not citizens of the United States. It was also found that votes were cast and counted for the defendant in three precincts, 21 votes in all, which had not been legally voted—the illegality consisting in assistance rendered by a judge of election where the elector did not require such assistance by reason of any legal disability. Thus on the face of the returns as revised by the recount, thirty votes appearing to have been cast for Nelson were subtracted, making the votes stand, as a result of these proceedings, 1597 for the plaintiff to 1569 for the defendant.

The first assignment argued by the appellant is that the notice of contest was not served within the time limited by the statute. Section 1046, Compiled Laws of 1913, says that any person desiring to contest the validity of an election or the right of any person declared duly elected to any office shall give notice in writing to the person whose election he desires to contest within 20 days after the canvass of the votes of such election. The notices of contest were served on December 2, 1920, and it is claimed that the canvass was completed on November 10th or 11th.

Much testimony was directed to the question as to when the canvass was, in fact, completed. The proceedings of the board of county commissioners, as published in the official paper some time after the canvassing was completed, made no reference to the canvass. They show that the board met on November 9th and 10th, and that on the 10th it adjourned to meet again on November 18th. The minutes of the proceedings indicate nothing but the transaction of ordinary county business. There are two copies of the abstract of votes in evidence, both of which are dated November 13th and are signed by the members of the canvassing board. Each one contains a certificate of the county auditor to the effect that it is a true and correct copy of the original abstract, and each of these is dated the 13th. One of the certificates of the canvassing board, however, was apparently dated originally, "November 10," but the "10" is scratched out with a pen, and "13" written

after it. These, in brief, are the circumstances chiefly relied upon by the appellant as showing that the canvass was completed more than 20 days before the service of notice of contest. A clear preponderance of the evidence given by the witnesses, however, establishes that the canvassing board was in session on November 11th and 12th, and that the minutes of the board of county commissioners, as prepared for publication and as published, did not show the true proceedings, or, in fact, any proceedings of the board of canvassers. The trial court's findings in this respect are well supported by the evidence introduced at the trial, and we think it clearly appears that the notices were served within the 20-day period prescribed by the statute. We may observe here that the contestant does not impeach any record actually made of the canvass, and that counsel for the contestee and appellant practically concede that the testimony of the witnesses is against their contention, for they find it necessary to attack this evidence as being "fabricated" or false. The trial court believed the testimony, and we can see no reason for reversing the findings made in so far as credibility is involved.

It is next contended that the court erred in permitting a recount of the ballots cast in Garness and Forthune precincts, for the reason that the ballots so recounted had not been kept as required by law. It seems that an iron box had been provided by the county as a repository for the ballots. This box was kept in a vault in the courthouse, which was set aside for the joint use of the county judge, the clerk of court, and the register of deeds. The box had evidently been provided prior to the increase in the electorate incident to woman suffrage, and was not large enough to hold all the ballots. After it was filled the remaining ballots were stored in the vault, as they came in, upon or near the box. It is claimed that the ballots so kept are not admissible in contest proceedings by virtue of chap. 121 of the Session Laws of 1919. That chapter amends § 1008 of the Compiled Laws of 1913. It provides, among other things, that the election judges shall wrap the ballots by sealing them with sealing wax and stamping the name of the county with a metal stamp provided for the purpose, so that the wrappers cannot be opened without breaking the seal, that they shall be returned by mail to the county judge, and that he shall arrange them in boxes which shall be securely locked and placed in a fireproof vault, where they shall be securely kept for six months. The purpose of the act is declared as follows:

"It is the purpose of this act (section) to provide a safe place for the

keeping of the ballots and to make them readily accessible for use in legal proceedings, and such ballots shall be received in evidence, without further identification or foundation being laid, and any failure on the part of the election officers to comply with any of the formalities required hereby as to the return of said ballots shall not invalidate any election or cause any ballot otherwise regular to be disregarded and any omissions or irregularities in the manner of identifying or returning the ballots of any precinct may be obviated by proof under the ordinary rules of evidence."

Full compliance with the statute is declared to be a sufficient foundation for identification; but, where the statute has not been strictly complied with, the ordinary legal foundation for identifying the ballots is required. If the contention of appellant's counsel be correct, it would follow that any meritorious contest could be wholly defeated through the mere failure of the county judge to fully comply with the strict letter of the statute. Such is not the evident purpose, for the Legislature has specifically said that any omission "in the manner of identifying" the ballots may be obviated by proof. The failure to keep the ballots as required is an omission in the manner of identifying them, and hence opens the way for ordinary proof under the express language of the statute.

But counsel argue that the ballots should not have been received in evidence because of the condition in which they were found, namely, in bundles with the seals broken, and, in one instance, in a gunny sack, which they contend is not the sack in which they were mailed to the county judge. The sack incident is fully explained in the record, and we think the identity of the original package was fully established. As to the other bundles, the trial court was in a much more advantageous position than this court to determine whether they presented an appearance of having been tampered with, and the ruling will not be reversed unless clearly erroneous. *Moon v. Harris*, 122 Minn. 138, 142 N. W. 12. It appears, however, that some of the bundles which had been kept in the box were in no better condition than those that had not been so kept; and it might be further observed that no effort was made to disprove the identity of the ballots themselves, and that, apparently, no ballot was recounted that did not bear all of the evidence of genuineness that is inherent in a regular ballot; such, for instance, as the official stamp and the initials of the inspector of election. We are of the opinion that the ballots were properly received in evidence.

Error is likewise assigned upon rulings of the trial court excluding the opinions of witnesses who observed the counting of the ballots in the precincts, as to whether, in their opinion, it was possible for the errors shown by the recount to have been committed. There was a full showing of the facts in each instance of the manner in which the votes were counted originally by the election officers. Obviously there was no occasion to resort to the conclusions or opinions of witnesses as to the ultimate fact of correct counting. Such opinions were clearly not competent.

This brings us to the question of the individual votes excluded by the trial court on the ground of nonresidence. The appellant challenges the findings of the trial court wherein it was found that Otto Nelson and his wife, W. G. Reibe and his wife, and Clarence Onstatt and Pansy Onstatt, were not residents of their respective precincts on election day. Otto Nelson had been a resident of the county for some years prior to the fall of 1920. Some time prior to August 28, 1920, he advertised in the local paper a public sale of his live stock, farm machinery, and household goods to be held August 28th. The advertisement recites:

"Having sold my farm, and as I am moving out of the country, I will sell at a public auction," etc.

After the sale was held Nelson and his wife remained in the vicinity for some time to collect notes and wind up their business affairs. They went away about a week before election, and the ballots cast were absent voters' ballots. They made a short visit with relatives in a distant part of the state, and did not return to Burke county, but went to California, where they they were apparently settled permanently by December 11th, as a letter of that date so indicates. While there is some evidence that their plans for the future were unsettled at least up until the time they left, we think the evidence as a whole proves that they had left the precinct without any intention of returning, and that it amply supports the finding of the trial court that they were in fact nonresidents at the time of the election. Otto Nelson was a brother of Andrew Nelson, the contestee, and the evidence tends strongly to show that both he and Mrs. Nelson voted for the latter.

We do not understand it to be seriously contended by the appellant that Reibe and his wife were residents of the precincts on election day. The specification that the court erred in finding that Mr. and Mrs. Reibe had voted for the defendant Nelson is likewise apparently abandoned, for it is not argued in the brief. For reasons which will present-

ly appear it is unnecessary to consider the two Onstatt votes.

The court found that Alma Brudvick, Mary Skalicky, and Muriel Bykonen were not legal voters, by reason of being aliens or married to alien husbands. The finding that these women were not legal voters is not attacked by the appellant, but he does complain of the subtraction of the three votes from the contestee. Alma Brudvick voted in Garness precinct, where the women's votes were 4 for Drinkwater and 24 for Nelson. Mrs. Skalicky and Mrs. Bykonen voted in Colville precinct, where the women's votes stood 5 for Drinkwater to 29 for Nelson. It will be seen that the ratio is about one-sixth, and if all evidence as to the political affiliations of these women be ignored and their votes regarded as simply illegal, which does not seem to be disputed, $2\frac{1}{2}$ votes should be subtracted from the Nelson vote, and one-half a vote from the Drinkwater total. McCrary on Elections (4th ed.) §§ 495—497. Thus Nelson's vote stands $1,592\frac{1}{2}$ to Drinkwater's $1,596\frac{1}{2}$. Obviously the result would not be changed if Nelson should be given the benefit of the Onstatt votes and of a ballot marked "Exhibit 121," to the exclusion of which he also excepts. So it is unnecessary to pursue further the subject of the individual votes.

Counsel for the appellant complain of a ruling of the trial court excluding from this contest certain absent voters' ballots in the precinct of Cleary, which were counted for Drinkwater, and of the denial of a motion to permit the defendant to amend his answer so as to exclude these votes from Drinkwater's count. The votes of the Cleary precinct were in no wise involved in the issues presented and tried in this contest. They were not mentioned in the notice of contest nor in the defendant's answer, and the recount was only had for its bearing upon another contest involving the office of county commissioner. The statute provides for the framing of issues through the notice of contest and the answer thereto. Sections 1046 and 1047, Compiled Laws of 1913. Section 1047 requires the defendant to serve an answer within 10 days after the service of notice upon him; and it further requires that "he shall state any other grounds upon which he rests the validity of his election." The motion was not made until the close of the testimony offered by the plaintiff, and, even if it be conceded that the defendant was not required to put these votes in issue in an answer served within 10 days after the notice, and that the trial court had a discretion to permit an amendment, we think the trial court properly exercised any discretion it might have had.

It follows that the judgment of the trial court was right, and it is affirmed.

CHRISTIANSON and ROBINSON, JJ., concur.

BRONSON, J., concurs in result.

GRACE, C. J. (concurring in part and dissenting in part). This case is one of unusual importance. It is one which, if space permitted, should be thoroughly discussed; however, as I alone of the judges of this court arrived at a partially different result than that of the majority opinion, I am inclined to forego any lengthy discussion.

I agree with the conclusion, arrived at in the majority opinion, that the evidence is sufficient to show that the contest was served within 20 days after the completion of the canvassing of the votes. I am of the opinion, however, that the precincts of Garness and Forthune could not be recounted, as the ballots from those precincts were not kept in the iron boxes as required by chap. 121 of the Session Laws of 1919, which amended § 1008, C. L. 1913. We feel quite certain the majority have gone astray in the matter of identification of ballots so as to render them admissible as evidence. There are two distinct identifications of ballots provided for in the above law: (1) The identification by the township election officers; and, (2) identification of the ballots after they have been returned to the county judge, who under the law is made the custodian of them. As to identification by precinct election officers, the law specifies that—

“The judges shall fold in two folds and lay in tiers all ballots counted by them except those which are void, and fold same securely in manila wrappers, not exceeding 200 to each wrapper, on which shall be indorsed in writing or print, the number of the precinct, date on which election was held, and securely seal such wrappers by sealing them with sealing wax and stamping on said wax, the name of the county with a metal stamp provided for that purpose, so that said wrappers cannot be opened without breaking the seal, and return by mail said ballots, together with those found void to the county judge.”

This is one method of identification of ballots, and refers exclusively to the identification of them by the precinct election officers. The law further provides:

"Immediately upon receiving such ballots, the county judge shall give receipt therefor to said judges of election and shall place them properly arranged in the order of the precinct numbers in boxes which shall be securely locked. Said boxes shall be placed in a fireproof vault and shall be securely kept for six months, not opening or inspecting them nor allowing any one else to do so, except upon order of court, in case of contested election, or when it shall be necessary to produce them at a trial for any offense committed at elections. * * * It is the purpose of this act (section) to provide a safe place for the keeping of the ballots and to make them readily accessible for use in legal proceedings, and such ballots shall be received in evidence without further identification or foundation being laid."

This is the second method of identification, and refers exclusively to the ballots after they have reached custody of the county judge, and he has complied with the law and has securely locked them in iron boxes. The following also appears at the close of the chapter, and is that which, in our view has led the majority into error:

"And any failure on the part of the election officers to comply with any of the formalities required hereby as to the return of said ballots shall not invalidate any election or cause any ballot otherwise regular to be disregarded and any omission or irregularities in the manner of identifying or returning the ballots of any precinct may be obviated by proof under the ordinary rules of evidence."

The majority opinion applies the identification last referred to, to the ballots after they have reached the custody of the county judge, and it is my view that, that part of the law refers exclusively to the identification of the ballots by the precinct election officer, and that the only identification possible or permissible of ballots after they have reached the custody of the county judge is that provided by the law, namely, that where the ballots have been kept in the manner by the county judge as prescribed by law, that is, in the iron box, and produced in court or any other place where they lawfully may be required to be produced that, that of itself constitutes an identification of the ballots, and the only identification of them that is permissible after the time they have reached the custody of the county judge. If the ballots were so properly identified and produced in court at the trial and it were found that some were not properly initialed as required by law, or were not properly stamped or numbered, then they might properly be identified in the manner specified by that part of the law to which reference last above

has been made.

The majority opinion contains the following:

"Full compliance with the statute is declared to be a sufficient foundation for identification; but where the statute has not been strictly complied with, the ordinary legal foundation for identifying the ballot is required. If the contention of appellant's counsel be correct, it would follow that any meritorious contest could be wholly defeated through the mere failure of the county judge to fully comply with the strict letter of the statute. Such is not the evident purpose, for the Legislature has specifically said that any omission in the manner of identifying the ballots may be obviated by proof. The failure to keep the ballots as required is an omission in the manner of identifying them, and hence opens the way for ordinary proof under the express language of the statute."

It will be seen from what the majority have thus said that the latter part of the statute above mentioned is erroneously applied to a subject-matter to which it does not pertain, that is, to the identification of ballots in custody of the county judge. In my view, the ballots outside of the iron box have no evidentiary value whatever.

As the precincts of Garness and Forthune and the ballots therefrom in my view of the law should not have been recounted, and should not have been received in evidence by reason of the total failure of identification, it must follow that the contestant must fail in his contest. Whatever other irregularities there were by which it is claimed a certain number of other ballots should be excluded; including certain ballots of alien voters, and voters who had removed from the precinct prior to the date of election, they are insufficient to change the result of election as that result is shown by the official canvass of the votes by precinct election officers, where no recount is permitted of the votes in Garness and Forthune.

In the recount the trial court deducted 8 men's votes in Garness and 12 women's votes in Forthune from the votes therein cast for Nelson. This the court was without authority to do, as the votes in those precincts were not properly in evidence. The court also deducted 4 votes in Garness on the theory that the voters had been improperly and unlawfully assisted in casting their ballots. It is evident that if this precinct should not have been recounted, these votes could not be deducted.

It may also be mentioned here that, in the companion contest case for the office of county commissioner of John O. Grubb v. Jake Dewing, 187-

N. W. 157, if the votes of Fortitude precinct cannot be recounted for the reasons above stated, that contest must fail, and this for the reason, that on recount 12 votes were taken from Dewing and given to Grubb or, in other words, Grubb gained 12 votes. In other words, if that precinct cannot be recounted, that fact alone is decisive of that contest, for if all other deductions claimed by Grubb are conceded, they would not be sufficient to overcome Dewing's majority as shown by the officials canvass.

From what has above been stated, it is evident that the exclusion of Garness and Fortitude precincts from the recount would terminate both above contests, and result in giving the offices of sheriff and county commissioner to Nelson and Dewing. That result would follow, if my view of the law prevailed, which I feel certain is in accordance with chap. 121 of the Session Laws of 1919. In view of the exclusion above stated, it is unnecessary to discuss the propriety of the exclusion of certain votes on the ground of failure to observe the secrecy of the ballot. We may observe, however, that § 988, C. L. 1913, is a wholesome law, intended to protect the right of franchise; it should be strictly enforced, and where its provisions have been violated by a voter or judge or judges of election, or where others than those specified in the section assist the voters, or where the assistance, if official, is not according to the provisions of that section, it is proper to exclude such ballots, where the evidence shows these facts, or any of them, with reference to a given vote or a number of given votes; that is, where the evidence clearly shows that certain specific individuals, naming them, were assisted in marking their ballots, which assistance was rendered in a manner contrary to the provisions of the section, those votes should be thrown out and declared void.

The majority opinion, however, lays down a rule of evidence that is very broad and far-reaching, as it in effect holds that it was proper for those who were present at the election to state in their opinion the number of voters who were unlawfully assisted in marking their ballots; for instance, it in effect holds that, if a witness should testify that he was present at the polls all day, and that in his opinion or judgment there were a number of voters, estimating the number, or about a given percentage of the vote, again estimating, or guessing at it, who were assisted, contrary to the provisions of law, in marking their ballots, such testimony is competent. The effect of this holding is to place with very few voters in each precinct the power to partially or fully disfranchise

the voters thereof, and to accomplish this result by the most speculative and shadowy testimony, whose basis is guess, doubt, or approximation. I am not yet convinced that I should approve such a rule of evidence. There may be cases, proceedings, or conditions which would warrant the admission of that character of testimony, but it not applicable nor admissible in the circumstances of this case.

The judgments appealed from should be reversed. The cases should be remanded, with instructions to the trial court to dismiss the contest proceedings.

R. W. DOUGHERTY, Appellant, v. JAMES COX DAVIS, Special Agent of the President, Respondent.

(187 N. W. 616)

Carriers — owe duty to those coming to meet trains to keep station platform reasonably free from obstacles liable to injure.

1. A railway company owes a duty, not only to passengers but also to those who come to meet incoming or accompany departing passengers, to keep its station platform reasonably clear and free from obstacles by which such persons are liable to be injured.

Carriers — bus operator held an invitee on station premises to whom carrier owed reasonable care for his safety.

2. A person engaged in the business of transporting passengers and baggage between two depots situated upon two different lines of railway in the same village and who has been so engaged for a considerable period of time with the knowledge and acquiescence of the carrier is an invitee upon the station premises and the carrier owes him a duty to use reasonable care for his safety.

Carriers — implied invitation to bus operator held to extend to waiting room and station platform.

3. In the instant case it is *held* that the implied invitation extended by the carrier to the person engaged in such transportation business extended not only to the particular premises where his bus was generally placed near the depot platform, but also to the waiting rooms in the depot and to the station platform.

Negligence — question for jury.

4. Questions of negligence and proximate cause are generally questions of fact for the jury. They become questions of law only when the

evidence is such that different minds cannot reasonably draw different conclusions either as to the facts or the deductions to be drawn from the facts.

Opinion filed April 1, 1922

From a judgment of the District court of Richland county, *Allen*, J. plaintiff appeals.

Reversed.

J. A. Slattery, W. E. Purcell, and W. S. Lauder, for appellant.

The test as to whether there is an implied invitation is stated by Mr. Campbell in his treatise on negligence in the following language: "The principle appears to be that invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is a mere pleasure or benefit of the person using it." This language is quoted with approval in *Bennett v. Louisville & N. Ry. Co.* 102 U. S. 577, 26 L. ed. 235. *Cogswell v. Atchison T. & S. F. Ry. Co. (Okla.)* 99 Pac. 923; 20 L. R. A. (N. S.) 837; *Galloway v. Chicago, Milwaukee & St. Paul Ry. Co. (Minn.)* 57 N. W. 1058.

Statutes which simply declare a rule of evidence without creating new rights or taking away vested ones are not within the rule against retrospective operation. *Estate of Patterson*, 155 Cal. 26, 102 Pac. 941, 26 L. R. A. (N. S.) 654.

When a statute changing a rule of evidence has gone into effect, cases thereafter tried must be governed thereby, unless there be a limitation in the statute although the pleadings were filed before the law went into effect. *First Methodist Episcopal Church of Grand Forks v. Fadden*, 8 N. D. 162, 77 N. W. 615; *Webb v. Den*, 17 How. 576; *Rich v. Flanders*, 39 N. H. 304; *D. E. Corda v. City of Galveston*, 4 Tex. 470; *Randon v. Green*, 7 Humph. 130; *Shields v. Land Co. (Tenn.)* 28 S. W. Rep. 668.

The question whether one injured was on the platform of the railway company by invitation or consent of the company is for the jury. Also the question of dangers existing at a railroad station and whether they were habitual and notorious, and whether the company had knowledge of them, or should have had such knowledge, where the evidence is in dispute, are questions which must be submitted to the jury for their deter-

mination. *Exton v. Central Ry. Co.* 63 N. J. L. 356; 56 L. R. C. 508; *Denver & Rio Grande Ry. Co. v. Spencer*, 51 L. R. A. 121, 27 Colo. 313; 61 Pac. 606; *Southern Ry. Co. v. Bates*, 194 Ala. 78, L. R. A. 1916A, 510.

Ed. L. Grantham and Young, Conmy & Young, for respondent.

"Statutes are presumed to operate prospectively only. No part of the Code of Civil Procedure of this state is retroactive unless expressly so declared." Section 7320 C. L. 1913; *E. J. Lander & Co. v. Deemy* (N. D.) 178 N. W. 922.

Action commenced and answer filed before statute relating to confession on pleading went into effect; trial held subsequently; held statute had no application. *Pugh v. Warner*, (Tex.) 106 S. W. 698.

Sale under deed of trust, publication of notice under provisions of old code; new code into effect April 1st; sale held April 5th; held valid. New code not retroactive. *Fowler v. Lewis*, Admr. (W. Va.) 14 S. E. 447; *Ranney v. Bostic*, 15 Mo. 215; *Gumper v. Waterbury Traction Co.* (Conn.) 36 Atl. 806.

Act providing for costs as to prosecutors inapplicable to prosecution commenced prior to going into effect of act. *State v. Berry*, 25 Mo. 355.

Cases tried below prior to new statute of trial de novo on appeal; held statute inapplicable to cases tried below prior to going into effect of the statute. *Simonson v. Simonson*, 50 Ia. 110; *Trebor v. Zwaff*, 50 Ia. 180; *Joliet I. & S. Co. v. C. C. & W. R. Co.*, 50 Ia. 455.

"If the injury is not the material and probable consequence of railroad company's negligence, and could not have been foreseen or reasonably anticipated, as the probable result of such negligence, there could be no recovery." 22 R. C. L. 942, § 184.

The question always is: Was there an unbroken connection between the wrongful act and the injury, a continuous operation? * * * It is admitted that the rule is difficult of application, but it is generally held that in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the wrongful act, and that it ought to have been foreseen in the light of attending circumstances." *Mil. & St. P. Ry. Co. v. Kellogg*, 94 U. S. 476; 24 L. ed. 256, cited and followed in; *Pielke v. C. M. & St. P. Ry. Co.*, 5 Dak. 444, 41 N. W. 669, applying the rule to fire cases, but citing au-

thorities applying to other situations; *Garraghty v. Hartstein*, (N. D.) 143 N. W. 390.

"The law is that if in doing a lawful act, a casualty purely accidental arises, no action will lie for an injury resulting."

"Mischief which could by no reasonable possibility have been foreseen, and which no reasonable person would have anticipated, can not be taken into account as a basis on which to predicate a wrong." *Wabash etc. Ry Co. v. Locke*, (Ind.) 114 N. E. 391; Judge Cooley in *Sjogren v. Hall*, 53 Mich. 75, 18 N. W. 812.

"An injury which is not the natural consequence of an act or omission, and that would not have resulted but for the interposition of a new and independent cause, is not actionable." *C. B. & Q. v. Richardson*, 202 Fed. 836, C. C. A.

"One of the most valuable tests to apply to determine whether a negligent act was the proximate or remote cause of an injury is to determine whether a responsible human agency has intervened sufficient of itself to stand as the cause." 176 Fed. 890, C. C. A., 9th circuit; *Seith v. Commonwealth*, (Ill.) 89 N. E. 425; *Wharton on Negligence*, § 134; *Tutin v. Hurley*, (Mass.) 93 Am. Dec. 154.

"If a person, although on the premises by invitation, deviates from the accustomed way or goes to a place other than such as are covered by the invitation, the owner's duty of care ceases forthwith." 20 R. C. L. 68, § 59.

"Where one enters upon the premises of another with his consent but without an invitation, and not in the discharge of any public or private duty, he is a bare licensee, and the occupier of the premises owes no duty, to him as long as no wanton or willful injury is inflicted upon him by the licensor or his servants." *Chesley v. Rocheford & Gould*, (Neb.) 96 N. W. 241.

"Where a plaintiff, a stevedore, was injured by falling through an unguarded hatchway on a ship, on a part of the ship where his duties did not require him to be, the defendants were not liable. Plaintiff, while not strictly a trespasser, being a mere licensee at sufferance to whom the defendants at the time owed no duty." *Kennedy v. Chase*, (Cal.) 3 Am. Neg. Rep. 520.

"Where the owner or occupier of lands, by express invitation, induces a person to make use of a portion of the premises for an express purpose, his liability is confined within the limitation of the invitation

and does not extend to injuries received by the person invited while using the premises for a purpose not expressed and not authorized by the invitation." *Ryerson v. Bathgate et al.* (N. J.) 11 Am. Neg. Rep. 300; *June v. Boston & A. R. Co.* (Mass.) 26 N. E. 238.

"When an invitee steps beyond the bounds of his invitation, he becomes, at most, a mere licensee." *Menteer v. Scalzo Fruit Co.* 240 Mo. 177, 144 S. W. 833, and other cases.

"One who, without being expressly or impliedly invited to enter railroad depot, enters depot for purpose of ascertaining if certain friends of his were therein, is a mere licensee and can not recover from railroad company for injuries from falling down open stairway in baggage office he had entered to ask porter about his friends." *C. R. I. & P. Ry. v. Russell* (Ark.) 206 S. W. 666.

As to what constitutes a licensee and invitee, see *Tex. O. & E. Ry. Co. v. McCarroll* (Okla.) 195 Pac. 139.

CHRISTIANSON, J. This is an action to recover damages for personal injuries sustained by the plaintiff at the station of the Chicago, Milwaukee & St. Paul Railway Company in Fairmount, Richland county, in this state. The injuries were sustained on the evening of January 31, 1920, and were occasioned by one of the passenger coaches on a south-bound passenger train operated by the defendant colliding with a sled which was standing on the station platform at Fairmount, causing said sled to be thrown against the plaintiff. The plaintiff, at the time of the injury, was, and for a long time prior thereto had been engaged in the bus, baggage, and transfer business at Fairmount, N. D. And as so engaged he met daily all the passenger trains arriving at and departing from the said Chicago, Milwaukee & St. Paul Railway Company's station at said place. About 9 o'clock on the evening in question, and at a time when a passenger train of the defendant was due and expected to come into said town from the north and stop at the station for the purpose of letting off and taking on passengers and unloading and loading baggage and expressage, the plaintiff was upon said depot platform. There was a sled to which a team of horses were hitched on the platform. This rig had been driven onto the platform by one Schafer, who was then an employee of the American Express Company. Schafer and his said rig were on the platform for the purpose of delivering express matter to or receiving the same from the express and baggage coach of

said passenger train, which train was then expected to arrive, and which collided with said sled. There was also on the sled at the time some baggage which had been taken from the regular baggage truck of the defendant, which baggage it was the duty of the defendant to deliver into the baggage coach of said passenger train. After the accident this baggage was delivered by the railroad employees into said baggage coach from the sled. On the night of the accident there was a snowstorm and there were some snowdrifts on the depot platform. The accident occurred at the north end of the station.

The evidence shows that the railroad track runs north and south, and that the depot is situated on the east side of the track. The depot platform is about 24 feet long. There is a bay window about 15 feet long which projects about 3 feet from the wall. There is a distance of about 13 feet from the bay window to the edge of the platform. There are two waiting rooms. The ladies' waiting room is the northerly room in the depot. The men's waiting room is south of the office, and the freight room is immediately south of that. A few minutes before the train came in, plaintiff drove his bus to its accustomed place, a point about 25 or 30 feet south of the depot. He left his bus and went into the ladies' waiting room. At that time there was no team or sled on the platform. He remained in the waiting room a little while, until he heard the train coming; he then stepped outside the door, and was returning to his bus at the south end of the platform when he was struck by the sled. The railway company furnished its employees at the depot with a truck operated by hand with which to transfer baggage from the baggage room in the depot to the baggage car and from the baggage car back to the baggage room in the depot. When there was snow on the depot platform, it was difficult, if not impossible, to operate this truck; and on such occasions Schafer would put the baggage on his sled and transfer it from the baggage room to the baggage car and vice versa. As already stated, on the evening of the accident Schafer had put the baggage on his sled; it was on the sled at the time the accident occurred; and, after the accident, the employees of the defendant took the baggage from the sled and put it into the baggage car. Schafer testified that he merely hauled the baggage for the accommodation of the boys in the depot. He further testified that ordinarily his sled would not be placed where it was that evening, and that the only reason he placed it there was because a man carrying the mail had left his sled and team on the platform so that the passage was obstructed.

At the close of all the evidence the court directed a verdict in favor of the defendant for a dismissal of the action, and plaintiff has appealed from the judgment. The controlling question on this appeal, therefore, is whether the court erred in directing a verdict.

It is contended by the defendant that under the evidence in this case: (1) The plaintiff was a licensee merely, upon the particular portion of the premises where the accident occurred; and "that the defendant owed him no duty except to refrain from wilfully and wantonly injuring him." (2) That the defendant was in no manner liable for the acts of Schafer. (3) That the accident was caused by the action of the mail man, Miller, in stopping his team upon the platform and obstructing Schafer's passage, and that this act was the proximate cause of the injury. (4) That no actionable negligence on the part of the defendant has been established. These contentions will be considered in the order stated:

1. We are unable to agree with the contention advanced that the plaintiff was restricted, and that the implied invitation of the defendant extended only, to the particular portion of the grounds where his bus was situated, and that the plaintiff, at the time and place where he was injured, was a licensee only. The plaintiff was engaged in transporting passengers, and their luggage, to and from the station where the accident occurred. In performing such service he would assist passengers with their hand luggage, and in general perform such service as is ordinarily performed by persons engaged in similar service. Not only is the nature of such service generally known, but the evidence in this case shows the kind of service the plaintiff had been performing for passengers which he transported to and from the station. In our opinion the service performed was for the mutual benefit of the carrier and the plaintiff, and the carrier owed the plaintiff the duty of using reasonable care for his safety while he was on the carrier's premises. 4 R. C. L. pp. 1051, 1052, § 502; 22 R. C. L. pp. 919, 920, §§ 165—166; 3 Thompson, Commentaries on the Law of Negligence (2d ed.) §§ 2685, 2686. We are also satisfied that the implied invitation under which plaintiff was acting extended to the place where he sustained his injuries. In other words, we are of the opinion that the plaintiff had a right, as an invitee of the defendant, to be where he was at the time the accident occurred.

(2—4). It is the duty of the railway company to keep its station plat-

form reasonably clear and free from obstacles by which passengers and others invited to transact business are liable to be injured. 4 Elliott on Railroads (2d ed.) § 1590; Mangum v. N. C. R. Co., 145 N. C. 152, 58 S. E. 913, 13 L. R. A. (N. S.) 589, 122 Am. St. Rep. 437. This duty makes it incumbent upon "the management of railroads to see to it that the platforms at the stations are unobstructed by trucks, baggage, or otherwise within a safe distance from the side of a train "coming into or leaving the station." C. & A. R. R. Co. v. Gore, 105 Ill. App. 16; Irvin v. Missouri Pac. R. Co., 81 Kan. 649, 106 Pac. 1063, 26 L. R. A. (N. S.) 739. At the time the accident occurred Schafer was performing certain work which the defendant carrier was required to perform, namely, the handling of baggage. And he was utilizing the sled and team for that purpose. Not only so, but Schafer had, on prior occasions, repeatedly performed this service when weather conditions were the same as they were on the night the accident occurred, and had utilized the same outfit in performing it. And while we deem the question a close one, we are not prepared to say that, as a matter of law, there was no actionable negligence on the part of the defendant. Nor are we prepared to say, as a matter of law, that some cause other than the negligence of the defendant's servants was the efficient or proximate cause of the injuries sustained by the plaintiff. See Irvin v. Missouri Pac. Ry. Co., 81 Kan. 649, 106 Pac. 1063, 26 L. R. A. (N. S.) 739; Mangum v. North Carolina R. Co., 145 N. C. 152, 58 S. E. 913, 13 L. R. A. (N. S.) 589, 122 Am. St. Rep. 437.

Ordinarily, the questions of negligence and proximate cause are questions of fact for the jury. 29 Cyc. 627, 639. They become questions of law only when the evidence is such that different minds cannot reasonably draw different conclusions, either as to the facts or the deductions to be drawn from the facts. McGregor v. Great Northern Ry. Co., 31 N. D. 471, 154 N. W. 261, Ann. Cas. 1917E, 141. And, in our opinion, the questions of negligence and proximate cause were, under the evidence in this case, questions of fact for the jury, and the trial court should not have directed a verdict in favor of the defendant.

Reversed and remanded for a new trial.

BRONSON, BIRDZELL, and ROBINSON, JJ., concur.

GRACE, C. J. (concurring specially). I am of the opinion that, under

the evidence, the questions of negligence and proximate cause were questions of fact for the jury, and it was error not to submit those questions to it for determination, instead of directing a verdict in defendant's favor, which the trial court did.

ERNEST C. BRAGONIER, Respondent, v. BROUGHAM STEVENSON, Appellant.

(187 N. W. 615)

Mortgages — judgment canceling notes held supported by convincing evidence.

Because of fraud, misrepresentation and want of consideration the trial court gave judgment cancelling two promissory notes and a mortgage made by the plaintiff to the defendant. *Held* that the judgment is in accord with convincing evidence.

Opinion filed April 1, 1922

Appeal from the District court of Bowman county; *Lembke, J.*

Affirmed.

Theo. B. Torkelson, for appellant.

Emil Scow, for respondent.

ROBINSON, J. About six years ago, in Nebraska, the plaintiff made to defendant his promissory notes for \$1,100 and secured the same by a mortgage on the land described in the complaint. The plaintiff brings this action to cancel the notes and the mortgage, alleging fraud and want of consideration. By cross-complaint defendant demands judgment for \$1,100 and interest, and that the land be sold to satisfy the same. Defendant appeals from a judgment against him. The record is lengthy and cumbersome, and the testimony is conflicting.

At Sholes, Neb., defendant was a banker and the manager of a store which he had installed and which was known as the Farmers' Store.

He had a fourth interest in the store, and the notes and mortgage were given as the purchase price of his interest. The plaintiff contracted to serve as manager for \$50 a month in cash and \$50 a month to be invested in the store. It was a country store with an old stock of dry goods, clothing, and groceries. Defendant and his partners had run the store for a year. He had bought the original stock at Benson, a suburb of Omaha. It was the total remains of a closing-out stock. Of course the question is one of fraud and misrepresentation. After plaintiff had run the store for about a year he brought an action in Nebraska to rescind the contract. While the action was dismissed because of laches, the court found thus:

"That at the time of the execution and delivery to the defendant of said promissory notes and mortgage the plaintiffs, nor either of them, did not know the value of the property of said Farmers' Store Company, nor the amount of its indebtedness, but relied upon the statements of the defendant as to the value of said property and the amount of said indebtedness, and believed the same to be true, and that in truth and in fact the amount of the indebtedness of said partnership existing at the time of said representations to plaintiffs by defendant was the sum of at least \$4,500, and the same continued to be an indebtedness against said partnership after plaintiff, Ernest C. Bragonier, purchased said undivided one-fourth interest therein, and such indebtedness had never been reduced by defendant to the sum of \$1,500, or any sum, but continued the liability of said copartnership."

That finding is substantially in accord with the finding of our trial court, and it is sustained by convincing testimony, regardless of the fact that the greater number of witnesses testify to the contrary. To induce the plaintiff to purchase his one-fourth interest in the store, it seems defendant represented to him that the debts of the store amounted to only \$1,500, and concealed from the plaintiff a debt of \$4,400 on promissory notes made by the store company to the defendant's bank. And while in the store as manager plaintiff was induced to renew the notes to the bank, and to pay some interest on assurances that the notes were merely for the accommodation of the bank. But, as time elapsed, defendant demanded that the supposed accommodation notes be secured by a mortgage on all the stock of goods in the store, or that goods to the amount of \$4,400 be turned over to the bank in payment of the notes. Then plaintiff's eyes were opened, and he refused the demand, and was put out of the store, and was forced to abandon to Stevenson all his

rights under the contract. Of course defendant insists and swears that there was no fraud or misrepresentation, and that the plaintiff signed the notes and mortgage with full knowledge of all the material facts. The testimony is lengthy, cumbersome, and conflicting, and it does admit of cogent arguments pro and con. But one thing is entirely certain, that if the plaintiff signed the notes and mortgage without deception and with actual knowledge of the facts in regard to the stock of goods and the debts of the store company, then he, the plaintiff, must be a mere dolt and in need of a guardian. Hence the strong probability is that he was deceived and misled. After serving in the store for nearly a year and receiving only \$50 a month in cash, he was forced to quit the store and to abandon all his interest to the defendant. He was forced to a practical rescission of the contract. He has received nothing from the defendant or the store company, and he should pay nothing.

Judgment affirmed.

CHRISTIANSON and BIRDZELL, JJ., concur.

BRONSON, J. (specially concurring). The plaintiff brought an action to quiet title. The defendant answered by setting up plaintiff's notes and real estate mortgage and demanding the foreclosure thereof. The plaintiff replied by alleging that the notes and mortgage were obtained through fraud and deceit to plaintiff's damage in the amount of such notes, and by demanding that the notes and mortgage be canceled. The trial court found that through false and fraudulent representation the plaintiff was induced to make the notes and mortgage; that at the time the same were made, the indebtedness of the store exceeded the amount of its property; and that for the one-fourth interest in the partnership, on account of which the notes were executed, plaintiff received no consideration whatever. The trial court concluded that the plaintiff was entitled to have his title quieted in the land and the mortgage lien of the defendant canceled. The defendant has appealed from the judgment thus entered, and has demanded a trial de novo. He contends that the evidence is insufficient to establish misrepresentation by the defendant, and to establish that plaintiff was damaged, in any event, to the amount of the notes. Upon review of the record, I am of the opinion that the

findings of the trial court find substantial support in the evidence, and should not be disturbed.

The judgment accordingly should be affirmed.

GRACE, C. J., concurs.

STATE OF NORTH DAKOTA, EX REL., OTTO BAUER, Relator, Petitioner, v. R. A. NESTOS, Governor of the State of North Dakota, SVEINBJORN JOHNSON, Attorney General of the State of North Dakota, JOSEPH KITCHEN, Commission of Agriculture and Labor, and as such constituting the Industrial Commission of the State of North Dakota, JOHN STEEN, State Treasurer of the State of North Dakota, and MARTIN S. HAGEN, Manager of the Hail Department of the State of North Dakota, and S. A. OLS-NESS, Commissioner of Insurance of the State of North Dakota, Respondents.

(187 N. W. 233)

Statutes — statutes granting specific power or imposing definite duty impliedly grant the necessary authority to execute the same.

1. Where a statute grants a specific power or imposes a definite duty, it, also, in the absence of a limitation, by implication confers authority to employ all the means that are usually employed and that are necessary to the exercise of the power conferred or to the performance of the duty imposed.

Insurance — statute authorizing negotiation of loan to state hail insurance fund held to imply power to execute its purpose.

2. In construing § 23, chap. 77, Laws 1921, which provides that "the Commissioner of Insurance, with the approval and assistance of the Industrial Commission, shall have authority to negotiate or float a loan, if found to be advisable, whereby the state hail insurance fund can pay its obligations in cash," it is *held*, that the power conferred and duty imposed upon the officers named carry by implication the power to use such proper and lawful means as in their judgment are necessary to accomplish the intended purpose.

Insurance — state officers could not be enjoined from carrying out an authorized contract to sell warrants to provide money for the state hail insurance fund.

3. In the instant case, wherein it is sought to restrain these officers and the State Treasurer from carrying out a certain contract made under the provisions of the statute above quoted, it is *held*, for reasons stated in the opinion, that the Commissioner of Insurance and the Industrial Commission in making such contract did not exceed the powers conferred upon them by such statute; and that the Commissioner of Insurance and the State Treasurer are not inhibited from performing any acts which they have agreed to perform under the contract.

Opinion filed Feb. 11, 1922. Rehearing denied April 11, 1922.

Original application for a writ of injunction against the members of the State Industrial Commission, and the Commissioner of Insurance, the State Treasurer, and the Manager of the State Hail Insurance Department.

Writ denied.

Sullivan, Hanley, and Sullivan, for petitioner.

Sveinbjorn Johnson, Attorney General, for respondents.

It is a rule of construction which applies to general legislation in regard to those subjects in which the public at large is interested that legislative grants or public grants for such public purposes are to be liberally construed and expounded than similar provisions concerning private grants." *Bradley v. N. Y. & N. H. Ry. Co.*, 21 Conn. 306; *United States v. Denver etc. Ry. Co.*, 150 U. S. 14; 14 Sup. Ct. Rep. 11; 37 U. S. Lawyers ed. 975.

As a general rule where power is granted, it implies that any reasonable and proper means may be employed to execute it, unless specific directions are given. 25 R. C. L. 980; 28 L. R. A. 732; 2 Sutherland Stat. Const. 563; 36 Cyc. 1113.

It is the duty of the court to carry out the purpose of the legislature. When cases of doubt arise in arriving at such intent and purpose the courts will look to contemporaneous history of the evils sought to be remedied and the conditions which probably led up to and induced the enactment. *Bailey v. State*, 71 N. E. 655.

A statute should be construed as a whole with to the whole system

of which it is a part. 2 Lewis' Sutherland Stat. Const. § 348.

CHRISTIANSON, J. This is an original proceeding in this court against the members of the State Industrial Commission (the Governor, Attorney General, and the Commissioner of Agriculture and Labor), the State Treasurer, the Insurance Commissioner, and the manager of the State Hail Insurance Department, to enjoin them from carrying out a certain contract between the Industrial Commission and the Minnesota Loan & Trust Company and Lane, Piper & Jaffray, Inc., relating to the sale of certain warrants issued by the State Hail Insurance Department. The jurisdiction of the court has not been challenged. The Attorney General of the state, who appears as one of the respondents, as well as attorney for all the respondents, while denying the merits of the cause, joins in the application that this court assume original jurisdiction. On the return day the respondents interposed a general demurrer to the petition of the relator, so the question before this court is whether the petition sets forth a cause of action, and entitles the plaintiff to any relief.

In order to intelligently consider the questions raised by the relator, it is essential to allude to the laws of this state establishing and providing for the operation of the State Hail Insurance Department. By constitutional amendment adopted at the general election held in November, 1918, the Legislature was authorized to levy a tax for the purpose of indemnifying the owners of crops against damage by hail. See article 24, Amendments to State Constitution. See, also, article 30 of such Amendments. Pursuant to the constitutional authority so granted, the legislative assembly in 1919 enacted a law, commonly known as the State Hail Insurance Act, establishing the State Hail Insurance Department, and providing for the operation thereof. Chap. 160, Laws 1919. The department was established in the office, and placed under the management, supervision, and control of the Commissioner of Insurance. *Id.* § 2.

The act provided that—

"All moneys collected under the provisions of this act shall be deposited with the State Treasurer and shall be kept in a separate fund to be designated 'state hail insurance fund.'" *Id.* § 23.

The act further provided:

"Whenever the Commissioner of Insurance shall furnish to the State

Auditor a certified list giving the losses sustained, together with the names and addresses, and a written acceptance of the amount allowed any claimant under the provisions of this act, it shall be the duty of the State Auditor with the consent and approval of the Governor, in anticipation of the payment of the taxes provided therefor, to draw warrants upon the State Treasurer for said amounts in favor of such persons, which amounts shall be charged to the state hail insurance fund. Such warrants to be mailed to the persons entitled thereto as shown by the certified list of the Commissioner of Insurance. All such warrants to be paid from the state hail insurance fund, and shall draw interest from date of issue at the rate of six per cent. per annum until due and payable. Such warrants shall become due and payable on the call of the State Treasurer." Id. § 21

The Hail Insurance Act carried an emergency clause, and became effective March 1, 1919. In 1921 the statute was re-enacted with certain amendments. Chap. 77, Laws 1921. Among other changes made in the law was one providing for a manager of the department. Section 23 of the act relating to the hail insurance fund was amended by adding thereto, among others, the following provision:

"Provided, that the Commissioner of Insurance, with the approval and assistance of the Industrial Commission, shall have the authority to negotiate or float a loan, if found to be advisable, whereby the state hail insurance fund could pay its obligations in cash upon certification of the Commissioner of Insurance to the State Auditor as provided in § 21 of this act." Chap. 77, Laws 1921, § 23.

It is obvious that the legislature had a purpose in view in adding this provision. Under the original act the warrants drawn could be paid only when the taxes levied had been collected. And it is a matter of common knowledge that many of the hail warrants issued during the years 1919 and 1920 were not paid for some period of time, and that many of the holders of such warrants, in order to obtain cash, were required to discount them at high rates. It was doubtless this condition that the legislature sought to remedy when it authorized the Commissioner of Insurance, with the approval and assistance of the Industrial Commission, to obtain a loan to pay the obligations of the hail insurance department. The contract, the performance of which it is sought to have enjoined by this proceeding, is one purporting to have been made by the Commissioner of Insurance by and with approval and assistance of the

Industrial Commission under the provision of law last quoted. In general the plan or arrangement as provided in the contract is as follows: The Minnesota Loan & Trust Company, Lane, Piper & Jaffray, Inc., agree to purchase any and all warrants issued for 1921 hail losses that may be offered to them by any person at the following rates: All warrants offered and purchased during February, 1922, at 98 per cent., during March, 1922, at 98½ per cent., during April, 1922, at 99 per cent., during May, 1922, at 99½ per cent., and during June, 1922, at 100 per cent. of the principal or face amount of such warrants. The Industrial Commission agrees to repurchase from the Minnesota Loan & Trust Company and Lane, Piper & Jaffray, Inc., at par and accrued interest, all hail warrants which they have so purchased from the holders thereof, and to issue in payment thereof the notes of the Industrial Commission dated December 1, 1921, and bearing interest at the rate of 6 per cent. per annum from the date thereof. Such notes to be issued in denomination of \$1,000, and to mature as follows: 20 per cent. thereof on December 1, 1922; 25 per cent. thereof on February 1, 1923; 20 per cent. thereof on April 1, 1923; and 35 per cent. thereof on June 1, 1923. The avowed purpose of the arrangement is to enable the holders of hail warrants to realize thereon in cash the amounts which the Minnesota Loan & Trust Company and Lane, Piper & Jaffray, Inc., have agreed to purchase them for. The contract also provides that the hail warrants so repurchased by the Industrial Commission from the Minnesota Loan & Trust Company and Lane, Piper & Jaffray, Inc., shall be deposited with the State Treasurer and by him held in trust as collateral security for the payment of the notes. And the State Treasurer agrees to certify on the back of each note that hail warrants aggregating in principal amount the amount of such notes and all similar notes outstanding have been deposited with and are held by him as collateral security for the payment of such note and all other notes, and that such warrants are payable from the hail insurance fund, into which fund are paid all proceeds from the flat acreage tax on all tillable lands in the state of North Dakota, and the special indemnity tax levied pursuant to the provisions of law relating to hail insurance. It is also provided that the Insurance Commissioner shall, and he agrees to, certify upon the back of each note as to the amount of hail insurance taxes levied for the year 1921 for the purpose of paying the obligations against the hail insurance fund. The contract further provides that, before the Minnesota Loan & Trust Company and Lane, Piper & Jaffray, Inc., shall be required to purchase war-

rants drawn on the hail insurance fund from the present holders thereof, the Commissioner of Insurance shall furnish a certificate that such warrants represent valid obligations upon the hail insurance fund, and that the State Treasurer shall furnish a certificate that the indorsements on the several warrants are in due form. The contract also provides that the State Treasurer shall, as far as practicable, call for payment and pay all other warrants drawn against the state hail insurance fund before he calls any of the warrants deposited with him as trustee.

It is contended by the petitioner that this contract is invalid for the reasons:

"(1) That the Industrial Commission and the Insurance Commissioner have no authority to purchase any of the hail warrants.

"(2) That they have no authority to execute or deliver any of the notes, etc., described in the petition.

"(3) That they have no authority to pay the notes, and that there is no fund out of which principal or interest of the said notes may be paid.

"(4) That they have no authority to contract with the company to deposit such warrants as collateral security with the State Treasurer.

"(5) That the State Treasurer has no authority under the law to become party to the contract, to indorse a statement upon the back of the notes as recited in the contract and as appears in the petition; also that the Commissioner of Insurance has no authority to certify to the validity of warrants.

"(6) That the State Treasurer has no authority to certify to the regularity of the indorsements of any of the warrants, or accept the warrants and hold the same as collateral to the notes, or to certify to the said notes as provided in the contract, or to pay principal or interest on any of said warrants so deposited with him, or to pay hail insurance warrants in the order provided in said contract, or to apply the proceeds of said warrants so deposited with him in payment of principal or interest of said notes.

"(7) It is further contended that the State Treasurer has no authority to pay, the Insurance Commissioner no authority to agree to authorize the payment, and the Industrial Commission no authority to contract and agree to pay out of the hail insurance fund such difference, if any, as may exist in interest between the dates the hail warrants are called for payment by the Treasurer when interest stops and the dates when

the notes made as provided in the contract mature and may be paid.

"(8) It is further contended that the warrants are not valid obligations of the hail fund, nor are the notes such obligations of the Industrial Commission or the hail fund or any officer of the state whatsoever."

In our opinion the contentions advanced by the relator cannot be sustained. The legislature specifically authorized the Commissioner of Insurance and the Industrial Commission, if and when they find it advisable so to do, to make a loan for the purpose of paying the outstanding obligations for hail losses. The Industrial Commission was created by the legislature in 1919 for the purpose of conducting and managing, on behalf of the state of North Dakota, "certain utilities, industries, enterprises, and business projects," which had been or might thereafter be established by law. Chap. 151, Laws 1919. The Industrial Commission was placed in control of the bank of North Dakota, the North Dakota Mill & Elevator Association, and the Home Building Association. Chaps. 147, 150—154, Laws 1919. See, also, *Green v. Frazier*, 253 U. S. 233, 40 Sup. Ct. 499, 64 L. ed. 878. The members of the Industrial Commission were "empowered and directed to manage, operate, control and govern all utilities, industries, enterprises and business projects," then or thereafter "established, owned, undertaken, administered or operated by the state of North Dakota, except those carried on in penal, charitable or educational institutions" (Laws 1919, chap. 151, § 5), and was given exceedingly broad powers in discharging the duties imposed upon it. See chap. 151, Laws 1919.

It will be noted that, while the legislature authorized the Commissioner of Insurance and the Industrial Commission to make a loan for the purpose of paying obligations for hail losses, no provision was made as to the manner in which the power so granted should be exercised. It does not follow, however, as contended by the relator, that these officers are precluded from exercising the power conferred and performing the duty imposed upon them because the legislature failed to prescribe the particular mode in which such power should be exercised and the duty performed. An express statutory grant of power on the imposition of a definite duty carries with it by implication, in the absence of a limitation, authority to employ all the means that are usually employed and that are necessary to the exercise of the power or the performance of the duty. 25 R. C. L. pp. 979, 980; 36 Cyc. 1113; 2 Lewis' Sutherland, Stat. Const. 563; *Newcomb v. Indianapolis*, 141 Ind. 451, 40 N. E. 919,

28 L. R. A. 732; Fuller v. Board of University and School Lands, 21 N. D. 212, 129 N. W. 1029. That which is clearly implied is as much a part of a law as that which is expressed. And, in our opinion, the authority conferred upon the Commissioner of Insurance and the Industrial Commission to negotiate or float a loan, if and when they find it desirable to do so, carries with it by implication the power to use such proper and lawful means as in their judgment are necessary to accomplish the intended purpose. Of course, it is not contended that, in making a loan to pay obligations against the hail insurance fund, the Commissioner of Insurance and the Industrial Commission have any authority to pledge the credit of the state of North Dakota; and there has been no attempt to do so. The notes to be issued will in reality be obligations against the hail insurance fund, and they will be paid with moneys realized from taxes levied and collected under the provisions of the Hail Insurance Act. See First National Bank of Halstad, Minn., v. Olsness et al. ante, 186 N. W. 751. What has been said disposes of the first three contentions advanced by the relator.

The fourth contention, namely, that there is no authority to contract that the warrants shall be deposited with the State Treasurer, and by him held in trust as collateral security for the payment of the notes is also practically disposed of by what has been said in considering the first three objections. Inasmuch as the officers have authority to "negotiate and float a loan," they unquestionably have power to issue instruments evidencing the indebtedness incurred. And we see no reason why they may not contract with the lender that collateral pledged as security for the payment of the loan shall be deposited with some suitable depository. No provision of law has been pointed out, and none has been found, which inhibits the State Treasurer from acting as such depository. The State Treasurer has heretofore been designated by the legislature as custodian of a fund to be accumulated and disbursed under an optional Hail Insurance Act (see State ex rel. Olson v. Jorgenson, 29 N. D. 173, 150 N. W. 565) and also as custodian of a fund provided for the bonding of municipal officers (see State ex rel. Linde v. Taylor, 33 N. D. 76, 109, 156 N. W. 561, L. R. A. 1918B, 156, Ann. Cas. 1918A, 583). Inasmuch as the State Treasurer has signified his willingness to act as a depository of the hail warrants to be pledged as collateral security for the payment of the notes to be issued by the Industrial Commission, and as there is nothing in the constitution or statutes of this state inhibiting

him from so doing, we are entirely agreed that the relator has not, nor has any other person, any cause to complain.

Nor do we think there is any merit in the fifth and sixth objections. Before the state treasurer pays any warrant drawn on the hail insurance fund he must examine the warrant and satisfy himself, not only that the warrant is a genuine one, but also that any indorsement thereon is in due form. This is a duty imposed upon him by law. Hence the contract merely requires him to perform that duty, and provides that he shall make a certificate showing that the duty has been performed.

Nor do we see any legal objection to the certification by the State Treasurer as to the amount of hail warrants which he has received and is holding as collateral security for the notes, or to the certification by the Commissioner of Insurance as to the amount of hail insurance taxes levied for the year 1921 for the purpose of paying claims against the hail insurance fund. Certainly there is no reason why a depository may not make a certificate as to what has been deposited with him or it. Nor is there any reason why a public officer may not make a certificate or an affidavit showing the facts regarding a matter connected with his office, or ascertainable from the records therein.

Nor do we see any legal objection to the certification by the Commissioner of Insurance that certain hail warrants are valid obligations against the hail insurance fund. Among the duties imposed upon the Commissioner of Insurance by the Hail Insurance Act are to ascertain the amount of losses adjusted and approved, and to certify to the State Auditor the amount of losses sustained, together with the names and addresses of the parties who are entitled to be compensated for such losses. The State Auditor is required to issue warrants to the persons named for the respective amounts stated in the list so certified by the Commissioner of Insurance. The duty of the Commissioner of Insurance is terminated when he has certified the losses to the State Auditor; but, if he is willing to compare the warrants issued by the State Auditor with the list of losses adjusted and approved so as to satisfy himself that the different warrants so examined have in fact been issued to the proper persons and in the proper amounts, there is clearly no legal objection to his doing so. Nor is there any good reason why he may not make a certificate stating that this has been done.

The seventh and eighth objections raised by the relator are fully answered by what was said in considering the first three.

We have carefully examined the contract involved in this controversy, and are unable to find wherein the Commissioner of Insurance or the Industrial Commission have exceeded the powers conferred upon them, or wherein the Commissioner of Insurance or the State Treasurer have agreed to perform any act which they are inhibited from performing.

It follows that the application of the relator must be, and the same hereby is, denied.

BIRDZELL and BRONSON, JJ., concur.

ROBINSON, J., concurs in result.

GRACE, C. J, did not participate.

On Rehearing Filed April 11, 1922

PER CURIAM. Plaintiff has filed a petition for rehearing wherein it is asserted that the court in rendering its decision herein failed to consider the fact that the contract involved is predicated on "the theory that the insurance fund is indivisible; that into said fund is paid the special indemnity tax and the flat acreage tax for various years; that when said taxes are paid into said fund there is no distinction between taxes levied for one year and taxes levied for another year; no distinction between the indemnity tax and the flat acreage tax of one year and the indemnity tax and the flat acreage tax levied for another year." That "as a matter of fact, the defendants are by the proceeding of which we complain in the complaint treating the hail insurance fund as an indivisible fund into which are paid all taxes levied pursuant to chap. 160 of the Laws of 1919, as amended by chap. 77 of the Laws of 1921, and are proceeding upon the theory that said taxes when paid into said fund lose their identity as taxes levied for any particular year, and become merely a general asset of the fund; that all taxes so paid into said fund are to be used, insofar as available after paying the expenses of the hail insurance department, in paying hail insurance warrants in the order in which they are registered; that is, that all 1921 warrants must be paid prior to the payment of the 1922 warrants, regardless of the fact that some of the funds used to pay said 1921 warrants may be proceeds of the indemnity

tax or the flat acreage tax levied for the year 1922, under chap. 77 of the Laws of 1921, or a portion of said funds may be obtained from the collection of delinquent hail insurance tax for 1920 or 1919, under chap. 160 of the Laws of 1919."

In our opinion these questions were fully determined in our former decision in this case, and by the decision in *First National Bank of Halstead, Minn., v. Qlsness, et al.*, ante, 186 N. W. 751. The statute (§ 21, chap. 77, Laws 1921) makes it the duty of the State Auditor to draw warrants upon the State Treasurer, for the amount of losses, and, in favor of the persons entitled to be compensated therefor, as certified by the commissioner of insurance; and to charge the amounts of the warrants so drawn to the state hail insurance fund. The statute further provides: "All such warrants shall be paid from the State Hail Insurance Fund and shall draw interest from the first day of December at the rate of six per cent. per annum until due and payable. *Such warrants shall become due and payable on the call of the State Treasurer.* It shall be the duty of the State Treasurer at least one each month to call such warrants to the amount of collections remitted to him by the various county treasurers during the preceding month. Provided, however, that a sufficient amount shall at all times be retained in the State Hail Insurance Fund to meet the current expenses of the State Hail Insurance Department as certified by the Commissioner of Insurance." (§ 21, chap. 77, Laws 1921). These provisions speak for themselves, and evidence, we think, an unmistakable intention on the part of the legislature that all moneys received from taxes levied for hail insurance purposes, whether they consist of proceeds of flat acreage taxes or of indemnity taxes; whether they consist of taxes for the current year or of delinquent taxes for previous years, shall all be paid into one fund, viz: the State Hail Insurance Fund; and that all warrants drawn on such fund are when and as called for payment by the State Treasurer properly payable out of any moneys in such fund without regard to the particular tax from which they were derived. A rehearing is denied.

CHRISTIANSON, BIRDZELL, ROBINSON, and BRONSON, JJ., concur.

GRACE, Ch. J., did not participate.

JOHN FROESCHER, Appellant, v. LUDWIG TABBERT, Respondent.

(187 N. W. 962)

Trial — where party agreed to submit matters to jury, court's failure to make findings held not error.

This is an action to recover a certain sum claimed to be owing to the plaintiff for threshing defendant's grain, and to foreclose a threshing lien. The defendant claims that the threshing was performed by another, and that the plaintiff is not the owner of the claim in suit. At the trial the parties stipulated in open court that the case shall "be tried in all respects as a jury case." The case was so tried. The jury returned a verdict for the defendant. The court made an order for judgment pursuant to the verdict, and judgment was entered accordingly. On appeal, the plaintiff contends that the trial court should have made findings of fact. For reasons stated in the opinion this contention is *held* to be without merit.

Opinion filed April 12, 1922

Appeal from the District court of Mercer county, *Pugh, J.*

Plaintiff appeals from the judgment, and from an order denying his motion for judgment notwithstanding the verdict, or for a new trial.

Affirmed.

Sullivan, Hanley & Sullivan and *J. A. Heder*, for appellant.

This action is an action for the foreclosure of a lien and consequently an action triable to the court. We do not anticipate that there will be any argument on that point. Section 7608 C. L. 1913.

In such cases the verdict is merely advisory. *Prondinski v. Garbutt*, 8 N. D. 191, 77 N. W. 1012; *State ex rel. Olson v Royal Indemnity Co.* (N. D.) 175 N. W. 625; *Emery v. First Nat'l Bank*, 32 N. D. 575, 156 N. W. 105.

"In giving the decision the facts found and conclusions must be separately stated." Section 7639 C. L. 1913.

This provision is mandatory. *Garr Scott Co. v. Spaulding*, 2 N. D. 414, 51 N. W. 867.

And the verdict in an equity case does not relieve from necessity of

findings of fact and conclusions of law. *Byrne v. McKeachie*, 29 S. D. 476, 137 N. W. 343.

The failure to comply with the statute is ground for reversal. *Gull River Lbr. Co. v. School Dist.* 39 N. D. 500, 48 N. W. 340.

David Schwartz and Norton & Kelsch, for respondent.

Findings of fact may be waived. Findings of fact—How prepared. Section 7641, C. L. of N. D. 1913.

Findings of fact—How waived. Section 7640 C. L. of N. D. 1913. *Prondzinski v. Garbutt*, 9 N. D. 239.

That findings of fact and conclusions of law were not waived must appear affirmatively of record. 42 Pac. (Cal.) 965.

Section 7656 Compiled Laws of North Dakota 1913 requires that the specifications of the insufficiency of the evidence to sustain the verdict or decision shall point out wherein the evidence is insufficient, etc. Appellant has failed to assign the insufficiency of the evidence as error, as required by statute on motion for new trial, hence is precluded from objecting to the insufficiency of the evidence for the first time on appeal. *Jensen v. Clausen*, 34 N. D. 637.

The appellate court will disregard an objection to the sufficiency of the evidence to sustain the decision in absence of proper and specific specifications of the insufficiency of the evidence. *Updegraff v. Tucker*, 24 N. D. 171.

CHRISTIANSON, J. The plaintiff brought this action to recover \$79.43 with interest from November 5, 1920, which he alleges is due him for threshing defendants's grain in the fall of 1920, and also to foreclose a thresher's lien securing the claim sued upon. The answer denies that the plaintiff was the owner of the cause of action set forth in the complaint, denies that the plaintiff was the owner or lessee of the threshing machine, and alleges that he operated the same under the direction and supervision of one Christ Froescher plaintiff's father, and that said Christ Froescher was the owner and operator of said machine at the time the threshing was done. The answer further alleges that the defendant made the agreement for threshing with Christ Froescher. The answer further alleges that the defendant has counter-claims against said Christ Froescher aggregating the sum of \$352.25. and that the action is brought in the name of John Froescher for the

purpose of precluding the defendant from setting up such counterclaims against Christ Froescher. When the case was called for trial it was stipulated in open court "that the same be tried in all respects as a jury case." Thereupon a jury was duly empaneled and sworn to try the case. and it was duly tried and submitted to the jury under general instructions, with directions to return one of two verdicts, that is, either a verdict for the plaintiff for the amount found to be due him on his claim, or one in favor of the defendant. The jury returned a verdict in favor of the defendant. The court made an order for judgment pursuant to the verdict. Judgment was entered accordingly for a dismissal of the action. Thereafter the plaintiff moved for judgment notwithstanding the verdict or for a new trial. The motion was denied, and the plaintiff has appealed from the judgment and from the order denying the motion for judgment notwithstanding the verdict or for a new trial.

On this appeal the plaintiff asserts that the judgment must be reversed because the trial court failed to make findings of fact. It is contended that, inasmuch as this case was an equitable one, the verdict was advisory only, and that it was incumbent upon the court to make findings of fact and conclusions of law. In our opinion this contention is without merit. The only question in this case was whether the plaintiff had performed the threshing and was the owner of the claim sued upon. The undisputed evidence was to the effect that Christ Froescher (plaintiff's father) was the owner of the threshing machine. The plaintiff claimed that he had leased the threshing machine from his father; that he contracted with, and performed the threshing for the defendant, and that defendant was accordingly indebted to him for the amount of the threshing bill. On the other hand, the defendant claimed that Christ Froescher agreed to perform the threshing; that he (Christ Froescher) actually did perform it, and that he is indebted to Christ Froescher, and not to the plaintiff, for the amount of the threshing bill. The defendant further alleged, and introduced evidence tending to show, that he had valid counterclaims against Christ Froescher aggregating considerably more than the claim in suit. The only question in dispute was as to whether the plaintiff had performed the service and was the owner of the claim in suit. As to this proposition there was, in our opinion, such conflict in the evidence as to make it a question of fact for the jury whether plaintiff's or defendant's version was the correct one. That question was of such nature as to be very properly triable to a jury. The parties expressly stipulated that the case should "be tried in all respects

as a jury case." And in view of this stipulation we are unable to see any reason why the court should continue to treat the action as a court case. There was only one disputed question of fact in the case. The obvious purpose and intention of the parties, as manifested by their stipulation, was that that question should be determined by the jury. The trial court recognized and gave effect to the stipulation. It is axiomatic that, "when the reason of a rule ceases, so should the rule itself" (§ 7244, C. L. 1913); that "he who consents to an act is not wronged by it" (§ 7249, C. L. 1913); and that "acquiescence in error takes away the right of objecting to it" (§ 7250, C. L. 1913). See *Pyke v. Jamestown*, 15 N. D. 157, 107 N. W. 359; *Dring v. St. Lawrence Twp.*, 23 S. D. 624, 122 N. W. 664; *State v. Hayes*, 23 S. D. 596, 122 N. W. 652; *Whalley v. Vidal*, 26 S. D. 300, 128 N. W. 331.

The judgment and order appealed from are affirmed.

GRACE, C. J., and BIRDZELL, BRONSON, and ROBINSON, JJ., concur.

ROSINA RIEDLINGER, Appellant. v. FREDERICK FEIL ET AL.,
Respondents.

(187 N. W. 963.)

Wills — district court's findings as to the mental capacity not disturbed unless clearly opposed to the preponderance of the evidence.

In proceedings contesting the probate of a will, where both the County Court and the District Court, having found mental incapacity of the testatrix and undue influence, disallowed the probate of the will, it is *held*, that the findings of the District Court, being in place of a verdict of a jury, are presumed to be correct and will not be disturbed unless clearly opposed to the preponderance of the evidence.

Opinion filed April 12, 1922.

Action in District court, McIntosh county, *Allen*, J. Petitioner has appealed from an order disallowing the probate of a will.

Affirmed.

Per Curiam.

F. E. McCurdy, for appellant.

G. M. Gannon, A. A. Ludwigs, for respondents.

PER CURIAM. This appeal involves an order of the district court affirming a similar order made by the county court denying the admission of a will to probate. The facts necessary to be stated are as follows: Christina Feil, the deceased, died on March 9, 1920, afflicted with cancer of the stomach. She left surviving her two daughters and three sons, aged, respectively, from 32 to 54 years: also six minor children of a deceased son. Her estate consists of about \$1,800 in cash and personality. On December 19, 1918, the deceased made a will devising all of her property to a daughter Maria Gugel, excepting the payment of her debts and funeral expenses, and \$1 to each of her children and grandchildren. This will was made upon an agreement that such daughter would furnish her with shelter and support for the remainder of her life. The signature of the testatrix to this will is in German script, quite legible. With this daughter she lived during three months. Whether she left by reason of ill treatment or dissatisfaction or to stay elsewhere and to look after her property interests is a matter of dispute in the evidence. In any event, she lived thereafter partly in a small house or shack upon land rented to a tenant and formerly owned by her deceased son; partly with a married daughter, Rosina Riedlinger; and partly with a married son, Samuel Feil. While at Samuel Feil's place her condition became such that it was deemed advisable to take her to a hospital in Bismarck. Accordingly, in February, 1920, in the company of her brother, Christ Layer, she was brought to such hospital. There she remained about two weeks. The evidence discloses that her physical condition was poor; that her cancerous condition had advanced to such a degree that only a short time remained until the final summons would come. Further, the evidence discloses without contradiction that the testatrix became extremely anxious to leave the hospital. She wanted to go away, to be taken away to the home of one or two of her children. She was willing to even sign her life away, as she stated, as well as her property, if she could be so taken away. She communicated her wishes over and over again to her brother. He had been residing with

the Riedlingers. Mr. Riedlinger was at the hospital Thursday, March 3, 1920. Her wishes were communicated to him. He explained that it was necessary for him to see his wife. The next day, Friday, Mr. Riedlinger and his wife, Rosina, the daughter, were at the hospital. The wishes of the testatrix were communicated to the doctor and to the superintendent of the hospital. A lawyer was called and a will was drawn. In the afternoon it was executed. It gave all of the property of the testatrix, after the payment of her funeral expenses, debts, and expenses of administration, to her daughter Rosina. Her signature is a mere scrawl, quite illegible. She signed again by her mark. Later in the afternoon her son Samuel Feil came to Bismarck and called at the hospital. The next day the testatrix was taken from the hospital on the train to the home of her daughter in McIntosh county. The following Tuesday, March 9, 1920, she died. On March 11, 1920, a petition was filed in the county court to probate the former will. On March 12, 1920, a petition was filed to probate the later will. A special guardian was appointed for the minor children. Upon the hearing in the county court, objections were filed to the probate of the later will on the grounds of mental incapacity and undue influence. Objections were filed to the allowance of the former will, upon the ground that there was a later will. Much evidence was taken and submitted to the county court concerning the mental capacity of the testatrix and the questions involving undue influence. The county court disallowed the later will and received for probate the former will. The daughter Rosina thereupon appealed to the district court from the order disallowing the later will. It was stipulated between the parties that the transcript of the testimony taken in the county court be considered the complete record and the evidence in the district court. After hearing without a jury, the district court found both mental incapacity of the testatrix and the exercise of undue influence. Accordingly the order of the county court was affirmed. It is deemed unnecessary to set forth at length the testimony of the various witnesses concerning the mental capacity of the testatrix or concerning undue influence. The record and the evidence has been reviewed carefully, and the disputed questions of fact considered.

The questions involved are questions of fact. Upon appeal to the district court, the parties were entitled to have such questions determined by a jury. Section 8620, C. L. 1913. Instead of so doing, and instead of again submitting evidence to the district court, the evidence submitted

in the county court was submitted for the decision of the district judge without a jury. No question is raised, pursuant to the specifications and contentions of the petitioners, upon the propriety of admitting to probate the former will. In the record it appears that the beneficiary in the former will, Maria Gugel, intends to allow to each of the children their legal proportion as heirs of the testatrix. The only objection presented concerning the former will was, as stated, that there was a later will. The petitioner maintains that the record fails to show mental incapacity or the exercise of undue influence. The appeal involved herein is not triable de novo in this court. It is before this court with the presumptions that attach to the findings of the trial judge with the jury waived. Such findings are presumed to be correct unless clearly opposed to the preponderance of the testimony. See *Stavens v. Nat. Elev. Co.*, 36 N. D. 9, 161 N. W. 558; *Richards v. Nor. Pac. Ry. Co.*, 42 N. D. 472, 173 N. W. 778; *McCormick v. Union Farmers' State Bank* (N. D.) 187 N. W. 421. Although the testimony of the lawyer who drew the latter will, the head of the hospital, and the medical testimony shows rather clearly mental capacity on the part of the testatrix involved, nevertheless we are not prepared to say, as a matter of law, upon careful consideration, that the findings of the trial court are so clearly opposed to the preponderance of the testimony that they should be disturbed. See *Peterson v. Lindquist*, 40 N. D. 501, 505, 169 N. W. 76. The order accordingly is affirmed.

GRACE, C. J., and BRONSON, CHRISTIANSON, BIRDZELL and ROBINSON, JJ., concur.

P. M. CLARK, as Administrator of the Estate of Grant Clark, Deceased,
Respondent v. JOHN BARTON PAYNE, as Director General of
Railroads of the United States, as Agent, Appellant.

(187 N. W. 817.)

Evidence — fact of agency cannot be proved by alleged agent.

1. The declarations of an alleged agent are not admissible against the alleged principal to prove the fact of agency or the extent or authority

of the alleged agent. Before the acts and statements of the alleged agent can be shown against the principal, the agency must be proved *prima facie* by other evidence.

Evidence — where agency shown, agent's declarations within scope of authority are admissible; but not station agent's statement as to who was foreman of a construction crew.

2. Where agency has been shown, the declarations of the agent, made within the scope of his authority, are admissible. But declarations of an agent relating to matters wholly outside of the scope of his authority are not admissible. For reasons stated in the opinion it is *held* that declarations made by a station agent to the effect that a certain man was the foreman of a construction crew were inadmissible.

Railroads — unlawful obstructions near track negligence as to trespassing child.

3. The non-performance by a railroad company of the duty imposed by §4700 C. L. 1913, (which provides that after January 1st, 1915, it shall be unlawful for any common carrier to erect or maintain on any standard gauge road or sidetrack any coal chute, stockpen, pole, mail crane, stand pipe, hog drencher, embankment of earth or natural rock, or any fixed or permanent structure or obstruction at a distance of less than eight feet from the center line of the track which such structure or obstruction adjoins), is a breach by such common carrier of its duty to the public, and, is therefore, evidence of negligence, for which it will be liable in case, as a result, of such violation of duty, personal injuries are sustained by a child about 8½ years of age.

Railroads — contributory negligence of child on cars held for jury.

4. Contributory negligence of an 8½ year old boy, killed while riding on a train passing an embankment near track, *held* a question for the jury.

Negligence — proximate cause of injury essential element.

5. To render one liable to another for damages from negligence, it must be shown that the damages proximately resulted from the negligence charged.

Railroads — negligence as to child on cars held for jury.

In an action for the death of an 8½ year old boy, knocked from the side of a car by an embankment, *held* that the questions of negligence and proximate cause of the injury were for the jury.

Opinion filed Feb. 17, 1922. Rehearing denied April 15, 1922.

From the judgment of the District court of Ward county, *Lowe, J.*, defendant appeals.

Reversed and remanded for a new trial.

John E. Greene & Palda & Aaker, for appellant.

"For the violation of a statute to constitute actionable negligence the person suing must ordinarily belong to that class of persons for whose benefit the statute was passed." *Indiana & Chicago Railway Co. v. Neal*, 166 Ind. 458; 9 Am. & Eng. Ann. Cas. 424.

"A signal of warning to be given by a train approaching a highway crossing is not for the benefit of a trespasser or mere licensee on the railroad company's track or right of way, and that a failure to comply with the statute will not entitle the person injured to maintain an action against the railroad company for the injuries sustained." *Pike v. Chicago, etc., Ry. Co.*, 39 Fed. 754, and a large number of cases cited on p. 429, vol. 9, Am. & Eng. Ann. Cas.; *Denton v. Missouri, etc., Ry. Co.*, 90 Kans. 51; 133 Pac. 558, Anno. Cases 1915B, 639; 47 L. R. A. (N. S.) 820; *Lepard v. Michigan Central Ry. Co.*, 116 Mich. 373; 130 N. W. 668.

In the case of *Arkansas & Louisiana Railway Co. v. Sain*, 119 S. W. 659, a ten-year-old boy stepped upon the rear platform of a passenger train to see who was in the car or if certain persons were to arrive on that train.

"If appellee (plaintiff) was a trespasser or a mere licensee then the question of his age was wholly immaterial, for in such case, as we have seen, appellant (defendant) would not be liable unless it had discovered that plaintiff was in a position of peril from which he could not extricate himself, and then failed to exercise ordinary care to avoid injuring him." Citing *McEachern v. Boston M. R. Co.*, 150 Mass. 515, 23 N. E. 231; *Vertress v. Newport News & M. R. Co.* 95 Ky. 314, 25 S. W. 1; *Frost v. Eastern R. Co.*, 64 N. H. 220, 10 Am. St. Rep. 396, 9 Atl. 790.

"A railroad company is not required to anticipate the presence of and look out for a ten-year-old boy in its private yards, so as to stop him from trying to jump upon a moving engine." *Vertress v. Newport News, etc., Ry. Co.*, supra.

"No duty is cast upon a railroad company to exercise greater vigilance to discover a two-year-old child trespasser on the tracks than would be required in the case of an adult trespasser." *Palmer v. Oregon Shortline Ry. Co.*, Utah 466; 98 Pac. 689; 16 A. & E. Ann. Cas. 229; *St. Louis S. W. R. Co. v. Davis*, 110 S. W. 939; *Felton v. Aubrey*, 20 C. C. A. 436; *Ave. & Belt R. Co. v. Robbins*, 124 Ala. 113, 82 Am. St. Rep. 153; *Kennare v. C. & N. W. R. Co.* 114 Ill. App. 230; A. T. &

S. R. Co. v. Todd, 54 Kans. 551, 38 Pac. 804.

McGee & Goss, for respondent.

Where one is under duty to give aid, undertakes to do so, his position is changed, and he is bound to use reasonable care not to aggravate the injury instead of helping it, and this is true even where the person voluntarily assisted, was a trespasser. The leading cases, fully sustaining this proposition, are: *Haug v. G. N. Ry. Co.*, 8 N. D. 23, 77 N. W. 97; *Hepfel v. Soo Line (Minn.)* 51 N. W. 1049; *Cincinnati Railway Co. v. Marrs*, 119 Ky. 954; 70 L. R. A. 291; *De Pue v. Plateau*, 100 (Minn.) 299; 111 N. W. 1; *Northern Railway Co. v. State*, 29 Md. 420; *Dyche v. Railway Co.*, 79 Miss. 361; *Gates v. Chesapeake Railway Co.* 185 Ky. 24; *Hernicke v. Meramac Quarry Co. (Mo.)* 212 S. W. 345; *Bessemer Co. v. Campbell*, 121 Ala. 50; *Troutman's Adm. v. L. & N. R. Y. Co.*, 179 Ky. 145; *Ohio & Mississippi Railway Co. v. Early*, 141 Ind. 73; *Heaven v. Pender*, 11 L. R. Q. B. Div. 496; *Fagg v. L. & N. Ry. Co.*, 111 Ky. 30; 54 L. R. A. 919; 63 S. W. 580; *Carey v. Davis, et al. (Iowa)* 180 N. W. 889.

The case at bar is analogous and practically on all fours in principle and on facts, with the *Marrs* case, 70 L. R. A. 291.

When the Court said:—

"In determining this question, we are to disregard all conflicts in the evidence and construe the same most favorably to the plaintiff, and if the evidence is such that intelligent men may fairly differ in their conclusions thereon upon any of the essential facts of the case, it is our duty to reverse the judgment (*non obstanti*) and order a new trial." *Cameron v. G. N. Ry. Co.*, 8 N. D. 124; 77 N. W. 1016; *Vickery v. Burton*, 6 N. D. 253; 69 N. W. 193; *McRea v. Bank*, 6 N. D. 353; *Pirie v. Gillett*, 2 N. D. 255; *Zink v. Lahart*, 16 N. D. 56; *Hall v. N. P. Ry. Co.* 16 N. D. 60-63; 111 N. W. 609; *Ness v. G. N. Ry. Co. (N. D.)* 142 N. W. 165-166.

"This state recognizes the humanitarian doctrine as a basis for damages in a strong opinion by *Corliss C. J.* 8 N. D. 23, 77 N. W. 97; a case analogous and in the same class with the *Marrs* case and the other cases heretofore cited under the same doctrine."

The case cites with approval and comments at length upon the following parallel cases: *Railroad Co. v. Johnson (Ala.)* 19 So. 51; *Railroad Co. v. Sullivan*, 81 Ky. 624; 50 Am. Rep. 186.

The latter a similar case of exposure to cold; and also, *Railroad Co. v. Weber*, 33 Kans. 543; 6 Pac. 877; *Brown v. Railroad Co.*, 51 Ia. 235; 1 N. W. 487.

For a recent case closely parallel on facts to *De Pue v. Flateau*, 111 N. W. p. 1, see the Iowa case of *Carey v. Davis*, 180 N. W. 889, citing and following the *Marrs* case. The latter case is also cited and followed: in 199 Pac. 525; 127 Pac. 978; 118 S. W. 949; 172 S. W. 50-52; 199 S. W. 800; 200 S. W. 17-16; 213 S. W. 567.

"A railway company also owes a child on or near its track, the duty of using all reasonable means to avoid injuring it after becoming aware of its presence and peril. If the child is of tender years, the railroad employees have no right to presume that it will get or keep out of the way." 33 Cyc. 802; 33 Cyc. 803, ¶ 2; *Dubs v. Northern Pacific Ry. Co.*, 42 N. D. 124; 171 N. W. 888; *Hepfel v. Soo Line (Minn.)* 51 N. W. 1049.

CHRISTIANSON, J. On the 26th day of July, 1919, Grant Clark, minor son of P. M. Clark, the administrator, who is plaintiff in this action, was killed while attempting to board or ride upon a moving freight train in the railroad yards of the defendant in the city of Kenmare in this state. At the time of his death, said Grant Clark was about 8½ years old. For some days prior to July 26, 1919, the employees of the defendant had been engaged in constructing a sewer from the lake front on which the railroad yards were located in a northerly direction, and under the several tracks of the Soo Railway Company in said railroad yard. In digging the trench in which to lay the sewer, the dirt was thrown up on each side of the ditch. At the point where the accident occurred there were two piles of dirt extending from the railroad tracks on each side of the trench. It is very difficult to ascertain the exact dimensions of the two piles of dirt, as all the witnesses merely gave their estimates, and the same witnesses frequently varied the estimates given. It appears, however, that the two piles were some 4½ to 5 feet in height, from 4 to 8 feet in width, and from 7 to 12 or 15 feet in length, extending as aforesaid from the railroad track on each side of the trench. There were planks laid so as to cover the trench between the two piles of dirt. About half past 3 o'clock in the afternoon of July 26, 1919, two boys, Grant Clark and Howard Tyson, being respectively 8½ and 9 years of age, passed the place where this work was going

on, watched the men work for a while, and then went down to the lake, a quarter of a mile away, where they stayed and played for some time. They returned just before 5 o'clock in the afternoon. At that time work on the sewer had ceased for the day, and all of the workmen, with the exception of one Koester, had departed. Koester had taken off his rubber boots, and was sitting on a pile of lumber, putting on his shoes. As the boys returned, a freight train, moving at a rate of speed of about five to eight miles an hour, was coming into the yards. The boys mounted the train, and stood with their feet in the stirrups on the side of a box car. As they came by where Koester was sitting, he shouted to the first boy, Howard Tyson, "Hey, boy, get off there." Howard Tyson thereupon got off within a few feet of where Koester was sitting, and Grant Clark, who was riding in a similar position on the car immediately following, also got off at about the same place. There is no question but they both landed safely. Shortly after Grant Clark again attempted to mount the train, and was at once killed by being thrown under the wheels of the train. There is some evidence tending to show that he caught hold of one of the handholds on the side of a box car, and that the moving train brought him in contact with one of the piles of dirt, which it is claimed was too near the track. In other words, there is some evidence from which the inference may reasonably be drawn that, if the piles of dirt had not been there, the injury would probably not have taken place. The action is predicated upon the following alleged grounds of negligence: (1) Failure of Koester to take proper precautions to prevent the boys from again attempting to get on the train after he had ordered them down; and (2) placing the piles of dirt near the railroad tracks. The trial court submitted both grounds of negligence to the jury to be determined as questions of fact. The jury returned a verdict in favor of the plaintiff for \$5,000, and defendant has appealed from the judgment entered on the verdict.

Defendant's first contention is that the evidence is insufficient to sustain any verdict, in this, that it fails to show any actionable negligence on the part of the defendant. It will be noted that the first ground of negligence is based upon the acts of Koester. In his complaint the plaintiff alleged and upon the trial sought to prove that Koester was the foreman, and that the sewer was being constructed under his supervision and direction. The only evidence tending to establish this alleged fact is the testimony of the plaintiff to the effect that some days after the accident occurred, Koester stated to the plaintiff that he (Koester) was

in charge at the time that the accident occurred, and also that the station agent at Kenmare said to the plaintiff that Koester was in charge of the work. In other words, the only testimony which we are able to find in the record tending to establish that Koester was in charge of the work, or was anything more than an ordinary laborer, is the testimony of the plaintiff to the effect that these statements were made to him by these two parties. Opposed to this is the positive testimony of Koester himself that he was not in charge of the work. And the testimony of Balstad, the foreman in charge of the work (who was temporarily absent at the time the accident occurred) that Koester was not the foreman; that when the foreman Balstad was not present one McCoy was delegated to act as foreman, and that Koester was merely an ordinary laborer, and had no authority whatever, either over the men or over the work. There is also the positive testimony of one Cunningham, who was called as a witness for the plaintiff. Cunningham is a drayman at Kenmare, and he was working with his team at the excavation. He says that the foreman who hired him was not there the day the accident occurred; that he does not know who was directing the men that day; that he saw Koester working around there, but did not notice him giving any orders to any of the men.

As already stated, it appears that at the time the accident occurred Koester was the only one of the men engaged in the construction work left at the excavation, and that he was about to leave. Koester, in answer to questions propounded by plaintiff's counsel, testified that before going away that evening he looked to see if any tools had been left lying around; and it is contended by plaintiff that this is evidence that he was in charge of the work. The undisputed testimony of Koester, however, is to the effect that the foreman had given orders to all the men to pile the tools up when they quit work in the evening; that he (Koester) was merely looking to see if any one had forgotten to place his tools where they belonged; that he was not in charge of any tools except those who he used personally. A careful consideration of all the evidence bearing on the question leads us to the conclusion that there is no substantial evidence to sustain a finding that Koester was in charge of the construction work, or that he was anything more than an ordinary laborer engaged in the construction of the sewer. In our opinion, all the competent evidence in the case shows that Koester was not the foreman, or in charge of the work, but was merely an ordinary laborer

working under the direction and orders of the foreman. While Koester's alleged statements would have been admissible in corroboration, if the agency had been otherwise proved *prima facie* the agency or the extent of authority could not be established thereby. Cyc. says:

"The declarations of an alleged agent are not admissible against the alleged principal to prove the fact of his agency. Neither are the declarations of an agent admissible against the principal to show the extent of his authority as such agent. The agency must be proved by other evidence before his acts and statements can be shown against the principal." 31 Cyc. 1652—1654.

See, also, 10 Ency. Ev. 15—18: Elliott on Railroads, (2d ed.) § 217.

Neither do we believe that the declarations of the station agent were admissible to establish the agency and extent of authority of Koester.

"Declarations of another agent of the same principal are not admissible, but admissions of a general agent as to the extent of an inferior agent's authority may be received upon the same footing as admissions of the principal." 10 Ency. Ev. 21.

See, also, Elliott on Railroads (2d ed.) §§ 217—2-9.

There is no evidence in this case tending to show that the station agent at Kenmare had any authority, or exercised any function, other than that of an ordinary station agent. Manifestly it cannot be presumed that such station agent exercised any control over construction crews, or that foremen in charge of such crews were under his direction. The declarations of the station agent, made within the scope of his authority, were, of course, admissible; but we find no reason, either in the evidence or in the authorities, for holding the alleged statement of the station agent as to the agency of Koester to be one connected with matters within the scope of a station agent's authority. See Elliott on Railroads (2d ed.) § 303. We are of the opinion, therefore, that it was error for the trial court to deny the motion to strike out the evidence relating to the statements alleged to have been made by Koester and the station agent. We are also of the opinion that there was no substantial evidence tending to establish that Koester was a foreman or in charge of the construction work, and that that question should not have been submitted to the jury. We cannot say that the verdict would have been the same if these errors had not been committed. Hence the judgment must be set aside and a new trial had. Funk, Adm'r, v. St. Paul City Ry. Co., 61 Minn. 435, 63 N. W. 1099, 29 L. R. A. 208, 52 Am. St. Rep.

608; *Barrett v. Magner*, 105 Minn. 118, 117 N. W. 245, 127 Am. St. Rep. 531. In view of a new trial, however, we deem it necessary to consider some other questions presented on this appeal.

The second ground of alleged negligence is predicated upon the placing of the two piles of dirt near the railroad track. Plaintiff invokes § 4700, C. L. 1913, which reads:

"On or after the first day of January, 1915, it shall be unlawful for any such common carrier to erect or maintain on any standard gauge road on its line, or on any standard gauge sidetrack used in connection therewith * * * any coal chute, stock pen, pole, mail crane, stand-pipe, hog drencher, embankment of earth or natural rock, or any fixed or permanent structure or obstruction upon its line of railroad, or on any side track used in connection therewith, at a distance less than eight feet, measured from the center line of the track which said structure or obstruction adjoins: * * * Provided that station freight house platforms which have a vertical height of not more than four feet, measured from the top of the track rail, may be erected and maintained at a less distance from the center of the track which they may adjoin than herein specified."

The defendant contends that this statute has no application for two reasons: (1) That the piles of dirt shown to exist in this case were not embankments of earth within the purview of the statute; and (2) that the statute was enacted solely for the benefit of trainmen, and that hence, in case of violation thereof, a recovery can be had only by a person belonging to the class which the legislature intended to be protected by the statute. After a careful consideration, we have reached the conclusion that neither of the contentions advanced by the defendant can be sustained.

At the time the accident occurred the construction crew had ceased to labor. The two piles of dirt which are involved in this controversy were left in the condition in which they were with the intention at least that they should so remain during the night. The evidence does not show how long they had been where they were, nor how long they would be likely to remain. We believe that these embankments of earth were within the prohibition of the statute.

While it may be true that the statute was intended primarily for the protection of railroad employees, we are by no means satisfied that it was enacted solely for the protection of such employees. The statute

by its terms is a general one. According to the title thereof, its object is to regulate "the size of engine, motors and cars, and also the clearance of obstructions" on railroads. A penalty is provided for a violation of any of the provisions of the statute. Such penalty is recoverable in a suit brought by the state's attorney of the county wherein the violation occurred. It is made the duty of the state's attorney to bring such suit under the direction of the Railroad Commission upon duly verified information being filed with him by any person that the statute had been violated; and it is made the duty of the Railroad Commission to lodge such information with the proper state's attorney, when it comes to its knowledge that any violation of the statute has occurred. Section 4704, C. L. 1913. Even in the absence of statute it has been held that a railroad company is liable to passengers who are injured by obstructions placed too near the railroad tracks, as, for instance, where a freight car was placed so near the main track at a switch that a passenger sitting with his arm projecting from the sill of an open window is injured. *Farlow v. Kelly*, 108 U. S. 288, 2 Sup. Ct. 555, 27 L. ed. 726; *Clerc v. Morgans*, etc., *Steamship Co.*, 107 La. 370, 31 So. 886, 90 Am. St. Rep. 319. In our opinion the duty imposed upon railroad companies by § 4700, *supra*, was not imposed solely for the benefit of railroad employees, but also for the benefit of the general public. In a somewhat analogous case of fences required by statute as a protection for animals, an action is given to the owners for the loss caused by a breach of the duty to fence. Almost the unanimous weight of judicial authority is to the effect that these statutes rest upon the police power of the state, and are for the benefit of the general public. *Elliott on Railroads* (2d ed.) § 1190. And it is generally held that in case a personal injury is sustained by reason of the failure to fence, an action will lie for the injury so sustained, and the breach of the duty to fence will be evidence of negligence. *Hayes v. Mich. Cent. R. R. Co.*, 111 U. S. 228, 240, 4 Sup. Ct. 369, 28 L. ed. 410—415. It is also generally held that a duty to fence applies to passengers, and that a passenger may bring an action for injuries resulting from a duty to fence. *Elliott on Railroads* (3d ed.) § 1191. And by the weight of authority it is held that an employee injured by reason of the breach of the duty to fence may maintain an action for damages. *Elliott on Railroads* (3d ed.) § 1192. And the Supreme Court of Minnesota, as well as the federal Supreme Court, have held that where a child strays upon the track and is injured in consequence of the failure

of the company to fence its road, an action will lie, and the breach of the duty to fence is evidence of negligence. *Rosse v. St. P. & Duluth Railway Co.*, 68 Minn. 216, 71 N. W. 20, 37 L. R. A. 591, 64 Am. St. Rep. 472; *Hayes v. Mich. Cent. R. R. Co.*, 111 U. S. 228, 4 Sup. Ct. 369, 28 L. ed. 410.

In *Union Pac. R. Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. ed. 434, the Supreme Court of the United States had occasion to consider the effect of noncompliance with a statute of the state of Colorado requiring the owners of coal mines to fence their slack pits. The statute by its express terms was enacted for the protection of cattle and horses. A boy some 12 years old becoming frightened by the threats of other boys, and attempting to escape from them, fell into the burning slack, and was injured. In that case, as here, it was contended that, inasmuch as the statute was enacted for the protection of horses and cattle, it could not be invoked in a case where personal injuries were sustained. In disposing of that contention the Supreme Court of the United States said:

"The only question that could arise upon this part of the case is whether the court should have instructed the jury—as, in effect, it did—that the failure of the company to put a fence around the slack pit, as required by the statute of Colorado, was negligence, of which the plaintiff could complain in this action for personal injuries sustained by him. Primarily, that statute was intended for the protection of cattle and horses. But it was not, for that reason, wholly inapplicable to the present case upon the issue as to negligence. In *Hayes v. Michigan Cent. R. Co.*, 111 U. S. 228, 240 (28: 410, 412), which was an action by an infant for personal injuries sustained by the alleged negligence of a railroad company in not properly guarding its line within the limits of the city of Chicago, this court, speaking by Mr. Justice Matthews, said: 'In the analogous case of fences required by the statute, as a protection for animals, an action is given to the owners for the loss caused by the breach of the duty. And although in the case of injury to persons by reason of the same default, the failure to fence is not, as in the case of animals, conclusive of the liability, irrespective of negligence, yet an action will lie for the personal injury, and this breach of duty will be evidence of negligence. The duty is due, not to the city as a municipal body, but to the public, considered as composed of individual persons; and each person specially injured by the breach of the obligation is entitled to his in-

dividual compensation, and to an action for its recovery.' The nonperformance by the railroad company of the duty imposed by statute, of putting a fence around a slack pit, was a breach of its duty to the public, and, therefore, evidence of negligence, for which it was liable in this case, if the injuries in question were, in a substantial sense, the result of such violation of duty." 152 U. S. 282, 283, 38 L. ed. 443.

See, also, *Martens v. Public Service Co.*, 219 Ill. App. 160.

We are of the opinion, therefore, that the plaintiff may predicate an action upon defendant's breach of the duty prescribed by § 4700, supra. A great deal of the evidence in the case relates to the second ground of negligence. We have carefully considered such evidence, and have reached the conclusion that under it the questions of negligence and proximate cause are questions of fact for the jury.

It is also contended that the deceased was guilty of contributory negligence as a matter of law. In view of the youth of the deceased, we do not believe it can be said that there was contributory negligence as a matter of law. See *Elliott on Railroads* (2d ed.) § 1261.

It is also suggested that the verdict is excessive. Under the evidence here we are not prepared to say that the verdict is so large that the court should interfere therewith.

Reversed and remanded for a new trial.

BRONSON and BIRDZELL, JJ., concur.

ROBINSON, J. I concur in reversal. In my opinion, there is no liability.

GRACE, C. J. I concur in the result.

PER CURIAM. Plaintiff has petitioned for a rehearing. In the petition it is argued that, inasmuch as this court ruled that there was sufficient evidence to sustain a verdict as to one of the two grounds of negligence upon which plaintiff's action is predicated, the court should have affirmed the judgment. It is doubtless true that where a cause of action for personal injury is based upon several grounds of negligence a recovery may be had if any one of the grounds is established, but we do

not believe that the verdict in this case can be sustained by applying this rule. In this case the plaintiff asserts two grounds of negligence: (1) The acts of Koester in permitting Grant Clark to get upon the moving train; and (2) the placing of the piles of dirt too near the railroad tracks. This court ruled that the first ground was not sustained by any competent evidence, and that the court erred in admitting evidence relating to such first ground. It is apparent that this incompetent evidence was considered by the jury, and, so far as we know, it may have been a controlling factor in arriving at the general verdict. For in answer to special interrogatories submitted with the general verdict the jury specifically found that "Koester was in charge of the work and embankments testified to on July 26, 1919," and that he "was negligent in permitting Grant Clark to get upon the freight car."

There was no special finding, however, covering the question of proximate cause. The jury by the general verdict said that the defendant was guilty of negligence, and that such negligence was the proximate cause of the death of Grant Clark, but they did not say that the placing of the embankments of dirt was the proximate cause. If there had been a special finding to that effect a wholly different situation would have been presented. It may be that in arriving at the general verdict the jury, or some of them, considered that the acts of Koester was the proximate cause. It is elementary that in order to render a party liable to another for damages resulting from negligence it must not only be shown that the party sought to be charged was negligent, and that the party seeking recovery was damaged, but it must also be shown that the damages sustained proximately resulted from the negligence of the party so sought to be charged.

In the petition for rehearing it is contended that the court should say, as a matter of law, that the placing of the embankments of dirt was the proximate cause of the death of Grant Clark. We are unable to agree with this contention, and adhere to the views expressed in our former opinion that both the question of negligence and proximate cause were, under the evidence here, questions of fact for the jury.

A rehearing is denied.

CHRISTIANSON, BRONSON, ROBINSON and BIRDZELL, JJ., concur.

S. M. SORENSON, P. L. SOLBERG, LEONARD HANSON, S. H. THOMPSON, O. A. KNUDSON, GEORGE GJELSTAD and C. A. HONG, Respondents, v. T. R. TOBIASON, OLE I. HANSON, K. O. BROKKE, MARTIN SPILLUM, and OSMUND SKARPERUD, as the Board of County Commissioners of Traill County, State of North Dakota, and G. D. OLSON, as County Auditor of said Traill County and ANNA G. NESTOS, as County Superintendent of Schools of said Traill County, North Dakota, Appellants.

(188 N. W. 41)

Schools and School Districts — statute held not to authorize detaching special district territory within three miles of central school.

Chapter 197 of the Session Laws of 1919 which provides for the organization of new school districts by the Board of County Commissioners and County Superintendent, upon petition, is construed in its relation to statutory provisions governing the territory embraced in special school districts and to the provisions for attaching territory to and detaching territory from such special districts, (§ 1240, Compiled Laws of 1913, and Chap. 196 of the Session Laws of 1919) and it is *held*:—the authority to organize new districts may not be so exercised as to detach from the special district territory within three miles of the central school.

Opinion filed April 26, 1922

Appealed from the District court of Traill county, *Cooley, J.*
Affirmed.

Chas. A. Lyche, I. A. Acker, States Attorney, Traill County, *F. W. Ames*, and *Theodore Koffel*, for appellants.

P. G. Swenson, for respondents

BIRDZELL, J. Appeal from a judgment in a certiorari proceeding, entered in the district court of Traill county. The writ issued to review proceedings of the board of county commissioners and superintendent of schools purporting to organize a new common school district embracing territory within the Buxton special school district. The facts are as follows:

In February, 1921, a special school district was organized, which embraced all of the civil township of Buxton, except sections 1, 2, 3, 11, 12, and the north $\frac{1}{2}$ of section 4. In May following a petition was presented to the county superintendent of schools and the board of county commissioners, asking for the organization of a new common school district to be composed of territory embraced in the Buxton special school district, excluding from the proposed common school district sections 13, 14, 23, 24, 25, 26, 35, and 36. The petitioners appealed to the authority of the superintendent and board of county commissioners vested by chap. 197 of the Session Laws of North Dakota for the year 1919. The petition was filed with the county superintendent of schools. Pursuant to notice given and a hearing had, a resolution was passed at the July meeting of the board creating the new common school district as prayed for in the petition. All of the territory of the new district was taken from the Buxton special school district. It comprises $22\frac{1}{2}$ sections, and leaves in the special school district 8 sections. Promptly thereafter a writ of certiorari issued out of the district court to review the proceedings had, and upon the review it was adjudged that the proceedings for the organization for the new common school district were null and void. The only question for consideration on this appeal is whether or not under chap. 197 of the Laws of 1919, which vests in the board of county commissioners and the superintendent of schools authority to create new school districts, such new district can be created from territory embraced within a special school district so that territory within three miles of the central school will be detached from the special district. Chap. 197 of the Session Laws of 1919 is an amendment of § 1147 of the Compiled Laws of 1913; and § 1147, in turn, was first enacted as § 44 of the school Code of 1911 (chap. 266). It is there found under article 3, which is entitled "Common School Districts" and expresses authority of the same nature as that previously vested in the board of county commissioners or in this board acting with the county superintendent of schools in relation to the organization and control of the boundaries of school districts. See § 784 et. seq., Revised Codes of 1905. The section as amended reads:

"Section 1147. *New Common School Districts. How Organized.* The board of county commissioners and county superintendent may organize a new school district from another district or from portions of districts already organized, if in their judgment the organization of a new

district is desirable and necessary, upon being petitioned so to do by at least two-thirds of the school voters residing in the proposed district. When two or more adjoining counties are affected, such proposed new district shall be organized by the concurrent action of the boards of county commissioners and county superintendents of such counties. Action on such organization shall be taken only at the July meeting of the county commissioners. Provided, that all assets and liabilities shall be equalized according to § 1327 of Compiled Laws of North Dakota for the year 1913."

We are of the opinion that this section does not give to the board of county commissioners and county superintendent authority to detach from a special school district territory lying within three miles of the central school. When a special school district is organized, it is governed by the article relating to such districts, in so far, at least, as that article deals with subject-matter affecting the special district. Section 1229, Compiled Laws 1913; *State ex rel. Nicholson v. Ferguson*, 23 N. D. 153, 134 N. W. 872. Section 1240 of the Compiled Laws of 1913 (of the article on special districts) regulates the matter of attaching territory to a special school district, and of detaching territory therefrom, the authority to attach being vested, upon petition, in the board of education of the district, and authority to detach in the board of county commissioners. This section was likewise amended in 1919 (chap. 196, Session Laws of 1919) so as to provide that both the authority to attach to and to detach territory from a special school district would be vested in the county commissioners. In providing for detaching territory, however, the act says:

"The county commissioners shall detach any part of such adjacent territory which is at a greater distance than three miles from the central school in such special district and attach it to any adjacent common or special school district or districts on petition to do so signed by two-thirds of the legal voters of such adjacent territory."

And in the original section (1240, Compiled Laws 1913), of which the above is an amendment, the authority of the county commissioners to detach territory was limited to territory "at a greater distance than three miles from the central school in such special district." The statutes governing special school districts clearly indicate that the territory within three miles of the central school is not to be rendered subject to detachment by the board of county commissioners alone or acting in conjunction

with the county superintendent. Hence, if chap. 197 be construed, as appellants contend it should be, as applicable to special school districts, so that new common school districts might be formed out of territory embraced within special districts and within three miles of the central school, it would necessarily conflict to this extent with chap. 196 of the Session Laws of 1919. If possible, these statutes, which were both approved on the same day, should be so construed as to be harmonious. In our opinion they cannot well operate consistently if the county commissioners and the county superintendent are permitted to do indirectly, through the organization of a new common school district, what they are forbidden to do otherwise by detaching territory, viz. take territory from a special district lying within three miles of the central school.

It follows that the judgment must be affirmed.

CHRISTIANSON, ROBINSON, and BRONSON, JJ., concur.

GRACE, C. J., concurs in the result.

STATE OF NORTH DAKOTA, EX REL., OLE JENSEN, Appellant,
v. JOHN F. STRAUSS, GUS A. REDDIG, HAMPTON LYN-
ESS, ED SUCKUT, and ANTON BOHN, as the Board of County
Commissioners of Wells County, North Dakota, and SENNEV
NERTROST, as Superintendent of Schools, and OTTO G. KRUE-
GER, as Auditor of said County, Respondents.

(187 N. W. 964)

Schools and school districts—determination of commissioners in organiza-
tion district held conclusive, so that it must be held properly organized in
absence of showing of fraud.

1. For reasons stated in the opinion, it is *held* that Harvey School
District No. 38 (common school district) was properly and legally organ-
ized under Chap. 197, of the Laws of 1917.

Schools and school districts—application for certiorari to review proceedings
in organizing new district held properly denied.

2. For reasons stated in the opinion, it is *held* that the trial court properly dismissed the petitioner's application for a Writ of Certiorari.

Opinion filed April 12, 1922—Rehearing denied April 27, 1922.

An appeal from an order of the District Court of Wells County, denying a writ of certiorari. *Coffey, J.*

Order affirmed.

Adamson & Thompson, for appellants.

B. F. Whipple, J. L. Johnston, and John O. Hanchett, for respondents.

It is well settled in this state as well as by recent decisions in Minnesota, Iowa and other states that the creation of municipalities and the changing of the boundaries of the municipalities already created is a legislative and not a judicial function, the exercise of which is, by the legislative assembly, properly conferred upon local boards under acts similar to chap. '197, Laws 1919 involved in this case. *State ex rel. Johnson v. Clark*, 21 N. D. 517; 131 N. W. 715; *Glaspell v. Jamestown*, 11 N. D. 86; 88 N. W. 1023; *Lenroot v. County Commissioners*, 40 N. W. 359, Minn.; *Moode v. Stearns Co.* 45 N. W. 435; *In re School Dist. of Granite Falls*, 167 N. W. 358 (Minn.); *State ex rel. Steinman v. Spellman*, 183 N. W. 577, (Iowa).

In the exercise of this judgment this board acted in a legislative capacity and their action was purely a matter of legislative discretion vested in the board, and therefore, not reviewable by the courts upon a writ of certiorari, or in any other manner. *Lenroot v. County Commissioners*, 49 N. W. 359, (Minn.); *Moode v. Stearns Co.* 45 N. W. 435, (Minn.); *In re School Dist. of Granite Falls*, 167 N. W. 358 (Minn.); *State ex rel. Steinman v. Spellman*, 183 N. W. 577 (Iowa).

"Upon certiorari to review the proceedings of commissioners or other boards or officers, the presumptions are all in favor of their rightful action, and their proceedings will be upheld unless it be made clearly to appear that they have proceeded in a manner not authorized by law." *State ex rel. Town of Manitowoc v. County Clerk of Manitowoc County*, 16 N. W. 617, (Wis.)

GRACE, C. J. This is an appeal from an order of the district court

denying a petition for a writ of certiorari. The material facts may first be stated. Prior to the July, 1921, meeting of the board of county commissioners of Wells county, there was a petition filed with it, for the formation of a new school district, designated as Harvey school district No. 38. It was proposed by the petition to form the new district out of parts of four common school districts, Wells, which was composed of an entire township, Harvey, a small city being situated on section 31 of that township, and Hillsdale, Pioneer, and Forward school districts, each composed of a congressional township. The four school districts corner but a short distance from the city of Harvey.

It was proposed by the petition for the formation of district No. 38 that it should be composed of 25 sections, which were to be taken in part from the territory comprising the four districts; the number of sections to be taken from each were Wells, 9, Pioneer, 4, Hillsdale and Forward, 6 each—all of which formed a solid block of territory, five miles in length and the same in breadth, about the city of Harvey. More than two-thirds of the voters residing within that territory signed the petition for the formation of the new district. This was determined by a checking of the names of the petition with the census.

On May 23, 1921, the county superintendent of schools of Wells county caused to be issued and transmitted by mail, to the various school officers of the four common school districts, a notice of the petition to create and organize district 38 from a certain part of the territory embraced in each of those districts. The notice described the different sections of land to be taken of each of the districts to form the new district, and gave due notice that the petition would be heard at the July meeting of the board of county commissioners, on the 5th day of that month, or as soon thereafter as the matter could be heard. The petition had been theretofore duly filed with the county auditor. On July 8, 1921, the board of county commissioners, having met pursuant to adjournment, proceeded to consider the petition for the organization of the new district; the meeting was thrown open for discussion either for or against its organization. The board listened to complaints against its formation and also to opinions in favor of it; it listened to a large deputation of taxpayers from each of the districts affected. Finally a motion was made and seconded that the session be closed in order that the board might consider the matter. A motion was made that definite action be taken which carried; a motion was then made that the petition be granted; the

county superintendent and all of the county commissioners, except one, voting aye; Commissioner Strauss voted no.

The foregoing facts are substantiated by the affidavits of four of the county commissioners who voted in favor of the formation of the new school district, by affidavit of Otto G. Krueger, the county auditor, and by that of Sennev Nertrout, the county superintendent. After the petition had been thus acted upon and allowed by the board of county commissioners, the plaintiff applied to the district court for a writ of certiorari to be issued and directed to the respondents, commanding them to certify to the court the transcript of the record of all proceedings in connection with the granting of the petition, and requiring them in the meantime to desist from further proceedings in the matter to be reviewed.

Some fifteen affidavits were made in support of the petition for the writ, which were to the effect that the affiants were taxpayers in the territory affected by the creation of the Harvey school district; that its creation would work hardship and financial loss to the taxpayers in the balance of the territory outside the city of Harvey. The affidavit of one, William Lamb, shows the existence, in 1921, of the four common school districts heretofore mentioned, and that three of them are composed entirely of territory which is purely agricultural in character and containing no city, town, or village; that a majority of the petitioners for the formation of the Harvey school district were residents of Harvey; that, at a hearing of the petition, no testimony under oath was taken by the board, showing, or tending to show that the creation of the school district was either desirable or necessary; and that the action of the board in the matter was arbitrary, and will result in irreparable damage and injury to the taxpayers within the remaining portion of the four school districts. Lamb's affidavit is given as a sample of all the affidavits made in support of the petition for the writ.

The court issued an order directed to the respondents to show cause before it, on the 22d day of August, 1921, why the writ should not be issued. Upon the hearing, the petition for the writ was denied. Substantially, the only errors assigned refer to the denial by the court of the application for the writ, and that testimony under oath was not taken at the hearing on the petition for the new school district, showing or tending to show that the creation of the new district was either desirable or necessary.

The new school district was organized under the provisions of chap. 197, Session Laws of 1919, which, in part, provides that:

"The board of county commissioners and county superintendent may organize a new school district from another district or from portions of districts already organized, if in their judgment, the organization of a new district is desirable and necessary, upon being petitioned so to do by at least two thirds of the school voters residing in the proposed district."

It is undisputed that the petition for the organization of the new school district contained more than two-thirds of the names of school voters residing within the territory of the proposed new district, and that the petition was in this condition when acted upon by the board of county commissioners and county superintendent, at the regular July meeting of the board of county commissioners. The board therefore, had full and complete jurisdiction of the matter.

After the hearing above mentioned, the commissioners, as above stated, granted the petition and organized the new school district. With these facts established, it is not difficult to arrive at the conclusion that the acts of the county commissioners, in granting the petition for the new school district and the creation of it, were of a legislative character; they were not bound to take any testimony under oath as to whether the new school district was either desirable or necessary. It was only necessary for them to satisfy themselves of the desirability of creating the new school district. If they determined that it was for the best interest of the territory affected and the school voters residing therein to create the new school district, and they did create the new district, it must be held—their jurisdiction being conceded—that their conclusion and disposition in this respect is conclusive, in the absence of substantial evidence showing that the proceedings and determination in creating the new district were fraudulent. *Farrell v. Sibley County*, 135 Minn. 439, 161 N. W. 152. It is also clear that the new school district became a legal entity at the time the petition was acted upon and the new school district created by the Board of County Commissioners and Superintendent of Schools. See *Farley v. Lawton School District*, 23 N. D. 565, 137 N. W. 821.

It being apparent that the board had full and complete jurisdiction at the time of the creation of the new school district, which clearly appears from what has above been stated, the trial court could do nothing

less than dismiss the petition for writ of certiorari. There are perhaps other reasons which could be stated, if necessary, to demonstrate that the court did not err in dismissing the petition for the writ, but it is entirely unnecessary to set forth other reasons than has already been done.

We have examined all appellant's assignments of error and find no reversible error in the record. There are no further questions properly presented for determination. The order appealed from is affirmed. Costs are allowed neither party.

BIRDZELL, CHRISTIANSON, and ROBINSON, JJ., concur.

BRONSON, J. (specially concurring). I concur in the affirmance of the order. The appellant contends that, before the board can act, there must be testimony under oath produced before it, from which the board can make its findings that the creation of the proposed new common school district is desirable and necessary; that no testimony was taken and, hence, there was nothing upon which to base an order. In my opinion this contention is without merit. The board, in considering the organization of a new school district, was exercising a legislative function. It was vested with a legislative judgment and discretion. Accordingly, upon this appeal, this court may not inquire into the propriety or the necessity of the board's order, in the absence of grounds asserted which show the necessity of judicial interference. See *Glaspell v. Jamestown*, 11 N. D. 86, 88 N. W. 1023; *State v. Clark*, 21 N. D. 517, 526, 131 N. W. 715; 12 C. J. 863; *Farrell v. Sibley County*, 135 Minn. 439, 161 N. W. 152. Upon the oral argument, the appellant first presented the question that the statute involved was unconstitutional because of an improper delegation of legislative power. Such question is, therefore, not properly before this court. *McCoy v. Davis*, 38 N. D. 328, 332, 164 N. W. 951.

CHRISTIANSON, J., concurs.

CAROLINE HOWLETT, Respondent, v. STOCKYARDS NATIONAL BANK, a corporation, H. E. KNOX and DANA WRIGHT, as Sheriff of Stutsman County, Appellants.

(188 N. W. 172.)

Estoppel — plaintiff held not estopped to claim ownership of cattle converted.

1. This is an action for conversion of four cows. Plaintiff recovered a verdict in the sum of \$400.00. It is *held*:

That the plaintiff is not estopped to claim ownership.

Trail — failure to limit jury to market value of cattle, held not error.

2. That the court did not err in its instructions upon the question of value.

Appeal and error — record held to show no basis for assignment of error upon alleged prejudicial remarks of plaintiff's counsel.

3. That there is no basis for an assignment of error predicated upon alleged prejudicial remarks of plaintiff's counsel in his argument to the jury.

New trial — denying motion for newly discovered evidence on an immaterial matter is not error.

4. That the court did not err in denying a motion for a new trial on the ground of newly discovered evidence.

Opinion filed April 27, 1922.

Appeal from the District court of Stutsman county; *Coffey, J.*

Affirmed.

John A. Carr, & Sullivan, Hanley & Sullivan, for appellants.

It has been the law of this state since territorial times that "It is the duty of the court to charge the jury, whether requested or not, every point material to the decision of the case upon which there is evidence, and to charge correctly and fully." *Moline Plow Company v. Gilbert*, 3 Dak. 239—15 N. W. 1; 38 Cyc. 1626; 29 Cyc. 798; *Moen v. Ry. Light Co. v. Southern Bell etc. Co.*, 93 S. E. 531, 20 Ga. App. 827.

This doctrine was affirmed by this court in the case of *Putnam v. Prouty*, 24 N. D. 517, See pp. 530-531.

It is well settled that the remarks and argument to the jury of counsel for the prevailing party, especially, as in this case, where the court

failed and refused to check the improper argument or to properly instruct the jury thereon, is ground for a new trial. 29 Cyc. 775; 2 R. C. L. pp. 425-426, ¶ 25; 2 R. C. L. p. 426, ¶ 25; *Sullivan v. Chicago St. R. Co.* 93 N. W. 367; 119 Ia. 464.

M. C. Freerks, for respondent.

ROBINSON, J. This is an appeal from a judgment against defendants for \$400 for the wrongful taking and conversion of four good, well-bred, heavy cream dairy cows. The plaintiff swore positively and convincingly that she had owned the animals, and that she had raised them from one calf which she bought for \$7 from Louis Sundahl at Valley City. She testifies she knew what the animals were worth; that the cows were worth about \$100 apiece and the calf \$10. Defendants took the same after she had warned them of her title and took them under a mortgage which did not in any manner describe the animals. Her testimony is well corroborated. Martin McGuire saw her buy the calf, knew her cows, knew she owned them. Defendants took the animals, claiming them under a chattel mortgage made by D. N. Howlett on 37 head of cattle, and not describing any of the animals.

Defendants assign numerous errors, but it appears that the defendants did have a fair trial, and that the verdict is well sustained by the evidence. In a recent case this court failed to note or discuss any of 50 errors assigned. We held thus:

"As the verdict is clearly right, there is no occasion for a discussion of the testimony or the assignment of errors." *Johnson Co. v. Hildreth*, 185 N. W. 812.

Counsel except to the charge of the court because it is not more extensive and does not fairly cover all the law and the points in the case. But the case was very simple, and counsel did not ask for special instructions. Counsel object that the court did not instruct the jury as to the law of estoppel and waiver; but there is no plea of estoppel or waiver, nor is there any sufficient evidence to sustain the same. It is said: The court failed to instruct the jury that their verdict must be limited to the reasonable market value of the property. But market value is not controlling in a case where a party wrongfully takes from a woman her pet animals that she has raised, fondled, caressed, and recognized with pride and affection. The verdict might well have been for a much greater sum. The jury might have given exemplary damages.

A motion for a new trial was made on the ground of newly discovered evidence tending to show that the plaintiff did not speak the truth when she testified that she was married to the man whose name she bore and with whom she had lived as a wife for 13 years. It is enough to say that the marriage was not and it cannot be made an issue in the case. It is immaterial.

The defendants have had a fair trial; the verdict is commendable. Judgment affirmed.

GRACE, C. J. I concur in the affirmance of the judgment and of the order denying a new trial.

CHRISTIANSON, J. (concurring specially). This is an action for conversion. The plaintiff claims that she was the owner of four head of cattle which the defendants wrongfully converted to their own use to her damage in the sum of \$500. The plaintiff testified positively that she was such owner. She also testified to the value of the cattle at the time of the conversion. Such testimony was competent. *Seckerson v. Sinclair*, 24 N. D. 625, 629, 140 N. W. 239.

It is asserted by the defendants that she is estopped to claim such ownership. Also that the court should have given appropriate instruction on the subject of estoppel. An examination of the evidence discloses that there is no basis for the contention that plaintiff is estopped as a matter of law. No instructions were requested on the subject of estoppel. The evidence, which it is asserted had a tendency to establish estoppel, was received and was doubtless considered by the jury on the question of ownership—that is, on the question whether the cattle belonged to the plaintiff. I have considerable doubt whether under the evidence, there was any basis for an instruction on the subject of estoppel; and I am entirely satisfied that there was no error in failing to instruct on that subject, in absence of a request for instruction.

It is next asserted that the court erred in not instructing the jury that in determining the value they must consider the market value alone. No such instruction was requested. The plaintiff had testified to the value of the property, which, being the owner, she was of course competent to do. Other witnesses were called during the course of the trial who testified as experts to the market value. Upon this state of the record it is quite doubtful if the defendants would have been entitled to

an instruction as contended for even if they had requested that it be given. See *McGilvray v. Railway Co.*, 35 N. D. 275, 287, 159 N. W. 854. But, inasmuch as they made no request for instruction, they are manifestly in no position to predicate error upon the court's failure to instruct on the question of value.

Error is also assigned upon alleged prejudicial remarks of counsel in the argument to the jury. The contention is that plaintiff's counsel in his opening statement to the jury referred to the defendants and their counsel as representatives of the beef trust. The record does not purport to show the exact language used. There is merely a statement by defendants' counsel that plaintiff's counsel in his argument referred to the defendants and their counsel as representatives of the beef trust. There was no motion on the part of the plaintiff, and no ruling by the court. Upon this record there is no basis for an assignment of error. *Erickson v. Wiper*, 33 N. D. 193, 157 N. W. 592; *Kimm v. Wolters*, 28 S. D. 255, 133 N. W. 277.

The following language used in *Erickson v. Wiper*, *supra*, is directly applicable here:

"A party asserting error has the burden of proving it. And as was said by this court in *Davis v. Jacobson*, 13 N. D. 430, 101 N. W. 314, he has the burden of preparing and presenting a record showing such error affirmatively. See, also, *State v. Gerhart*, 13 N. D. 663, 102 N. W. 880; *State v. Scholfield*, 13 N. D. 664, 102 N. W. 878. This rule applies with more than usual strictness where error is predicated on rulings upon matters resting largely within the trial court's discretion. An abuse of discretion will not be assumed, but must clearly be shown by the party asserting error. The party predicating error on improper argument must present a record showing: (1) The objectionable language used; (2) the objection made; (3) the court's ruling on the objection. *Bradshaw v. State*, 17 Neb. 147, 22 N. W. 361, 363, 5 Am. Crim. Rep. 499. In this case the record does not show the language used. * * * This is clearly insufficient to permit a review. So far as this court knows, the conclusions of defendant's counsel as to what plaintiff's counsel said may have been entirely erroneous." 33 N. D. 222, 223, 157 N. W. 592, 602.

Error is also assigned upon the overruling of the motion for a new trial. The motion was made solely on a discretionary ground, namely, newly discovered evidence. The newly discovered evidence had ref-

erence to the question whether plaintiff was in fact married to Mr. Howlett, the man with whom she is living, and whose wife she purports to be. It seems too clear for argument that this court would not be justified in disturbing the trial court's ruling on this motion.

Hence I concur in an affirmance of the judgment and of the order denying a new trial.

BRONSON and BIRDZELL, JJ., concur.

JAMES B. LILLY, Respondent, v. HAYNES COOPERATIVE COAL MINING COMPANY, a corporation, Appellant.

(188 N. W. 38.)

Appeal and error—order setting aside stipulation for dismissal of action is appealable as one which “involves the merits of an action or some part thereof.”

1. An order setting aside a stipulation for dismissal of an action is appealable under subdivision 4, Sec. 7841, C. L. 1913, as an order which “involves the merits of an action or some part thereof.”

Compromise and settlement—stipulations—District Court may relieve from stipulation of dismissal, but validity of compromise must be tried as any other defense.

2. The district court has power to relieve a party from a stipulation of dismissal upon proper application and showing; but such court may not, in a summary manner upon motion, determine the validity of a compromise of the cause of action. The validity of such compromise should be tried and determined the same as any other defense presented in such action.

Appeal and error—where court overruled application for change on one ground, but ignored another ground, the case must be remanded for ruling thereon.

3. Section 7418, Comp. Laws 1913, provides that the court may change the place of trial of a civil action: * * * (2) “When there is reason to believe that an impartial trial cannot be had” in the county in which the action was brought; and (3) “When the convenience of witnesses and the ends of justice would be promoted by the change.” In this action the defendant asked for a change of venue on both of these grounds. The plaintiff objected to the sufficiency of the moving affidavits, coupled

with a request that in event the objection was overruled, that he be afforded an opportunity to submit counter-affidavits. The trial court, in effect, sustained the objection on the ground that he could not "agree with counsel for the defendant that he cannot have a fair and impartial trial" in Hettinger County. It is *held* that the trial court erred in holding that the showing made was insufficient to require the granting of the application for a change of the place of trial, and the order denying such application is therefore reversed, and the trial court directed to hear the motion anew, and afford both parties reasonable opportunity to present such additional showing as they may desire to present.

Opinion filed March 29, 1922—Rehearing denied April 27, 1922.

Appeal from the district court of Hettinger county, *Lembke, J.*

Defendant appeals from an order setting aside a stipulation of dismissal, and from an order denying an application for a change of place of trial.

Order setting aside stipulation modified and affirmed; order denying change of place of trial reversed.

Norton & Kelsch, for appellant.

"In determining an application for a change of place of trial, the court should look to the affidavits, as well as to the issues to be tried, and determine upon the entire showing made, in which of the two courts a trial will be most accessible to the greatest number of witnesses whose personal attendance the parties may require or reasonably expect to obtain." *Robertson Lumber Co. v. Jones*, 13 N. D. 112; 99 N. W. 1082; *King v. Vanderbilt*, 7 How. Prac. 385; *Fletcher v. Church*, 11 S. D. 537; 78 N. W. 947.

In the case of *Fletcher v. Church*, 11 S. D. 537; 78 N. W. 947, reviewing the uncontroverted affidavits in the case where application was made for change of place of trial the court said:

"Under Compiled Laws § 4891, authorizing a change of venue for the convenience of witnesses, but not prescribing the procedure, defendant's motion therefor is properly granted in the absence of any denial of the facts set forth by him as to the convenience of witnesses." *Sherwood v. Steele*, 12 Wend. 295; *Hull v. Hull*, 1 Hill, (N. Y.) 671.

"Application for change of place of trial which fails to show materiality of the testimony of witnesses is sufficient if opposing party presents no affidavit as to witnesses." *People v. Hayes*, 7 How. Prac. 248; *Brown v. Peck*, 10 Wend. 569.

Jacobsen & Murray, and Zuger & Tillotson, for respondent.

"No appeal from an intermediate order, before judgment," shall stay proceedings, unless the court or presiding judge thereof, (meaning the trial judge) shall in his discretion so specially order. Section 7832, C. L. 1913.

The granting of a stay from an intermediate order is wholly discretionary with the trial judge. See *Devereaux v. Cotts*, 22 N. D. 351; *Langer v. Courier News*, N. D. 193 N. W. 1009.

"When the court or the judge thereof, from which the appeal is taken, or desired to be taken, shall make or refuse to make any order or direction, not wholly discretionary, * * * The Supreme Court, or one of the judges thereof, shall make such order or direction." 7836, C. L. 1913.

"Stipulation dismissing action, procured by fraud, may be vacated by the court." 18 C. J. 1172, § 67, note 64; See also 142 N. W. 612; See § 7483, C. L. 1913.

The matter of changing the place of trial, to accommodate witnesses, or on the ground that the defendant cannot have a fair trial, is wholly discretionary with the trial judge. See 157 N. W. 117; 170 N. W. 875.

The question of continuing the case over the term was wholly discretionary with the trial judge. 177 N. W. 964; 176 N. W. 220; 171 N. W. 118; 118 N. W. 1042; 32 N. D. 483.

PER CURIAM. The defendant has appealed from an order setting aside a stipulation dismissing the action, and from an order refusing to change the place of trial. The two appeals were argued at the same time and will be considered in one opinion. The defendant is a South Dakota corporation, engaged in mining coal at Haynes, in Adams county, in this state. On or about December 23, 1920, the plaintiff commenced this action in the district court of Hettinger county, seeking to recover damages in the sum of \$50,000 for certain personal injuries which he claimed he had sustained on or about February 20, 1920, while employed as a laborer in the coal mine operated by the defendant coal company near Haynes in Adams county. The case was afterwards transferred to the federal court, but on application of the plaintiff it was remanded

to the district court of Hettinger county. On November 14, 1921, certain negotiations were had between a representative of the defendant and the plaintiff relating to a settlement of the action, with the result that the defendant company paid the plaintiff \$200 in cash, and agreed to pay, and later paid, hospital bills aggregating \$175. And the plaintiff executed and delivered to the defendant a release in full of all claims. On that same day the parties entered into a written stipulation whereby it was stipulated that the action be dismissed with prejudice. This stipulation was filed in the office of the clerk of the district court of Hettinger county. On December 6, 1921, the plaintiff, pursuant to notice, applied to the district court for an order vacating the settlement and the stipulation of dismissal and reinstating the cause upon the calendar for trial. A hearing was had on this motion at which certain affidavits were submitted and witnesses also testified orally. The trial court thereupon made an order to the effect that—

“The stipulation dismissing the above-entitled action and the release and settlement signed by the plaintiff on or about the 14th day of November, 1921, be and they are hereby vacated, set aside and held for naught; and the above-entitled action stand on the calendar for trial for the term of court now convened, and that the same be tried in its regular order on the calendar.”

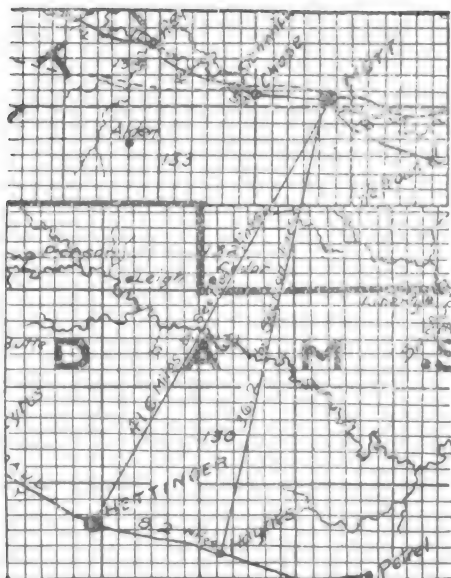
On December 10, 1921, the defendant moved the court that the place of trial be changed from the county of Hettinger to the county of Adams. This motion was denied.

On the oral argument it is contended that the order setting aside the stipulation of dismissal is not an appealable order. No motion was made to dismiss the appeal on this ground, and the objection was presented for the first time on the oral argument. We are of the opinion, however, that the order is one which “involves the merits of an action or some part thereof,” and hence is appealable under subdivision 4 of § 7841, C. L. 1913. That is the specific holding of the Supreme Court of Minnesota under a statute identical in terms with that quoted above. *Rogers v. Greenwood*, 14 Minn. 333 (Gil. 256); *Bingham v. Board of Supervisors*, 6 Minn. 136 (Gil. 82). The Supreme Court of Wisconsin, in *Brown v. Cohn et al.*, 88 Wis. 627, 60 N. W. 826, considered and determined on the merits an appeal from an order relieving a party from a stipulation waiving a jury trial. In *Northern Pac. R. Co. v. Barlow*, 20 N. D. 197, 126 N. W. 233, Ann. Cas. 1912C, 763, this court ruled that an order which set aside findings of facts and relieved the parties

from a stipulation on which the case was submitted was appealable. See, also, *Bolton v. Donavan*, 9 N. D. 575, 84 N. W. 357. It is contended by the appellant that there was not sufficient showing to justify the trial court in setting aside the stipulation of dismissal. While we deem the question to be a close one, we are not prepared to say that the trial court erred in setting aside the stipulation of dismissal so as to afford the parties an opportunity to try the cause on its merits. See 36 Cyc. 1295. The order entered by the trial court, however, went much further than this. It set aside not only the stipulation of dismissal but the compromise of the cause of action itself and the release of damages executed by the defendant. This was clearly outside of the functions of the court on the motion and outside of the matter properly submitted for the determination of the court on such motion. While the court has power to set aside stipulations in any case pending before it, and ought to do so if all causes where it would be inequitable to enforce the stipulation (36 Cyc. 1294, 1295), the court may not, upon motion, set aside the compromise of the cause of action itself (36 Cyc. 1296). The question as to the validity of a compromise goes to the very existence of the cause of action itself, and ought not to be determined in a summary manner upon motion. In fact, on the presentation of this appeal it was not seriously contended by the plaintiff that the validity of the compromise was a matter properly determinable by the trial court on the motion; and it was argued that the order of the trial court was not intended to, and did not have, any such effect. It was contended that the only effect of the order was to set aside the stipulation of dismissal and to enable the parties upon the trial to have determined on its merits the question of whether the cause of action itself had in fact been compromised between the parties. That contention, however, is not in accord with, but directly contrary to, the language of the order appealed from. Hence we are of the opinion that the order setting aside the stipulation of dismissal and the settlement or compromise of the cause of action should be modified so as to provide merely that the stipulation of dismissal be set aside; and that the defendant, if it so desires, be afforded permission to serve and file a supplemental answer setting forth as a defense the alleged compromise of the cause of action.

In support of the application for a change of the place of trial, the defendant submitted several affidavits, including the affidavit of the president of the defendant company and that of its attorney, and one Dewey, a former county judge of Hettinger county. Many of these

affidavits tend to show that for various reasons the defendant cannot have a fair and impartial trial in the county of Hettinger. The affidavits, and the facts of which the court takes judicial notice further show that the plaintiff is a resident of the county of Adams; that the mine in which the alleged injuries are claimed to have been sustained was located near Haynes in Adams county, a distance of about 8.2 miles from Hettinger, the county seat of Adams county; that Hettinger and Haynes are located on the same line of railway; that Mott, the county seat of Hettinger county, is located on a different line of railway some 36 miles from Haynes. The affidavits show that all of the witnesses for both the plaintiff and the defendant, with one or two possible exceptions, reside in the county of Adams, and are from 20 to 40 miles nearer to Hettinger in Adams county than to Mott in Hettinger county; that the defendant has in all some 18 witnesses, who are named in the affidavits, and all of whom, with one exception, are residents of Adams county; that the other witness is one Dr. Murdy of Aberdeen, S. D., who will find it much more convenient to come to Hettinger than to Mott. The location of Hettinger, the county seat of Adams county, Mott, the county seat of Hettinger county, and Haynes, where the accident occurred, are shown on the following map:



The oral testimony (adduced upon the hearing of the motion to set aside the stipulation of dismissal) shows that the alleged injury sustained by the plaintiff was received in the coal mine at Haynes, and that after the injury plaintiff was taken first to a hospital at Hettinger and treated by one Dr. Mordoff, who is still residing there; that later on he was taken to a hospital at Aberdeen, S. D. The undisputed evidence also shows that the settlement or compromise in controversy was perfected at Haynes and that the plaintiff resides only a relatively short distance from that town. When the showing made by the defendant is considered in light of the facts of which the court takes judicial notice (such as the location of cities and villages and distances between two or more cities or villages), it would seem that the convenience of witnesses would be greatly promoted by changing the place of trial from Hettinger to Adams county. The record, however, discloses that upon the hearing of the motion the plaintiff interposed what he denominated a "demurrer" or a general objection to the sufficiency of the moving affidavits, coupled with a request that in event the demurrer or objection was overruled that he be afforded an opportunity to present counter affidavits. The trial court in effect sustained the objection. It seems that in so doing he ignored the ground that the convenience of witnesses would be promoted by changing the place of trial, and considered merely the ground that there was reason to believe that an impartial trial could not be had in the county in which the action was brought, for, in denying the motion, the trial judge said that he could not "agree with counsel for the defendant that he cannot have a fair and impartial trial here," i. e., in Hettinger county. Under the statute, a change of place of trial ought to be granted either when there is reason to believe that an impartial trial cannot be had in the county from which the change is asked, or when the convenience of witnesses and the ends of justice would be promoted by the change. Section 7418, C. L. 1913.

Hence the order denying a change of place of trial is reversed, and the trial court is directed to fix a date for hearing the motion and to afford both parties reasonable opportunity to present such other showing as they may desire. Costs of both appeals will abide the final judgment in the action.

GRACE, C. J., and BIRDZELL, BRONSON, CHRISTIANSON and ROBINSON,
JJ., concur.

FIRST NATIONAL BANK OF NEW ROCKFORD, Appellant, v.
E. R. DAVIDSON, C. McLACHLAN, W. H. CARSON, C. J.
STICKNEY, and W. M. ROBERTS, Respondents.

(188 N. W. 194.)

Bills and notes — note given to bank to cover up overdrafts and to withstand examination of bank examiner held asset of bank.

1. In an action upon a promissory note, where the defense asserted was that the note was given to a bank purely for its accommodation to cover up temporarily overdrafts of a publishing company, of which the defendants were directors, to pass an examination by the federal examiner, without any consideration, and upon the understanding that the note become a part of the bank's assets and should not be a legal binding obligation upon the defendants, and, where, further as to one of the defendants, the defense was asserted that the note was signed and handed by such defendant to the plaintiff upon the express agreement that it should not take effect until certain conditions were first performed, it is *held*:

That the evidence establishes, as a matter of law, that the note became a part of the assets of the bank.

Bills and notes — whether there was any consideration for note held for jury.

2. That the questions whether there existed a consideration for the note and whether the note was given as an accommodation to the publishing company, were for the jury.

Bills and notes — directors, who gave bank note to cover overdrafts of corporation, held liable on note to holder for value.

3. That directors, who with full understanding assume a duty and responsibility for their company to take up its overdraft, the payments of which is its legal duty, and, who sign a note, in response to this duty and responsibility which serves as an accommodation to their company and the fulfillment of its duty, are liable to a holder for value of such note.

Appeal and error — admission of evidence concerning contract of indemnity for payment of note to bank by former parties interested therein, and of their wealth, held prejudicial error.

4. That the admission of evidence concerning the existence of a guaranty contract of indemnity for the payment of the note to the bank by former parties interested therein and, concerning their wealth, is prejudicial error.

Bills and notes — failure to perform conditions precedent to delivery of note a good defense.

5. That the failure to perform the conditions precedent to the de-

livery of the note was properly a defense for the defendant who pleaded such failure.

Appeal and error—erroneous admission of evidence on one defense ground for a new trial, where it is impossible to determine on which of two defenses jury based its verdict.

6. That the plaintiff is entitled to a new trial as to all of the defendants by reason of prejudicial error in the record.

Opinion filed Jan. 22, 1922. Rehearing denied April 27, 1922.

Action on promissory note in District court, Eddy county, *Coffey, J.* From an order denying judgment non obstante, or, in the alternative, for a new trial, the plaintiff has appealed.

Reversed and new trial granted.

Bangs, Hamilton & Bangs, N. J. Bothne, and A. L. Netcher, for appellant.

It was not necessary that any consideration should pass directly to the makers of said note, or that the makers should receive any personal benefit by reason of the execution and delivery of said note. Section 6914 C. L. 1913; *First Nat'l Bank v. Meyer*, 30 N. D. 388; *Marling v. Jones et al.*, 119 N. W. 931 Wis.; 3 R. C. L. p. 827.

The defendants, Carson and Stickney, had no knowledge of the agreement or promise made by Roberts with the other defendants, and insofar as they were concerned, the note Exhibit 1, was discounted in the ordinary and usual course of business.

Under such circumstances the promise or agreement made by Roberts and the knowledge thereof by said Roberts and by the said defendants Carson and Stickney, did not, and does not constitute a defense to the liability of any of said defendants, so executing and delivering said note. Vol. 3 *Fletcher Cyc. Corp.*, pp. 3237 and 3325; *Thompson v. McKee*, 5 Dak. 172; *State Bank v. Forsyth*, 28 L. R. A. (N. S.) 501, Mont.; *Mead v. Pettigrew*, 78 N. W. 945; *First Nat'l Bank v. Oil & Coal Co.* 28 L. R. A. (N. S.) 511; *Pauly v. O'Brien*, 69 Fed. 460.

The defendant McLachlan, was president of the Farmers & Merchants Bank of New Rockford. He and the defendants Carson and Stickney were jointly interested with the defendant Roberts in the New Rockford Publishing Company, and the defendants McLachlan, Carson and Stickney must have known that at the time of the execution of said

note aforesaid, the said Roberts and the said defendants Carson and Stickney were acting for themselves and for their own benefit, or for the New Rockford Publishing Company and must have known and ought to have known that neither said Roberts nor either of the directors of said plaintiff bank could act as agent for the plaintiff bank and at the same time adversely to it. *Bank of LeRoy v. Purdy*, 91 N. Y. Supp. 310, (312); *Woodworth & Co. v. Carroll*, 112 N. W. 1054 Minn.; *McCarty v. Kepreta*, 24 N. D. 395—414; *Packers Nat'l Bank v. Rushart*, 152 N. W. 789 Neb.; *Exchange Bank v. Ins. Co.* 120 N. W. 1010, Neb.; *Amer. Nat'l Bank v. Ritz*, 40 L. R. A. (N. S.) 156 W. Va.; *First Nat'l Bank v. Persall*, 125 N. W. 506 Minn.; *Lilly v. Hamilton Bank*, 29 L. R. A. (N. S.) 501, Mont.; *State Bank v. Forsyth*, 28 L. R. A. (N. S.) 501, Mont.; *Brookhouse v. Union Pub. Co.* 2 L. R. A. (N. S.) 993, N. H.; *First Nat'l Bank v. Burns*, 39 L. R. A. (N. S.) 764; *First Nat'l Bank v. Briggs Assignees*, 41 Atl. 580, Vt.

"It is not the duty of the president to make such contract, nor has he the power to bind the bank, except in discharge of his ordinary duties." *State Bank v. Forsyth*, 28 L. R. A. (N. S.) 501, (507); Citing *Bank of U. S. v. Dunn*, 6 Peters 51, 8 L. ed. 316, (also see cases cited under Point 8).

"Courts are not compelled to accept unreasonable and incredible evidence as a sufficient basis for a legal judgment, simply because it is not contradicted by direct and positive testimony." *Hughes v. Hughes*, 84 Atl. 647, Me.

"No consideration moving to an accommodation maker of a note is necessary to uphold it; the consideration supporting the promise of the maker being that parted with by the person taking the accommodation note and received by the person accommodated." *Marling v. Jones*, 119 N. W. 931 Wis.; 3 R. C. L. p. 927.

"Evidence of a parol agreement between the payee of a note and the indorser that the latter should not be held liable on such indorsement is inadmissible, as varying the terms of a written contract." *Thompson v. McKee*, 5 Dak. 172; 37 N. W. 367.

Kelly & Morris, R. E. Rinker, F. B. Lambert, and Knauf & Knauf, for respondents.

"The party for whose accommodation a promissory note was executed is not entitled to recover from the accommodation party therein, but such

defense in order to avail must be especially pleaded." First State Bank of Eckman v. Kelly, 30 N. D. 84; 152 N. W. 125; Farmers Security Bank v. Nelson, N. D. 179 N. W. 917; First National Bank v. Miller, N. D. 179 N. W. 997; Scandinavian Am. Bank v. Westby, 41 N. D. 276; 172 N. W. 665; 8 Corp. Jur. p. 259; 8 Corp. Jur. p. 262; Pittsburgh St. Bank v. Kirk (Pa.) 65 At. 932; Arthur v. Brown (S. C.) 74 S. E. 652; Conrad v. Clark (Minn.) 119 N. W. 214.

"The party for whom accommodation negotiable paper is made cannot sue the accommodation party." Williams v. Hasshagen, 166 Cal. 386; 137 Pac. 9.

"A party to a note can defend on the ground that the note was signed as an accommodation to the payee." Corliss v. Howe, 11 Gray. 125.

Statement.

BRONSON, J. This is an action upon a promissory note. The plaintiff has appealed from an order denying judgment non obstante, or, in the alternative, for a new trial. The material facts, necessary to be stated, are as follows:

In September, 1918, the defendant Davidson executed the note involved for \$3,000, payable, on March 1, 1919, to the plaintiff. It was indorsed in blank by the remaining defendants. The defendant Davidson in his separate answer alleged, in addition to the defense of the other defendants, that he signed this note and delivered it to the plaintiff upon the express condition that the same should not be deemed delivered nor used until the plaintiff should first obtain a valid first chattel mortgage upon the property of the New Rockford Publishing Company; that the plaintiff did not so do, and the note never has been delivered. The remaining defendants, excepting Roberts, who was not served and did not appear, in their answer, alleged that the note was given without consideration and wholly for purposes of accommodation to the plaintiff for temporary use, and upon the definite understanding that the note should not be paid nor be a personal obligation. It appears that in 1916 the said publishing company was incorporated and established for the purpose of assisting in the movement for the removal of the State Capital to New Rockford. This company sold some \$10,000 or \$11,000 of its stock. It established a daily newspaper at New Rockford and a job-printing plant. It employed an editor and manager. The defendants were associated with this company. The defendant Roberts was the

president and a director. The remaining defendants were directors. The company did its banking business with the plaintiff and the Farmers & Merchants Bank of New Rockford. The defendant Roberts was then and until the time when the note involved was signed, the president of the plaintiff and actively in charge of its business. In January, 1917, the company had overdrawn its account with the plaintiff.

One Phillips, then the manager of the newspaper, gave a note to the plaintiff for \$2,500. He testified that his employer, Roberts, wanted an accommodation note temporarily to put in the bank to take care of the overdraft as the bank was about to be examined. At the same time, the defendants Roberts, Stickney, McLachlan, and Carson gave their promissory note for a like amount payable to Phillips or bearer. This note was then delivered to the plaintiff as collateral to the Phillips' note. The defendant McLachlan, a physician and the president of the Farmers & Merchants Bank for many years, testified that, when Roberts requested the indorsement for the Phillips' note, he stated that no one upon the notes would be held. The defendant Stickney, a merchant and a director of the plaintiff bank from November 1917, to January, 1920, testified: That when the Phillips' note was made the company had an overdraft of some \$6,000 or \$7,000. That Phillips (a newcomer) had no local credit standing. Roberts wanted a note to Phillips as an accommodation to the bank to cover the overdraft. That it could not be carried and would not be passed by the examiner. The defendant Carson, a contractor and a director in the plaintiff bank when the note in suit was signed, testified: That Roberts wanted him to sign the note (to Phillips) so that he could take up the overdraft and make it appear upon the books that it was paid. That he assured him that it was for the accommodation of the bank, and that he would never be asked to pay it. That Roberts informed him that the note would appear upon the books of the bank in place of the evidence of indebtedness that the bank had against the publishing company. In April, 1917, Roberts had a conference with the defendants, directors of the publishing company, in the Farmers & Merchants State Bank. The conference was limited to directors of the publishing company, Roberts, Stickney, Carson, and McLachlan were present. Stickney testified that Roberts had under consideration the indebtedness of the publishing company. Roberts told them about the overdraft of the company, that there would be an examination of the bank, that the bank could not carry it and that it had to be fixed up in some way. He wanted accommodation notes to be used

temporarily for the bank. He explained that the assets of the publishing company would more than take care of this indebtedness, and that they would never be expected nor asked to pay the notes. McLachlan then made a note for \$2,500 to the bank, and Roberts, Stickney, and Davidson gave a note for a like amount to McLachlan as collateral to such note. McLachlan testified that Davidson was there at this meeting, although, otherwise, he testified that he was not sure; further that the amount of the overdraft was divided; that assurance was given that they would never have to pay the notes; that it was distinctly understood that the signers of the note should not be held personally. Carson testified: That Roberts called him into the bank (plaintiff's bank). Roberts and Stickney had signed the note (\$2,500 note). Roberts told him that there was an overdraft there, and he wanted to cover it with these notes. That he assured him that he would never be held liable, and it would only be carried temporarily. Roberts told him the first note (which Carson had signed) was still held in the bank, and was being carried in place of some money advanced for the publishing company.

In September, 1918, as McLachlan testified, Roberts called another meeting. It was held in the Farmers & Merchants Bank. Roberts, Stickney, Carson, and McLachlan were present. Roberts called the meeting to order. Roberts stated that he had paper in plaintiff bank that was overdue; that there were overdrafts not included in the notes given previously (the accommodation notes); that he wanted to have notes representing these original notes and overdrafts, since made, placed in accommodation notes covering the total amount; that the bank was being examined, and he must have these notes for use while the bank was being examined. He stated that they would not have to pay them; that they would not be held responsible in any way for them. He figured and showed Carson on a piece of paper that there was plenty of security in the plant; that nothing was being put over on the examination; that the security was all right, but that it could not be put in that way under the banking law. Otherwise he testified that at this time the plaintiff bank had an indebtedness of \$2,750 running from the publishing company, secured by a chattel mortgage upon the plant. At that time Roberts had the Davidson note (the note in suit) there. He thinks they signed three notes there. They objected to signing further accommodation notes, but upon explanation of the purposes they signed the note (the Davidson note indorsed) for accommodation purposes only.

Stickney testified that this note (in suit) was signed on September 14, 1918 in the Farmers & Merchants Bank; that it was a part of a series of notes; that Roberts, Davidson, McLachlan, and he himself were there, and Carson, he believed; that the sum and substance of the conversation was that the bank had this overdraft, and that he desired it fixed in such a way that it could be temporarily carried; that he was expecting an examination of the bank, and he wanted these notes put in there so that the bank could pass without any difficulty; that he assured them that they would never be called upon to pay these notes; that they were simply accommodation notes. Later, he further testified that Roberts stated that they were checking up the bank; in fact they were working in the bank at that time, and that it was absolutely necessary for him to have this paper renewed immediately. Further, he testified that the plaintiff bank was transferred on the night this note was indorsed to the present owners from Roberts and Beiseker. Carson testified that Roberts came to his office. He had the note (in suit) already signed by Davidson and a note for \$3,200, he believed, not signed by anybody. Roberts stated that it was a renewal of the other notes; that they were checking up the bank, and he had to have it right away; that they would use it only for a couple of days, and that they would never be held liable upon them; that later they all signed at the bank; that at that time he was a director in the plaintiff bank.

The defendant Davidson testified that, during the time Roberts was president, he was in the Farmers & Merchants Bank; that in June, 1917, Roberts called him in the back room of the Farmers & Merchants Bank, and stated that the publishing company had an overdraft with the plaintiff; that he wanted him to give an accommodation note for \$2,500; that he would get McLachlan, Stickney, and Carson to indorse the note, and he (Davidson) would never have anything to pay on it; McLachlan and Stickney were present; that he signed that note there as an accommodation note; that he understood that his note would stand in lieu of the overdraft, and the purpose was to wipe it out, although the claim between the bank and the publishing company would still remain; that he was then a stockholder in the publishing company; that he indorsed the note to McLachlan in April, 1917, although he did not remember the circumstances or the occasion of it; that he did not attend any meeting with that bunch; that he was appointed by the board to fill a vacancy (directorship) in the latter part of 1917, was reelected a director at the stockholders meeting late in 1917 or in January, 1918, and

sold his stock and resigned as director in June, 1918. He further testified that on September 13, or 14, 1918, Roberts came into the country with an automobile and saw him. Roberts stated that he was renewing some paper, and desired a renewal note; that the examiner would be there in a few days, and he must have a new note; that the bank was still carrying the old note; that he refused to give a renewal, because he did not owe the bank anything; that Roberts then stated that he would get McLachlan, Stickney, Carson, and himself to indorse the note, and would get a mortgage upon the property of the publishing company and put behind the note so he would never have anything to pay on the note; that he signed the note upon the distinct understanding that he would secure the indorsements as stated and procure the mortgage; and that until that time he would not use the note.

It appears in the evidence that the plaintiff did not secure this mortgage, although prior to this action the Farmers & Merchants Bank took a mortgage from the publishing company covering all its property. It appears further in the evidence that about September 14, or 15, 1918, the bank changed management. Mortenson succeeded Roberts as president. One Aas became vice president. Roberts and Beiseker gave a written guaranty to the bank, thus under new management, covering the paper in the bank. It appears further that the defendant Stickney was a member of the discount and examining committees of the plaintiff bank. He testified that he may have checked over the bills and notes; that he took part in an examination once while Roberts was there and since the new administration; that he and Carson checked over the notes and bills of the plaintiff bank in January, 1919; that he presumed that he checked over this note and other notes in the series; that he knew, in January, 1919, when the examination was made, that he was checking these notes in the assets and making an official report as officer of the bank, and that Carson was there and joined with him; that at that time he said nothing to the bank officers about any defects in these notes. He otherwise testified, however, that after the change of administration at a meeting, he thinks, of the board of directors, he told the vice president that this paper was accommodation paper; that Mortenson was there; that they said they were not concerned; that it was immaterial, as they had a guaranty contract; that the guaranty was there and he read it himself. Carson corroborated this testimony. The officers of the bank, Mortenson, Aas, and the cashier, denied any notification or knowledge that this note was accommodation paper. The cashier testified

that this note (in suit) and the series were in the bills receivable of the bank.

The trial court submitted the case to the jury upon extensive instructions. The question as to whether the note ever became a part of the assets of the bank was submitted as an issue of fact. It submitted the issue of consideration and the giving of the note, as a pure accommodation for the bank and not as a legal obligation. Further, as to the defendant Davidson, it submitted the issue of a delivery conditional upon express conditions, and the failure of the plaintiff to perform such conditions. A general verdict was returned in favor of the defendants.

Contentions.

The plaintiff has assigned numerous specifications of error. These cover the admission or rejection of evidence, the instructions of the trial court, and the sufficiency of the evidence to justify the verdict. In general, the plaintiff contends that the defendants executed the note with full understanding and without duress, fraud, or undue influence; that the evidence discloses a good and valuable consideration for the note; that the note was not given as an accommodation for the plaintiff bank, but for the accommodation of the publishing company; that the evidence permitted to be introduced, concerning the arrangement of treating the note in respect to the overdraft, the examination by the federal bank examiner, and the nonliability of the defendants thereon, was incompetent and inadmissible; that such testimony varied and altered a written instrument; that it established an agreement beyond the powers of the bank president, and operated as a fraud upon the plaintiff bank; that the defendants cannot plead their own fraud as a defense.

The respondents contend, with respect to the defendant Davidson, an issue of fact was presented upon an express condition precedent, the issue of conditional delivery; that the finding of the jury is determinative of this issue. With respect to the other defendants, it is maintained that, since there is no liability on the part of the defendant Davidson, the principal, no liability can attach to the other defendants, for the reason that they are in the position of sureties only, and as such exonerated by statute (§ 6680, C. L. 1913); that otherwise the evidence, properly admissible concerning the transactions between the parties and the nature and character to be given to the note involved, was all properly for determination by the jury. The record is voluminous. Able and exten-

sive briefs have been presented by both parties. Necessarily, only a concise generalization of the various contentions has been stated.

Decision.

1. *Does the record disclose that the note became a part of the assets of the bank?*

We are of the opinion that it appears without controversy that this note, as well as the note or notes for which it was given, were carried in the bills receivable of the plaintiff bank. But it may be urged that the agreement was that such note or notes should not be considered a part of the assets of the bank, and not, in fact, to be any legal obligation at all. The testimony concerning this phase all proceeds from the defendants themselves, and can be answered by their own testimony. The various overdrafts of the publishing company were assets of the plaintiff. Its money or the money of its depositors had been used to create them. These notes were given, as they testified, to "cover up" these overdrafts and as a means to withstand the examination of the federal bank examiner. This very understanding and purpose, as stated, involved the necessity of such notes becoming a part of the assets of the bank. Some of the defendants admit that they understood, and knew that through these notes the overdrafts would be taken up. It does not lie well in the mouths of the defendants to say that these notes were not to become a part of the assets, when the very purpose and understanding for which they made them was in order that they might become a part of the assets. Such notes did in fact become a part of plaintiff's assets. It is immaterial that the understanding was that they should so be, temporarily. The defendants could not escape a knowledge and understanding that these notes would be placed in the assets of the bank. They were all business men, familiar and connected with the banking business. Two of them directors of the plaintiff bank and two of them connected with the Farmers & Merchants Bank.

2. *Does the record disclose a consideration for the note?*

The writer is of the opinion, as a matter of law, that out of the mouths of the defendants a consideration is established which the defendants may not deny by mere assertion. The defendants, all of them, were directors of the Publishing Company; Davidson for part of the time. Although, as they testified, there was a president, Roberts, and

a manager, who conducted the business of the publishing company, they were nevertheless concerned, and legally concerned in the company's business. The overdrafts of the company were matters of their concern. They recognized it by attending the meetings of directors called for the very purpose of considering such overdrafts. It is true that no formal meetings were had and no formal action was taken, but in many things apparently the publishing company functioned without formality. May these directors say that there was no obligation, no responsibility, no duty, when they assumed and pretended to take an obligation, responsibility, and duty? It was the duty of the publishing company to pay these overdrafts. It is not asserted nor contended that they were not legal obligations. It was its duty to promptly pay them, since the company, through its officers, had issued drafts or checks upon the banks, representing that it had money to meet the same, when in fact it had no such money. The directors cannot deny any responsibility or duty simply because the stockholders had authorized the directors to make a contract with a manager and editor to have full power to conduct the business affairs of the company. It is not otherwise shown that the duties of these directors were different than those usual for directors of a corporation. In fact, the stockholders required the manager to submit, every 90 days, a comprehensive statement concerning its business, the amount of cash on hand, and its indebtedness. Assuredly, in the contract with the manager, the directors were representing the company. These directors, when the matter of taking up the overdrafts was presented, knew or were bound to know that the bank's money or the money of its depositors had been used to pay such overdrafts. When these directors indorsed the note of its own manager to take care of an overdraft, when they, likewise, later so made or indorsed a note, after the meeting in April, 1917, did they assume no responsibility nor duty? If so, and such note or notes were to be temporarily used, only for a few days, what was their duty concerning the overdrafts that would have to be reinstated if the showing of the notes should be withdrawn? Could they and their manager assume that either the notes or the overdrafts needed no further attention. Either the notes operated to take up, in fact, the overdrafts, as some of the defendants' testimony admits, or the duty remained to pay such overdrafts. No showing is made that the manager or the directors attempted in any way to otherwise pay these overdrafts, by notes, money, or security of the company. It is to be presumed that they desired the company to live. The action of the directors give sup-

port to this presumption. It is ordinarily the duty and function of directors to see that a corporation does live, and live a legal business life. If these defendants had likewise given a note for their personal overdraft, would they contend that there was no consideration therefor? It is plainly evident that the overdrafts were due, when made. The giving of the notes operated to extend the payment thereof. The failure to otherwise pay or secure such overdrafts again operated to extend the payment of the indebtedness as to the plaintiff bank. Certain facts sometimes establish their own incontestability. It is obvious that there was a consideration for these notes. 3 R. C. L. 927; 8 C. J. 220, 238; *Fulton v. Loughlin*, 118 Ind. 286, 20 N. E. 796; *Bank v. Wixon*, 46 Barb. (N. Y.) 218; *Skagit State Bank v. Moody*, 86 Wash. 286, 150 Pac. 425, L. R. A. 1916A, 1215; *Marling v. Jones*, 138 Wis. 82, 119 N. W. 931, 131 Am. St. Rep. 996, § 6910, C. L. 1913; section 25, Neg. Inst. Act; *Branan*, Neg. Inst. Law, p. 98 et seq. The trial court erred in submitting to the jury the question of such notes becoming a part of the bank's assets, and of the existence of a consideration therefor. The above statements in this ¶ 2 are the views of the writer. The majority of this court, however, are unable to agree otherwise than that the question of consideration, upon the record, was for the jury.

3. *Does the evidence concerning an agreement that the note should be an accommodation for the bank to cover up the overdrafts for the bank examiner and that no legal liability should attach thereto, constitute a defense?*

The facts show that the note became a part of the bank's assets, and that there was a consideration therefor. This action is between the immediate parties. The note is subject to the same defenses as if it were nonnegotiable. Section 6943, C. L. 1913: § 58, Neg. Inst. Act. However, the plaintiff is a holder for value. Section 6911, C. L. 1913: § 26, Neg. Inst. Act. The defendants may be held liable upon the note to the plaintiff, a holder for value, notwithstanding the plaintiff, at the time of taking the note, knew the defendants to be only accommodation parties. Section 6914, C. L. 1913; § 29, Neg. Inst. Act; *Neal v. Wilson*, 213 Mass. 336, 100 N. E. 544. The defendants are in the position of parties who have contracted to pay for a consideration. The fact that this note was an accommodation to the bank, accepted as true, does not constitute a defense. It also was an accommodation to the publishing company. *Skagit State Bank v. Moody*, 86 Wash. 286, 150 Pac.

425, L. R. A. 1916A, 1215. Davidson, in a letter to the plaintiff denying liability upon the note, stated that he had executed the note as an accommodation for the company. It was further an accommodation to the directors of the company, whose duty, so assumed at least, it was to give attention to the overdrafts. The purpose of the note, so serving through the alleged representations made, to cover up the overdrafts and thus safely pass federal examination, likewise constituted no defense. It was the duty of the directors and the manager, too, to take up these overdrafts either by money or acceptable paper. It was their duty to meet the demands of the banking laws and the federal examiner, presumed to follow the law, in the company's transactions with the bank. It was their duty and responsibility to see that their company's transactions and indebtedness passed muster with the examiner. May they now assert successfully that their action upon this duty and responsibility, which they assumed to perform and which operated to take up the overdrafts and successfully pass federal inspection, is a defense to the obligation thereby incurred because the bank represented that the note must be so given, and, even temporarily so, in order to pass federal inspection? See *Ins. Co. v. Haynes*, 71 Vt. 306, 45 Atl. 221, 76 Am. St. Rep. 771. Assuredly, the many cases cited by the defendants where notes were given purely for the accommodation of a bank and without consideration are not in point. But it is urged that the bank further represented that none of the defendants should be held liable; that there should be no personal liability on the note. All of these defendants were business men, and all of them were engaged in the banking business, two of them with the plaintiff bank and two of them with the other bank. They knew and were bound to know that the banking business is fraught with public concern; that banks are permitted to do business through the courtesy and permission of the law and subject to its provisions for the protection of depositors, creditors and stockholders; that public faith and credit and honesty in business transactions are their main assets. These defendants cannot be heard to say that they did not sign this note with full understanding of its purposes and consequences. Construing this note as a part of the bank's assets and upon a consideration therefor, it was wrong for the defendants to so sign such note upon any understanding of nonliability in any event. It was wholly proper for them to consider that they might never suffer any loss or be compelled in fact to pay by reason of the potential assets of the company which Roberts explained to them. But it was and is a fraud upon

themselves, upon the bank, and upon the public to contend that an obligation, which they made their duty to assume and which in writing they did assume, was not an obligation at all. It was a fraud upon themselves, because it pretended legally in solemn written form the performance of their duty; a fraud upon the bank, because it gave assurance of legal compliance concerning their company's indebtedness, to the government, to the bank's directors, two of them the defendants, and to depositors, creditors, and stockholders. A fraud upon the public and public law, because it gave assurance that moneys, perchance, of depositors, which had been paid out for the indebtedness of the publishing company, were protected by the directors of this company, whose duty it was so to do, and also by the bank's directors. Not without understanding did they enter upon this apparent legal obligation. Not to thus perpetrate a wrong and a fraud contrary to their assumed duty and responsibility may they now assert nonliability in defense. Sections 7251, 7255, C. L. 1913; 5 L. R. A. 344. See *Bank v. Forsyth*, 41 Mont. 249, 108 Pac. 914, 28 L. R. A. (N. S.) 501, 510; note, 28 L. R. A. (N. S.) 501.

The above statements in this ¶ 3 are the views of the writer. The majority of this court, however, do agree that if the jury, upon a new trial, should find that there was consideration for the note, then the views of the writer, above stated, are proper.

The majority are also of the opinion, though such is not the view of the writer, that, under the evidence in the case, the question as to whether the note was for the accommodation of the bank or of the publishing company is likewise a question of fact for the jury; and, in accordance with the views of the majority, if the jury should find that the note was given for the accommodation of the publishing company, it would then be immaterial whether any present consideration was given by the bank, as it would be a holder for value under the Negotiable Instruments Act. *Neal v. Wilson*, 213 Mass. 336, 100 N. E. 544; *Metzger v. Sigall*, 83 Wash. 80, 145 Pac. 72.

Prejudicial Error in the Record.

4. The majority of this court are of the opinion that, in any event, a new trial must be awarded for prejudicial error in the record resulting through the admission of evidence concerning the guaranty contract of Roberts and Beiseker and the wealth of Beiseker. Such evidence served purposes of bringing to the attention and consideration of the jury an in-

demnity contract that, in any event, covered and guaranteed the payment of the note to the bank and emphasized prejudicially the ability of Beiseker to make such payment. It was highly objectionable and prejudicial upon well-settled principles of law.

5. *Did the fact of the nondelivery of the note as to the defendant Davidson operate to discharge the remaining defendants from the obligation?*

The plaintiff concedes that the evidence was sufficient for the consideration by the jury of the question of conditional delivery so far as the same concerns the defendant Davidson. As between the parties, it was competent to prove a delivery by the defendant Davidson upon condition and the failure to comply with such condition imposed before delivery. Section 6901, C. L. 1913; § 16, Neg. Inst. Law; First Nat. Bank v. Miller (N. D.) 179 N. W. 997. Such an understanding and its nonfulfilment, if so found by the jury, would operate as a defense and discharge from liability. The defendants, other than Davidson, did not plead as a defense a delivery of the note upon conditions. The trial court did not submit to the jury any such issue as to these defendants, other than Davidson. Accordingly this court expresses no opinion upon the question of conditional delivery, excepting as it affects Davidson's liability.

6. *Is the plaintiff entitled to a new trial?*

In its instructions to the jury, the trial court charged that a verdict should be returned for the defendants if they found that the note was made for the accommodation of the bank, and upon an intention to become a legal obligation; that if they found that defendants signed the note without consideration and for temporary use to cover up an overdraft of the publishing company, with the understanding that they were never to pay such note, a verdict should be returned for the defendants who so signed such note. Further, that, if they found that the note was signed by Davidson upon an express condition concerning to delivery, and that this condition was not performed, a verdict should be returned in Davidson's favor. In the separate answer of Davidson, two general defenses are alleged: The making of the note for purposes of accommodation of the plaintiff, to cover up the overdraft and satisfy the federal banking department, without any consideration and upon the understanding that the same should not become a legal obligation; and the delivery of the note upon an express condition.

A new trial must be granted at least with respect to the defendants other than Davidson. Upon their defense, as pleaded, and upon the evidence, the verdict, through error in the admission of prejudicial evidence, must be set aside. The presumption is that every fact necessary to support the verdict in favor of Davidson has been found by the jury, 4 C. J. 772. Nevertheless, the prejudicial error in the record concerned Davidson as well as the other defendants. While Davidson might prevail upon either or both of the two defenses submitted, the error nevertheless affects the verdict as to all of the defendants. Accordingly, it being impossible to determine upon which issue the jury based its verdict as to the defendant Davidson, or the extent to which the prejudicial error aided or influenced the jury in any finding upon conditional delivery, a new trial must be awarded. 20 R. C. L. 268; Funk v. Railway Co., 61 Minn. 435, 63 N. W. 1099, 29 L. R. A. 208, 52 Am. St. Rep. 608; Barrett v. Magner, 105 Minn. 118, 117 N. W. 245, 127 Am. St. Rep. 531.

The order is reversed, and a new trial ordered, with costs.

BIRDZELL and CHRISTIANSON, JJ., concur.

GRACE, C. J. (dissenting). The facts and evidence have been amply stated in the majority opinion. The controverted facts with all other facts were submitted to a jury; a verdict was returned in defendant's favor, and judgment entered accordingly. There is not only substantial but abundant evidence to support the verdict. Where that is true and there is no prejudicial reversible error in the record, the judgment should be affirmed. There is no prejudicial error in the record, and the majority opinion, in our opinion, points out none.

We are clear that the order from which appeal was taken should be affirmed.

ROBINSON, J. (dissenting). It is for the interest of the republic that there should be an end to litigation. Accordingly, when the issues in an action have been fairly submitted to a jury and a verdict rendered, it should not be set aside unless on a reasonable showing that the verdict is wrong. The plaintiff and appellant sued to recover from defendants on a promissory note made to it for \$3,000 and interest. The note is made by

Davidson and indorsed by the other defendants. The answer of Davidson is that at the request of Roberts, the president of the bank, he signed the note for an accommodation and without any consideration. To the same effect is the answer of the other defendants. The case was fairly submitted, and the jury found in favor of the defendants on all the issues, and the bank appeals. Now it is certain the bank paid nothing for the note, and it did not release or surrender any drafts or securities. It solicited and secured the note as an accommodation for the purpose of making a good showing to the bank examiner. Appellant makes 40 points or assignments of error, and it seems to conclude that 40 bad points make 1 good point. The only good point would be a showing that the note was made to the bank for a valuable consideration.

In his memoranda opinion the trial judge says:

"The case was carefully tried by able counsel on both sides, and submitted to the jury upon written instructions, and the jury found a verdict in favor of the defendant. I deny the motion for a new trial on the ground that the case was carefully tried, a good record made, and, in my judgment, the instructions covered the questions of law involved in the case, and I am not prepared to say that the verdict is not in conformity with the evidence."

The instructions appear to be full and fair. The jury was told:

"The point which defendants raise is that the note in suit was never to become a part of the assets of the bank. That is the question of fact which the jury are called upon to determine, and the burden of proof is upon the defendants to establish the defense by the weight of evidence." "The burden of proof is upon defendants to establish either failure of consideration or any other defense that is alleged, and such defense must be established to your satisfaction by a fair preponderance of the evidence." "You are instructed that to constitute a consideration it is not necessary that a person executing or indorsing a note shall himself recover a consideration. It is sufficient that the person accepting the note extends either to the person making or indorsing the note, or to some one else, at his request, something of value, be it money, property, credit, or other favor which may be of benefit to such person." "If you are convinced from the evidence that the note was made without any consideration or value, and simply turned over to the plaintiff for temporary use to cover up overdrafts of the New Rockford Publishing Company, but not to pay the same, with the understanding and agreement that defendants were never to pay the note, or that it was to be used tem-

porarily by the plaintiff to get the approval of the examining officer, and not to be a part of the assets of the bank, then, and in that case, they have established their defense."

Thus the points at issue were fairly submitted and decided, and now, on appeal from the order denying a new trial, the real and narrow issue should not be obscured by a multitude of words. It is for the appellants to point out and clearly show a legal and valuable consideration for the note. The fact that it was given to cover up the condition of the bank is neither a consideration nor an estoppel. The accommodation did the bank no injury. The bank is in no position to object to it. In appellant's brief (p. 71) it is said:

"There was a valuable consideration for the note. It was given for the purpose of taking care of or covering up overdrafts which the bank held against the New Rockford Publishing Company, and for the purpose of reducing notes previously given."

Truly it does appear that the note was given to cover up, but it does not appear that it was given for the renewal, or even the accommodation of prior notes. There is no showing that it was given or received in payment or discharge of any debts. The contention amounts to no more than this: That the defendants were directors of the publishing company, and hence were under some obligations to pay its debts and overdrafts. And that may be true, but the note was not given to pay any such debts or overdrafts, and defendants were under no legal obligation to pay the same. Of course if the note had been given to the publishing company and it had transferred the same to the bank in due course, and for value, then there would be no question on the consideration. Then the bank would be a holder for value the same as in case of *Bank v. Meyer*, 30 N. D. 392, 152 N. W. 657. But clearly the note in question was not given to the bank in that way. The bank received it directly as accommodation paper, and it was not at liberty to use or transfer the note. It was made to cover up defaults and overdrafts, and to prepare the way for the bank examiner. If the bank had transferred the note to an innocent purchaser for value, then, on payment of the same, the defendants could have recovered against the bank. We should not try to obscure the issues by a multitude of words or by talking around the real issue. The verdict is right. The note was given only as an accommodation and a cover-up.

On Rehearing.

PER CURIAM. A reargument of this case was ordered, upon which the parties advanced contentions as follows:

On behalf of the defendant, that the court erred (1) in holding that the note was delivered to become a part of the assets of the bank; (2) in holding that prejudicial error was committed in admitting the testimony relative to the guaranty contract between Roberts and Beiseker on one hand and the bank on the other; and (3) in admitting evidence to prove the wealth of Beiseker. On behalf of the defendant and respondent Davidson it was argued that the error or errors upon which the reversal is based in the principal opinion were not such as to entitle the plaintiffs to a new trial against him. These contentions are controverted by the appellant.

The majority of the court is still of the opinion that the note in suit was delivered for the purpose of becoming a part of the assets of the bank, or in renewal of other notes given for that purpose. This conclusion, in the opinion of the majority, necessarily follows from the testimony of the defendants themselves, who stated expressly that such notes were given "to take the place of" the debt owed by the publishing company and to "cover up" the overdraft of the publishing company. Obviously, it could not take the place of the debt owed by the publishing company on the books of the bank or cover up the overdraft without being entered as an asset in the "bills receivable" account of the bank. No person consenting to such an arrangement is in a position to say that a note, so delivered, did not become an asset. For the purpose of this question, it is immaterial whether the asset be enforceable or not. In our opinion, the plaintiff had a right to have the case submitted to the jury from the standpoint of the note being an asset, subject to whatever legal defense the defendants might otherwise have, and it was error for the court to submit this question as one of fact. Whether this error alone was sufficiently prejudicial to require a reversal we need not determine.

The previous holding with respect to the admission of prejudicial evidence relating to the guaranty contract and to the wealth of Beiseker was to the effect that the evidence relating to this contract, coupled with that concerning Beiseker's wealth, was prejudicial. It is pointed out in the petition for rehearing that the appellant is not in a position to complain of the evidence in question because proper objections were not

made upon the trial. The record shows that when the guaranty was first mentioned at the trial, the testimony was stricken out, on motion of the plaintiff's attorney, on the ground that it was irrelevant to any issue in the case. Following this, however, and during the cross-examination of the defendant's witnesses, the guaranty was referred to several times, and the testimony was allowed to go to the jury. The manner in which the fact was brought out will be seen from the following, taken from the cross-examination of the defendant Stickney. Referring to certain occurrences at a directors' meeting, held after the change in the ownership of the bank, he was questioned, concerning a conversation in which the note in suit and others were mentioned as accommodation paper, whereupon he testified:

"Q. Well, just how did it come up? now tell us that. A. Well, as I told you, the entire situation developing out of this change and on the guaranteeing of the paper, made by Beiseker, covering all the paper and the general situation was under discussion. That is the facts, and they were talked at different times, and one of these statements—this particular fact was mentioned. * * *

"Q. When you said to these men that this was accommodation paper that was in this bank, signed by Mr. Carson and myself, was accommodation paper, they absolutely made no remark about it at all—just let it drop right there? A. No; they said it was immaterial to them; the bank would protect it anyway (was protected anyway?)

"Q. And they said that it was purely immaterial to them? A. No, not necessarily that, but words to that effect.

"Q. What were the words? A. I am simply giving you the sum and substance of the talk; they said they weren't concerned with that; that they had the guaranty. The guaranty was short, and I read it myself.

"Q. Who was it that said that? They didn't say it in unison, did they? A. No; I think the conversation at that time was directed to Mr. Aas, and I think he handed me the contract covering the guaranty.

"Q. So you think it was Mr. Aas at that time said they weren't concerned in the matter as to whether it was accommodation paper or not, because they had the guaranty? A. Yes, sir. * * *

"Q. And you knew at that time you were claiming and that you didn't owe that note? A. I knew at that time that the bank was depending upon the guaranty of Beiseker."

As this testimony was elicited by the attorney for the plaintiff, upon cross-examination, the error, if any, in its admission, in so far as prejudicial to the plaintiff, is not available on appeal. But, though the plaintiff cannot complain of the evidence relating to the guaranty contract, it does not follow that it cannot avail itself of the prejudicial error, if any, in the admission of the evidence as to Beiseker's wealth. Immediately after the cross-examination, partially quoted above, was concluded, one of the defendant's attorneys upon redirected examination inquired as follows:

"Q. You say you saw a written guaranty of all these notes signed by Mr. Beiseker? A. Yes, sir.

"Q. Did you know Mr. Beiseker, have you met him, or just know him by reputation? A. Yes, sir.

"Q. You knew him to be a very wealthy man, didn't you?

"Mr. Bangs: That is objected to as irrelevant, incompetent, and immaterial.

"The Court: Objection sustained.

"Mr. Lambert: We simply want to show that his guaranty of these notes was good. We object to anything that was not an exhibit in this case.

"The Court: You do not know just what the form of that guaranty was?

"Mr. Lambert: We haven't got it. We would be glad to have it and offer it in evidence if they will produce it.

"The Court: The question in my mind is whether the guaranty was a guaranty of the apparent assets of the bank without respect to a particular instrument.

"Mr. Lambert: I do not know what it is, but it is my understanding that it is a guaranty of all the notes that were turned over, guaranteeing that there would be no loss on the notes.

"The Court: In other words, a guaranty of the assets of the bank.

"Mr. Lambert: Not of the assets, of the notes.

"The Court: Of course they are assets.

"Mr. Lambert: Yes, some of the assets, but there might be others.

"The Court: I will overrule the objection.

"Witness: A. I know that he is reputed to be a very wealthy man.

"Q. What was your idea then and now as to his guaranty in regard to making any notes or these notes good, or any of the assets of the bank or all of the assets of the bank?

"Mr. Bangs: That is objected to as irrelevant, incompetent, and immaterial.

"The Court: Objection overruled.

"Witness: A. That guaranty will make them absolutely good in my opinion.

"Q. Did you believe by reason of this guaranty that that paper was good paper in the bank at the time you signed this report or list of notes he has spoken of?

"Mr. Bangs: That is objected to as irrelevant, incompetent, and immaterial, and calling for a conclusion of the witness.

"The Court: Objection overruled.

"Witness: Yes, absolutely."

We are of the opinion that this evidence is not rendered competent by reason of the previous admission of testimony relating to the existence of the guaranty contract. It may well be that the facts transpiring at a certain meeting of directors could not be fully elicited without narrating a conversation which would disclose the existence of the guaranty contract. But from this it does not follow that the defendant is entitled to show that the plaintiff is fully indemnified from any loss incident to failure to recover upon the note in suit, by reason of the fact that the guaranty contract is an obligation of a person of adequate means. The wealth of the guarantor is foreign to any issue in the case. His ability to meet payment of the entire amount affords no more legal reason for denying recovery against the defendants than his lack of means would afford for a judgment favorable to the plaintiff. Such testimony can only serve to prejudice a fair trial. It should be excluded for every reason that prevails in excluding indemnity insurance in casualty litigation. See *Beardsley v. Ewing*, 40 N. D. 373, 168 N. W. 791, and authorities therein cited.

But the respondents argue that, inasmuch as it is sought to visit censure upon them for certifying, as a part of the assets of the bank, paper which they knew to be for the accommodation of the bank, and consequently as not representing an enforceable asset in its hands, they should be permitted to show that no prejudice could have resulted from their act in so doing by reason of there being a sound guaranty behind the notes. We do not regard this circumstance as sufficient justification for resort to such prejudicial, incompetent evidence. All of the defendants admitted being parties to a transaction whereby representations were

to be made to the Comptroller of the Currency that they were indebted to the bank for an amount equivalent to the publishing company's overdraft, whereas, in fact, an arrangement existed according to which they were not to be held thus liable. This arrangement, according to the testimony of all the defendants, was made long prior to the existence of the Beiseker guaranty. Hence the moral and legal quality of their act is not reflected in its true light by being linked with the guaranty. Moreover, even though Beiseker's guaranty made the paper absolutely good, the continued representation of the notes as the liability of those who had signed them was a fraud on the examining authorities. We adhere to our previous holding that the admission of this evidence was prejudicial.

We have carefully reconsidered the record of the trial, with a view to determining whether or not the errors which require a reversal of the judgment were such as to destroy the probability of a fair trial of the plaintiff's rights as against Davidson. While he was represented at the trial by counsel who did not appear for the other defendants, and though it appears that his counsel separately examined witnesses with a view to establishing his particular defenses, yet the record shows he reaped the full benefit of the testimony offered on behalf of other defendants. It also shows that in instructing the jury the trial court did not distinguish between Davidson and the other defendants, except in so far as was necessary to present the issue of conditional delivery which was submitted by Davidson alone. In this state of the record we are of the opinion that the interests of justice require a new trial as to Davidson.

Justice Bronson concurs in the above per curiam, subject to his personal views expressed in the original decision herein.

Judgment reversed, and new trial granted.

BIRDZELL, BRONSON, and CHRISTIANSON, JJ., concur.

MAUDE PIPER, as Administratrix of Estate of Dell B. Piper, deceased, Appellant, v. JOHN TAYLOR, ET AL., Respondents.

(188 N. W. 171.)

Deeds—real estate may be conveyed divided perpendicularly or laterally.

1. Real estate may be conveyed divided upon perpendicular or lateral lines.

Associations—voluntary unincorporated association may receive a lease running to its trustees.

2. A voluntary unincorporated association may receive a lease running to its trustees.

Where the second story of a building was constructed by an unincorporated association, at its expense, upon the land and building of another, with understanding that it should possess an ownership and dominion thereover, and where such association went into possession upon completion of the second story and has since remained in possession, paid the taxes, and kept up the insurance, and where, pursuant to a misconception of the association's rights, a lease for 20 years with the privilege of renewal for an additional 20 years was made as the evidence of its right, and, thereafter, the law being amended so as to permit a 99 year lease, a 99 year lease was made dating from the original occupancy, pursuant to the agreement of the parties but was never delivered or has been lost, it is *held*, for reasons stated in the opinion, that the judgment of the trial court, directing the holder of the legal title to execute such 99 year lease was proper.

Opinion filed April 26, 1922.

Action to quiet title in District court, Dickey county, *McKenna*, J.

The plaintiff has appealed from the judgment.

Affirmed.

Per curiam.

E. E. Cassels, *T. L. Brouillard*, and *E. T. Burke*, for appellant.

F. J. Graham, *W. S. Lauder*, for respondents.

The mere fact that a lease of certain premises exists does not estop one named as lessee to question the other's title. *Hebden v. Bina*, 17 N. D. 235.

"Open, notorious and adverse possession of the real property is notice to the world of every right or interest owned by or held by the person or persons in possession whether such right be legal or equitable." *Krause v. Krause*, 30 N. D. 54-67; See also *O'Toole v. Omlie*, 8 N. D. 444; *Hadlin v. Les*, 21 N. D. 495; 48 Cent. Dig. 765.

Statement.

PER CURIAM. The administratrix brings this action to quiet the title of the estate in two lots, and a two-story building situated thereupon, in the town of Monango, N. D. The facts necessary to be stated are as follows: In 1899, one Caldwell, then the owner of the lots, contemplated the erection of a store building. Various persons in the town were interested in erecting a town hall. Some \$1,200 was raised for such purpose through the sale of shares at \$10 per share to some 60-odd individuals. A voluntary unincorporated association was formed called the Monango Hall Association. Through negotiations had between Mr. Caldwell and the trustees of this association, it was agreed that the association might construct, upon the first story of the building to be erected by Mr. Caldwell, a second story for its use. Pursuant to such negotiations, bids were requested, and a contract made for the construction of a two-story building, the cost of the second story to be paid by the association. The building was accordingly so erected. The cost of the second story, about \$1,300, was paid by the association. This amounted to four-ninths of the total cost of the building. The parties secured legal advice upon the manner in which the right of the association should be evidenced. Legal advice was given, to the effect that a deed of the second story alone could not be made; that a lease for more than 20 years could not be made by reason of the inhibition of the statute, then in force, prohibiting leases of town or city lots for a period longer than 20 years. Section 3310, R. C. 1899. The Hall Association desired a lease for 99 years. Caldwell agreed so to lease. The inhibitions of the statute prevented. Accordingly, a lease was executed from Caldwell and his wife to five persons, including Caldwell, as trustees of and for the Monango Hall Association, and any assignee thereof and to their successors in office, demising the second story of the building for a period of 20 years from November 4, 1899, upon a consideration of \$1,308 paid. This lease further provided that the trustees should pay four-ninths of all taxes

assessed, and the leased premises should be insured for the benefit of such trustees; that such trustees should keep in repair the leased premises and the roof thereof, excepting that Caldwell should keep the eaves-troughs in repair; that upon its termination the trustees should have the right of renewal for a further period of 20 years upon the payment of \$1. This lease was dated October 31, 1899. It was acknowledged March 15, 1901, and recorded a few days thereafter. The parties thereafter had negotiations for the purpose of making an effort to change the law. Their attorney drew a proposed law. Their representative from Dickey county urged its passage. The legislature, in 1903, did amend the law so as to permit the leasing of city lots for a period of 99 years. Chap. 151, Laws 1903; § 5289, C. L. 1913. Caldwell agreed that after the law was changed he would execute a lease for 99 years. Prior to the time that such act became effective as a law, Caldwell sold and conveyed the premises to one Piper, now deceased. During his lifetime, Piper was a member or director of the association. He was at some of the meetings of the association in 1902. He was elected as a director, and served his first term in 1903. The deed to Mr. Piper recited that it was subject to all the terms, covenants, and agreements of the lease of the upper story to the trustees, and that the grantee assumed and agreed to perform all acts under said lease agreed to be done and performed. The attorney who drew the lease testified that a lease for 99 years was drawn, and was signed after the law was amended. Mr. Piper, the deceased, and his wife (not his present widow) signed it, and he took their acknowledgement. Members of the Hall Association signed the same, but he does not know who they were. He had a copy of this lease; he has hunted for it, but cannot find it. The term in such lease began upon the date of the 20-year lease. None of the members or officers of the association were able to testify to the delivery, existence, or provisions of such 99-year lease.

The Hall Association went into possession of the second story of the building upon its completion. It has had possession, and has paid four-ninths of the taxes ever since. (From 1901 to 1919 the premises have been assessed in the name of Piper and the Hall Association). It has carried insurance in its own name. It has received the rents and profits in subleases made or in otherwise renting the Hall for various purposes. The trial court found, upon such facts, that the Hall Association was entitled to a lease for 99 years, dating from the original occupancy, to be made by the plaintiff as administratrix. Judgment was entered ac-

cordingly. The plaintiff has appealed.

It is the contention of the plaintiff that the lease for 20 years was enforceable and valid only for such period; that this period having expired, the defendants have no further claim upon the property.

Decision.

Upon the facts it is evident that the association paid the consideration for the erection of the second story of the building. It took possession upon completion. It has had possession and exercised dominion ever since. It has paid the taxes and kept up the insurance in its own name. The owner of the land intended that the association should own the second story. He would have deeded the same to the association except for the advice received that such could not be legally done. This advice was erroneous. Caldwell could have granted or reserved the second story alone, as the parties desired. Real estate may be granted or leased, divided upon perpendicular or lateral lines. 8 R. C. L. 1068; 18 C. J. 161; Beulah Coal Mining Co. v. Heihn (N. D.) 180 N. W. 787; Pearson v. Matheson, 102 S. C. 377, 86 S. E. 1063; 3 Washburn, 340; Massot v Moses, 3 S. C. 168, 16 Am. Rep. 697 See, in re coal reservations, § 5518, C. L. 1913; Hahn v. Baker Lodge, 21 Or. 30, 27 Pac. 166, 13 L. R. A. 158, 28 Am. St. Rep. 723. In fact, the making of the lease recognized these principles. The only reason why a lease for 20 years was executed and delivered was because the parties thought that such was the extent of their legal right to create in the association an interest in the second story concerned. Both parties took action for the purpose of securing an amendment to the then existing law, so that a lease for 99 years to the association might be legally made. The attorney for the parties drew the proposed law. Their representative in the legislature urged its enactment. The law was amended, permitting such 99-year lease. Piper, the deceased and the successor of the legal title, as well as parties representing the association, signed a lease for 99 years, drawn by such attorney. This lease has not been produced. The evidence is not clear that it was ever delivered to any party, trustee, or officer of the association, but it was, in fact, drawn, signed, and acknowledged. It is further manifest that the association has been satisfied to receive a 99-year lease as representative of its interest in the second story.

Upon the facts so stated equity might readily recognize a trust by

operation of law. The situation is analogous to a resulting trust. Instead of purchasing real estate and paying the consideration therefor and by voluntary act directing or permitting the title thereto to be taken in the name of Caldwell, the situation here involves the creating of a real estate interest, the payment of the consideration therefor, and the involuntary transfer of the title in such real estate interest to Caldwell. But it was agreeable to the parties, to Piper, the owner of the legal title, and to the association, entitled equitably to a freehold in the second story, that the association should receive a 99-year lease, dating from its original occupancy. As representative of its interest, Piper executed such a lease; likewise, the association. Although unincorporated, it was proper for this association to receive and to possess such lease for its purposes, running to its trustees. 5 C. J. 1344. In effect the trial court has directed the administratrix to confirm this 99-year lease by executing a new 99-year lease, based upon the terms of the 20-year lease (excepting the term) and dating from the original occupancy. This would simply confirm in writing that which now exists in law. Accordingly, the judgment of the trial court should be affirmed.

It is so ordered, with costs.

BRONSON, CHRISTIANSON, ROBINSON and BIRDZELL, JJ., concur.

GRACE, C. J., concurs in the result.

JOHN LEE, Appellant, v. HIRAM S. LEE and W. P. REED, Respondents.

(188 N. W. 42.)

Agriculture — act giving farm laborer lien for wages does not give lien for use of horses and machinery.

1. Under § 6857 of the Compiled Laws of 1913, which gives the farm laborer a lien for his wages, a laborer is not given a lien for the value of the use of his own horses and machinery.

Agriculture — farm laborer under entire contract for wages and value of use of horses and machinery may have lien for reasonable wages.

2. Where a farm laborer performs services for which he is to be compensated under an entire contract, embracing both his wages and the value of the use of his horses and machinery, he is, under the statute, § 6857, entitled to a lien for his reasonable wages.

Opinion filed April 26, 1922.

Appeal from the District court of Ransom county, *Allen, J.*

Judgment reversed.

Curtis & Remington, for appellant.

"But under a statute giving a lien for personal services, or for manual and other services, no lien arises for the value of the use of horses in doing work." *R. C. L. v. 18*, p. 507, and cases cited; *Hale v. Brown* (N. H.) 47 Am. Rep. 224; *Martin v. Wakefield* (Minn.) 43 N. W. 966; *McKinnon v. Red River Lumber Co.* (Minn.) 138 N. W. 731; 42 L. R. A. (N. S.) 372.

Ego, Craig and Thompson, for respondent.

BIRDZELL, J. This is an appeal from a judgment entered in the district court of Ransom county, dismissing an action brought to foreclose a farm laborer's lien. The facts are as follows: During the season of 1921 the plaintiff was employed by the defendant, Hiram Lee, his brother, to work upon his farm at an agreed compensation of \$100 a month, which, it is alleged, was reasonable wages, and did not exceed the usual charge for the same kind of work in the locality. The defendant Reed was the owner of the land upon which the crop was raised.

Upon the trial it was shown that the compensation agreed to be paid, and for which the lien is claimed, included compensation for the labor of five horses used by the plaintiff and for the use of a plow, drill, and binder, all belonging to the plaintiff. The contract was entire, and there is no testimony as to the value of the plaintiff's services apart from the worth of the labor of the horses and the use of the machinery. The trial court held that the plaintiff was not a farm laborer within the lien statute (§ 6854 of the Compiled Laws of 1913), and dismissed the action.

The only question presented upon the appeal is the correctness of that holding. The statute reads:

"Any person who performs services for another in the capacity of a farm laborer between the first day of April and the first day of December in any year, shall have a lien on all crops of every kind grown, raised or harvested by the person for whom the services were performed during said time as security for the payment of any wages due or owing to such persons for services so performed, and said lien shall have priority over all other liens, chattel mortgages or incumbrances, excepting, however, seed grain and threshers' liens; provided, that the wages for which a lien may be obtained must be reasonable and not in excess of that which is usually charged for the same kind of work in the locality where the labor is performed," etc.

It is contended that the statute in question is analogous to certain logging lien statutes, in construing which, it has been held that the services of the laborer may include the use and earnings of his own oxen, chain, canthook, and sled, if actually used by him as an essential part of the services rendered. See *Hale v. Brown*, 59 N. H. 551, 47 Am. Rep. 224; *Martin v. Wakefield*, 42 Minn. 176, 43 N. W. 966, 6 L. R. A. 362; *McKinnon v. Red River Lumber Co.*, 119 Minn. 479, 138 N. W. 781, 42 L. R. A. (N. S.) 872. We do not regard our statute as being entirely analogous to those involved in the cases cited. Our statute emphasizes the capacity in which the laborer is employed, and we think it was clearly intended to limit the lien to his wages. 26 Cyc. 1067. It does not purport to give a lien for the value of the use of horses and machinery. See *Clark v. Brown*, 141 Cal. 93, 74 Pac. 548; *McCrills v. Wilson*, 34 Me. 286, 56 Am. Dec. 655; *Coburn v. Kerswell*, 35 Me. 126; *Tuckey v. Lovell*, 8 Idaho, 731, 71 Pac. 122. See, however, *Essency v. Essency*, 10 Wash. 375, 38 Pac. 1130, where the opposite view is indicated.

We are of the opinion, however, that the fact that the agreed compensation covered both the labor of the plaintiff and the use of his horses and machinery is not fatal to his present action. The statute is designed to give farm laborers a prior lien for their reasonable compensation, and one who uses his own team and machinery may be none the less a farm laborer. It appears in this record that the plaintiff was employed in that capacity, and hence comes within the class favored by the statute. In order to permit him to establish the reasonable value of his services, separate and apart from the value of the use of his horses and machinery, the judgment below should be reversed, and the cause remand-

ed for further proceedings. *Clark v. Brown*, 141 Cal. 93, 74 Pac. 548. It is so ordered. No costs to either party on this appeal.

GRACE, C. J., and CHRISTIANSON and ROBINSON, JJ., concur.

BRONSON, J. (partly concurring and partly dissenting). I concur in the principles stated in the syllabus. At the conclusion of plaintiff's case the defendant moved for a dismissal upon the ground that the evidence showed that the lien claimed covered not only plaintiff's manual labor, but also that of teams and farm machinery. The court inquired of the plaintiff what his services would have been worth if he had not furnished any horses or machinery; also, what were the going wages for a man of his capacity during last season. The plaintiff answered by stating that he did not know. He further informed the court that he was to receive more because he furnished the horses and machinery. Accordingly, as I understand the record, the court thereupon granted plaintiff's motion for the reason that plaintiff failed to prove the compensation due him for the performance of his labor alone.

It would have been error, as the majority opinion demonstrates, for the court to have denied the motion. Its action operated as a nonsuit. *Woodward v. N. P. Ry.*, 16 N. D. 38, 42, 111 N. W. 627; 18 C. J. 1146. Upon the record there was no final determination of the merits, and plaintiff is not precluded from maintaining further proceedings for his proper demand. *Section 7597, C. L. 1913; Hart v. First State Bank*, 37 N. D. 9, 13, 163 N. W. 530. See *Horton v. Emerson*, 30 N. D. 258, 272, 152 N. W. 529; *Lee v. Elevator Co.*, 34 N. D. 1, 6, 157 N. W. 688; 6 Enc. Pl. & Pr. 986; 18 C. J. 1201

The judgment should be affirmed, with costs.

GEORGE E. McWILLIAMS, Administrator of the Estate of John C. McWILLIAMS, Deceased, Respondent, v. THERESA J. BRITTON, Appellant.

(188 N. W. 44.)

Trusts — facts held not to show completed gift vesting title in donor in trust for donee.

Where one purchased a house and lot taking the title thereto in his own name with the intention of providing a home for his sister and her children, and, where, at the time of the purchase, he wrote a letter to his sister to the effect that he had bought a home for her, and where, otherwise, pursuant to the oral statements of the deceased, it appears that he intended to give such home to his sister and to convey the same to her if it could be done free from any claims of her husband who had deserted her, it is *held*, for reasons stated in the opinion, that there was not a completed gift of the beneficial interest to his sister and an express trust was not created vesting the legal title in the deceased, as donor, in trust for his sister, as donee.

Opinion filed April 26, 1922.

Action to quiet title in District court, Grand Forks county, *Cooley, J.* The defendant has appealed from the judgment.

Affirmed.

James Manahan, for appellant.

Where the author of the gift retains the legal dominion over the subject of the gift in himself, but fully and completely declares himself to be trustee of the property for the purposes indicated, there he will be treated as its trustee, and the object of his bounty will be given the benefit of the trust. *Taylor v. Henry*, 48 Md. 550; *Lane v. Ewing*, 31 Mo. 86.

The following are cases in which voluntary trusts have been created in the donor by a declaration which complied with the statutory requirements. *Ford v. Mayo*, 91 Ky. 83; *Bond v. Bunting*, 78 Pa. 210; *Krankel v. Krankel*, 104 Ky. 745; *Taylor v. Henry & Bruscup, Adm'rs.*, 48 Md. 550; *Barkley & C. v. Lane*, 69 Ky. 587; *Roche & C. v. George's Ex'r.* 93 Ky. 609; *Leeper v. Taylor*, 111 Mo. 312.

It is well settled that the declaration of trust need not be a formal document. 3 Pomeroy Equity Juris. 4th ed. § 1007; Barrell v. Joy, 16 Mass. 221; Barkley v. Lane, 6 Bush (69 Ky.) 589.

S. J. Radcliffe, Murphy & Toner, for respondent.

"To warrant a decree for specific performance of a parol contract, whether of gift or otherwise, for the conveyance of land the evidence must be cogent, clear and unequivocal, both as to the existence of the contract and as to the terms and conditions." Logue v. Langan, 151 Fed. 459, citing: Story's Eq. Jur. Vol. 2, § 764; McKee v. Higbee, 79 S. W. (Mo.) 407.

Statement.

BRONSON, J. John C. McWilliams died in March, 1919. The administrator of his estate brings this action against his sister, one of the heirs, to quiet title in a house and lot in Grand Forks. The defense is that the deceased purchased the property, and took title thereto in his own name upon an express trust in favor of the defendant.

The substantial facts are as follows: The defendant was termed the favorite sister of the deceased. In the years past she had worked and kept house for him upon his farm. Later the sister married, and, for a time lived at McCanna, where her husband ran a barber shop and pool room. While there, her husband deserted her and their two children, and left for places unknown. Thereupon deceased assisted and provided for his sister; he took and disposed of the property left by her husband; for a time she lived in a house owned by him at McCanna.

In the fall of 1916 the deceased bought the property involved. He had desired to arrange so that his sister might live in Grand Forks, and that her children might have the school advantages there. Before he purchased this property he stated that he wanted to purchase a home for his sister. When the deceased bought this property he wrote his sister as follows:

"Dear Sister Thress: Bought you the Edwards house. Think it will be large enough for you. Bought Brown some underclothes and a coat. Will see you Saturday. Your brother, J. C."

Brown was the defendant's minor son. Various witnesses testified concerning oral statements made by the deceased in regard to the purchase

of this property. In general they are to the effect that he had bought this house for his sister as her home; he wanted to take care of his sister during her lifetime; he had always supported her since her husband deserted her; that he did not give to her a deed of the property by reason of her husband, fearing that, if anything should happen to her, he might come back and claim the property; that he would keep this property in his name to protect her; that he would have deeded it to his sister if he could in some way arrange it so that her husband could not get hold of it. To one party he stated that he wanted a deed drawn to protect her from her husband; to another party that, if things could be arranged so that her husband would release any claim upon the property, he would deed the house to her. With that party he made arrangements to try to locate the husband. Such party attempted to so do, but was unable to find or locate such husband. To another witness he stated that this home where his sister was living was one he had purchased for her and had given to her. Another sister of the deceased testified that, about Thanksgiving time in 1918, her sister, the defendant, stated that the deceased wanted to sell the house.

The deceased paid the real estate taxes upon the property; also the personal property taxes of his sister. He also aided her in her support.

The trial court found that the deceased was the owner of the property, and that the defendant possessed only a one-sixth interest therein as heir of the deceased, all subject to the control of the county court for purposes of the administration. From the judgment so entered, the plaintiff has appealed.

It is the contention of the defendant that the record discloses a completed gift of the beneficial interest in the property and a valid declaration of a trust which vested the legal title in the deceased, as donor, in trust for his sister, as donee.

Decision.

The defendant must rely on the creation of an express trust in realty through the voluntary gift of the deceased. The record does not warrant a finding of any indebtedness owing by the deceased to his sister so as to afford a basis for a valuable consideration.

Did the deceased create an express trust in favor of his sister as cestui que trust? Upon the record this is largely a matter of intention and interpretation. The letter written to his sister satisfies the require-

ments of the statute if he did intend to create an express trust. Section 5364, C. L. 1913; 3 Pomeroy's Eq. Jurisprudence, § 1007. An express trust, however, must be created with certainty, so that a court of equity may enforce its execution. 39 Cyc. 58. The burden of establishing such express trust is upon the party seeking to establish it. 39 Cyc. 631. Upon the record it is apparent that the deceased intended to furnish a home for his sister. It is evident that he intended to protect her, so as to assure for her a home. If an express trust did exist, as contended by the defendant, this protection would not exist quite as the deceased intended; for, if the sister had died prior to the death of her brother, title in this house and lot would have passed to her husband and her children if there had existed an express trust as so contended by the defendant. A conveyance by the sister, with her husband joining, would have been effective to pass a title.

The deceased did not intend to place the title so that it might become in any way subject to any claims of the sister's husband. He sought to make an arrangement whereby the title could be transferred so as to be free from any claim of the husband. He sought advice for such purposes. He tried to locate his sister's husband. He was unable to so do, and nothing in that regard was done. It may not be doubted that he possessed intentions to give his property to his sister. It is apparent that the actual transfer of the legal title in consummation of his intentions was not made, by reason of possible claims that might be asserted by the husband. Did he intend to pass the entire beneficial interest to his sister? We are unable to answer this question in the affirmative. The deceased retained dominion and supervision over the title, which he took in his own name. He paid the taxes, and provided for her a home, and intended to protect her in that home. Although he intended to give this property to her, the gift was imperfect, and not completed. Accordingly equity must leave the parties as it finds them. *Lane v. Ewing*, 31 Mo. 75, 86, 77 Am. Dec. 632

It follows that the judgment of the trial court was proper. It is affirmed.

GRACE, C. J., and ROBINSON, BIRDZELL, and CHRISTIANSON, JJ., concur.

E. L. WARNER, Respondent, v. J. R. PENCE and R. W. PENCE, individually, and J. R. PENCE and R. W. PENCE, co-partners as Pence & Pence, Appellants.

(188 N. W. 167.)

Physicians and surgeons — evidence held to prove stiff elbow joint the result of physician's negligence.

1. In an action to recover damages alleged to have resulted from negligence in the treatment of an injured arm, the plaintiff had judgment.

The evidence is examined and *held* to be sufficient to support the verdict.

Physicians and surgeons — \$5,000 verdict for stiff elbow joint held not so excessive as to indicate passion or prejudice.

2. Where the injury resulting to the plaintiff is that of a stiff elbow joint which will be permanently rigid unless relieved by an operation, requiring the removal of a portion of a bone, and the expenditure of from four to eight months' time for treatment and of approximately \$600.00 for professional services, after which the arm may be considerably weakened permanently, it is *held* that a verdict for \$5000.00 is not so excessive as to indicate passion or prejudice on the part of the jury.

Appeal from District court, Ward county, *Moellring*, J.

Affirmed.

Lewis & Bach, for appellants.

W. H. Sibbald, *E. R. Sinkler*, and *Greenleaf & Wooldge*, for respondent.

BIRDZELL, J. Action to recover damages alleged to have resulted from negligence in the treatment of the plaintiff's injured arm. This is an appeal from a judgment for the plaintiff for \$5,091.60, and from an order denying a motion for a new trial. The facts necessary to be stated are as follows:

On the 11th of May, 1920, the plaintiff was kicked on his left arm by a horse. He resided in the country a distance of several miles from Minot, to which place he went for treatment on the same day and soon after the injury was sustained. He consulted the defendant, Dr. J. R. Pence, a physician and surgeon residing in the city of Minot. The

doctor bared the arm and gave it both a manual and fluoroscopic examination with the aid of an X-ray apparatus. The ulna was discovered to have been broken several inches below the elbow; the break being diagonal in shape with the ends left somewhat jagged. The bone was entirely severed, and the ends were not in contact, but overlapped to some extent. On account of the swelling, it was deemed not advisable to reduce the fracture that day, so the arm was placed in a sling and other first aid treatment given. Later attempts were made by both defendants to reduce the fracture by setting the broken parts in position by manipulation. At these times both the manual and fluoroscopic examinations were made. These attempts proving unsuccessful, the plaintiff was taken to the hospital on May 20th, where an operation was performed by the defendants, assisted by Dr. Kermott. The operation consisted of an incision separating the tissues of the forearm to the broken bone, placing the broken bone in shape, and fastening it with silver wire. The arm was put in a plaster cast which was occasionally removed thereafter to permit the proper dressing of the wound, and, as the doctors testify, for the purpose of exercising the arm so that it would not become stiff. About five weeks after the operation the cast was permanently removed. The elbow joint was stiff, and about July 1st the plaintiff went to one Wood, a chiropractor, for treatment. On July 16th he went to work on the section, cutting weeds with a hoe and shovel. He worked here less than two weeks. In September, 1920, he went to another physician for treatment. Then and at the time of the trial the elbow joint was practically rigid, and the damages claimed in this action are predicated on alleged negligence in the treatment, which, it is claimed, resulted in the stiff joint. The testimony is voluminous and conflicting in a number of respects. It need not be stated except in so far as necessary in the proper consideration of the questions presented upon appeal.

It is contended that the evidence is insufficient to support the verdict. This contention is based largely upon what the appellants claim is a clear inconsistency between certain evidence of a highly probative character and certain other evidence of lesser value. It is asserted by the plaintiff and witnesses who testify in his behalf that at the time he consulted the physicians originally there was a large lump on his arm in such a position as to indicate that the elbow joint was injured. There is likewise evidence interpreting certain X-ray plates or pictures which were made soon after the injury to the effect that a break near the lower end of the humerus or the arm bone is indicated. There is also an X-ray picture

taken in September which clearly shows a marked dislocation of the radius at the elbow joint. The appellants contend that the pictures taken soon after the injury show no injury to the elbow joint and no dislocation, that the plates do not sufficiently show the lower end of the humerus to determine the existence of a fracture there, but that they do show the elbow joint plainly enough to indicate that the bones are in place. There is also testimony by the defendants to the effect that the X-ray picture taken in September shows that the ulna has been rebroken at the point of the original break. The fluoroscopic examinations are likewise minutely described so as to demonstrate the impossibility of such an examination having been made without discovery of an injury or dislocation at the joint, if such existed. From the apparently irreconcilable discrepancies between the condition disclosed by the early plates and that disclosed by later ones, together with the undisputed evidence concerning the character of the fluoroscopic examinations, it is argued that a conclusive showing is made that the present condition of the plaintiff's arm is due to some injury sustained subsequent to the treatment given by the defendants, or to the plaintiff's failure to follow the defendants' directions for restoring motion in the joint and in doing work beyond the capacity of the weakened member to withstand.

There is considerable evidence in the record tending circumstantially to establish the existence of a dislocation at the elbow at the time the plaintiff originally consulted the physicians. And the strongly contrary showing afforded by the X-ray pictures, taken soon after the injury was sustained, is somewhat weakened by the explanations or interpretations of them. These demonstrate that the apparently conclusive effect of the pictures is more or less deceptive, owing to the different effects produced by taking such pictures from different angles. In addition to this, the fact that the plaintiff's elbow was stiff when the plaster cast was permanently removed tends to support the contention that an injury to the elbow had remained without proper treatment until that time. We think this statement warranted, though a normal elbow joint might become stiffened by being kept in a cast for a period. The testimony is conflicting as to whether or not the joint had been flexed at intervals following the operation. If it had been properly flexed at intervals, it is improbable that it would have become as rigid as it was at the time the cast was permanently removed. It is certain that the dislocation existed in September; and, while the defendants undertake to account for it on the theory of a fresh injury, the plaintiff's testimony, for which we find con-

siderable circumstantial corroboration in the record, is that no such subsequent injury was sustained. We think the record likewise negatives, by substantial evidence, the contention advanced by the defendants that the stiffening was due to the plaintiffs' neglect or to the failure to follow directions given by the defendants. We are satisfied that the verdict is amply supported by the evidence.

The appellant argues that the verdict is so excessive as to indicate that the jury was actuated by passion and prejudice. The evidence shows that the injury is permanent in character; that the plaintiff had, up to the time of the trial, been subject to considerable expense on account of the physical impairment resulting; that he will not be able to continue efficiently to perform the character of physical labor which he had been accustomed to performing; that in order to repair his injury as best he can it will be necessary for him to submit to an operation for the removal of a portion of the bone at the elbow joint, at a cost of approximately \$600, and which will require for treatment a period of approximately four to eight months' time, after which his arm will continue to be considerably weakened permanently. In view of these circumstances we think the verdict is not so large as to indicate passion or prejudice on the part of the jury. The order denying the motion for a new trial and the judgment appealed from are affirmed.

GRACE, C. J., and BRONSON, CHRISTIANSON, and ROBINSON, JJ., concur.

GEORGE E. VALKER, Respondent, v. NATIONAL TEA COMPANY, a corporation, and T. D. THORSON, Appellants.

(188 N. W. 306.)

Compromise and settlement—evidence held to prove defendant liable for rent; evidence held not to show full settlement of landlord's claim.

1. Plaintiff brought this action to recover \$1,600 claimed as rental, of a certain building for a term of four months. The facts were tried to a jury; it rendered a verdict in plaintiff's favor for the full amount. There is substantial evidence to sustain the verdict and the judgment.

Trial—reopening of case after plaintiff had rested, to permit plaintiff to introduce further testimony, held not error.

2. For reasons stated in the opinion, the court did not err in permitting the reopening of the case after plaintiff had rested, at plaintiff's request, for the reception of further testimony.

Landlord and tenant—whether corporation was party to lease claimed to have been made by its manager and president held for jury.

3. Who were the actual parties to the lease, was a question of fact for the jury.

Prejudicial error not shown by record.

4. There is no prejudicial reversible error of law in the record.

Frauds, statute of—four-year oral lease not binding.

5. A four-year lease, not reduced to writing, will not be binding under Comp. Laws 1913, § 5888, subd. 5.

Opinion filed April 28, 1922.

An appeal from a judgment and order denying a new trial, *Burr, J.*

Judgment and order affirmed.

J. T. Burke and Leighton and Brace, for appellant.

"Jurors are very vigilant in scrutinizing all that is said by the trial judges in the progress of a cause before them, and great care should be observed that nothing is said which can, by any possibility, be construed to the prejudice of either party. Courts cannot be too circumspect in this regard." *Cronkhite v. Deckerson*, 51 Mich. 177, 16 N. W. 371; *McDuff v. Detroit Eve. Jour. Co.*, 84 Mich. 1, 47 N. W. 671; *People v. Hare*, 57 Mich. 505, 24 N. W. 843; *McMinn v. Wheelan*, 27 Cal. 300, 319; *Thompson on Trials*, § 218; *Abbott, Civil Jury Trials*, p. 474.

Bosard and Twiford, for respondent.

Where a contract made in the name of a corporation, by its president, is one that the corporation has power to authorize its president to make, or to ratify, after it has been made, the burden is upon the corporation to show that it was not authorized or ratified. *Patterson v. Robinson*, 116 N. Y. 193; *Chemical National Bank v. Kohner*, 85 N. Y. 189; *Union Mutual Ins. Co. v. White*, 106 Ill. 67; *Meating v. Tigerton, etc.*, Co. 113 Wis. 379; *White v. Elgin*, 108 Iowa, 522.

Where a corporation accepts the benefit of a lease made by its pres-

ident, it is bound thereby. *Alexander v. Cluberson, etc. Co.* 85 N. W. 283, (Wis.)

It is true that the defendant made a motion for a dismissal of the action, as to the National Tea Company, at the end of the plaintiff's case; but the defendant did not renew such motion at the end of his case, and therefore waived the same. *Pease v. McGill*, 17 N. D. 166; *Landis Mach. Co. v. Konantz Saddlery Co.* 17 N. D. 310; *McBride v. Wallace*, 17 N. D. 495.

GRACE, C. J. Plaintiff brought this action to recover \$1,600, claiming this amount to be agreed rental for four months of a certain building in the city of Minot. It is admitted that the National Tea Company is a corporation. The defendants deny any indebtedness to the plaintiff. The defendants pleaded a mutual settlement between plaintiff and then of all transactions. The action was tried to a jury, plaintiff recovering judgment for the full amount claimed in his complaint.

The material facts are substantially as follows: Plaintiff owned lot 8 in block 3 of the original townsite of Minot. He had a conversation with Taylor the manager of the tea company, in the presence of one Thorson, its president, with reference to leasing the property. The rental was fixed at \$400 per month. The building was occupied during the month of August and subsequent months, up to and including December, and the rent paid therefor. It is claimed by the defendants that a certain concern designated as the National Meat Market transacted business in the building during the months just mentioned. There is, however, no controversy concerning the rental for those months. There is some evidence that the lease between the plaintiff and Thorson, the president, and Taylor, the manager, of the tea company, was to be for a term of four years. It is the claim of defendants that the only occupancy shown under the alleged four-year lease was that of the National Meat Market.

The property was a two-story building. There is evidence that the upper story was subrented by Taylor until May 1st, when the whole building was turned over to a new tenant procured by Taylor. It is the claim of the plaintiff that the building during all the time commencing with August and from then until the 1st of May was rented to the National Tea Company; that Taylor paid the rent until January 1st, part of which was paid by the checks of the National Tea Company. It is claimed by the defendants that if there were any rental contract en-

tered into, it was a verbal one for the term of four years, and it is further their claim that the occupancy of the building for which rent is sought to be recovered, for the four months, was not by the tea company, but by the National Meat Market.

There is evidence that the rent which was paid was in part paid by the checks of the National Tea Company. It also appears that the defendants pleaded a settlement between plaintiff and themselves. In the evidence they endeavored to show that the plaintiff agreed to accept \$800 in settlement of the \$1,600 rental claim. The plaintiff does not deny that there were such negotiations; the evidence, however, on his behalf shows that the \$800 were to be paid by a certain Saturday night, which was not done, while the testimony on behalf of defendants in this respect is to the effect that the sum was to be paid soon. There is no evidence of the payment or a tender of the \$800 at any time. The evidence that the rent in part was paid by checks of the tea company, is at least some substantial evidence that the negotiations concerning the rental contract were between the plaintiff on the one side and Taylor and Thorson on behalf of the tea company on the other.

The questions of who were the actual parties to the lease, if any and whether there was a settlement with reference to the amount of rental which would be accepted by the plaintiff in full settlement of his claim, were questions of fact for the jury. They found in plaintiff's favor, and by their verdict determined the rental contract, whatever may have been its nature or terms, was in reality between the plaintiff and the National Tea Company, and further that no attempted settlement of the rentals claimed by the plaintiff had ever reached any fruition. The verdict of the jury is supported by substantial evidence.

Considerable stress has been placed upon the verbal negotiations for a four-year lease. In other words, that the terms of the lease for a term of four years were agreed upon, but were never reduced to writing. Of course, a lease for that term would have no binding force unless it were reduced to writing. Subdivision 5 of § 5888, C. L. This question, however, we think, in this case is of little consequence, since the plaintiff is seeking only to recover rent for four months. He claims the defendants leased the premises for that period of time. It is not alleged that the lease was for any definite length of time. However, the relation of landlord and tenant arose, and we think the nature of the defendants' possession was, under the evidence, that of a tenant at will. The defendant tea company, did enter into possession of the premises and oc-

cupied the same, subletting the upper story, and had full control and use of the entire premises. In these circumstances, certainly it at least would be a tenant at will; it could not expect to use the property without paying rental for it during the time it used it. It did pay until January 1st, at the rate of \$400 per month. It did not turn back possession until about the 1st of May. In other words, it kept possession and control and used, or had opportunity to use, the premises, during the four months, for which rent is claimed, and, as the jury found, is liable therefor.

We may now briefly notice such assignments of error as we think merit discussion. It is claimed by appellants that the court erred in making certain remarks to the attorneys, which were made in the presence of the jury. The plaintiff, after the introduction of his evidence announced to the court that "plaintiff rests." A motion was then made by defendant Thorson to dismiss as against him on the grounds and for the reason that plaintiff had failed to establish a cause of action as against him. The court inquired of the attorney for plaintiff if he opposed the motion. He replied, in substance, that if there was any question as to that, he would like to reopen the case for the purpose of submitting further evidence. This the court allowed. Testimony was then given by the plaintiff of conversations he had with Taylor and Thorson with reference to the leasing of the building. He stated, in substance, that he talked with them about the price; that they wanted it for less, but agreed to take it for \$400. After plaintiff had given other testimony unnecessary here to mention, the court remarked:

"There is nothing here that I can see to show that the National Tea Company ever rented the building or whether either of the parties with whom these conversations were had are officers of the National Tea Company."

The attorney for plaintiff then resumed examination of the plaintiff, who testified that Taylor was the manager of the tea company. Taylor testified that he was its manager and Thorson its president. This was testimony of facts known to these witnesses. Taylor further testified to the fact that he signed checks for the company, made payments, bought merchandise for it, and that, as manager, he conducted all the business of the company at Minot, but not in signing papers or entering into contracts. At this point plaintiff again rested his case, whereupon the defendant Thorson renewed the motion of dismissal as to him and further made a motion that the action be dismissed as against the tea company, upon the grounds that the plaintiff had failed to establish by competent

proof the material allegations of the complaint, or that Taylor was any more than manager of the corporation, and that the proof showed that he was not an officer thereof. The motions were denied. Additional testimony was then given on behalf of the defendants.

There was no error in the denial of the motions. The court had charge of the conduct of the trial of the case. There can be little doubt that it was within its discretion to reopen the case for the purpose of taking further testimony. We are clear in so doing there was no reversible error or abuse of discretion. We have examined the errors based upon the objections of defendant with reference to the admission of certain evidence offered by plaintiff to prove that Thorson and Taylor were the agents of the tea company. Valker testified that Taylor was the manager of the tea company. Taylor testified that he was the manager and Thorson the president of the tea company. This was not hearsay, but was testimony of those having knowledge of the fact.

The defendants predicated error on the giving of a certain instruction, but in the brief abandoned this contention. They further contend that the court failed to give an instruction upon a material issue in the case. We think the instructions as a whole fairly cover the issues, and that there is no reversible error in them. We are further of the opinion that there is no fatal variance between the pleadings and the proof. We are of the opinion there is substantial evidence to sustain the verdict. There is no prejudicial reversible error in the record. The court did not err in denying the motion for a new trial.

The judgment and order appealed from are affirmed. Plaintiff is entitled to his costs and disbursements on appeal.

ROBINSON, BRONSON, CHRISTIANSON, and BIRDZELL, JJ., concur.

STATE BANK OF LEHR, a corporation, Respondent, v. EDWARD SUKUT, Appellant.

(187 N. W. 960.)

Bills and notes — plaintiff holder held to have the burden of showing good faith.

1. In an action by plaintiff to recover on a promissory note, given for a tractor, wherein it claims that it purchased the note in the ordinary course of business before maturity for value and without notice, there

is evidence of defendant's dissatisfaction with the tractor, prior to the time of the purchase of the note, which dissatisfaction was manifested in the presence of the President of the plaintiff bank, who negotiated the purchase of the note.

Bills and notes—evidence held to present a jury question whether plaintiff was bona fide holder.

2. It is *held*, that the evidence was of such character that it was for the jury to determine from it, and all the evidence whether the plaintiff acted in good faith in the purchase of the note and whether it purchased it in the manner claimed by it.

Opinion filed March 31, 1922. Rehearing denied April 29, 1922.

Appeal from the judgment of the District court of Logan county, Allen, J.

Reversed and remanded for a new trial.

Arthur B. Atkins and *Scott Cameron*, for appellant.

Before the court is entitled to direct a verdict for the plaintiff in an action of this kind the testimony must not only be such as to show consistently the good faith of the purchaser of the note in suit, but it must also be such that no fair-minded person can draw any other inferences therefrom. *Sweet v. Anderson*, 41 N. D. 375; *Union National Bank v. Moomaw*, 184 N. W. 5, Nebr.; 26 R. C. L. p. 1068; 26 R. C. L. p. 1069.

E. T. Burke, for respondent.

The holder's right can not be defeated without proof of actual notice of the defect in title or bad faith on his part evidenced by circumstances. Though he may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted mala fide his title, according to settled doctrines will prevail. *Valley Savings Bank v. Mercer*, 97 Md. 458, 479; *Cheever v. Pittsburgh, Chenango & Lake Erie R. R. Co.*, 150 N. Y. 59, 65; *American Exchange National Bank v. New York Belting, etc., Co.*, 148 N. Y. 705; *Knox v. Eden Musee Am. Co.*, 148 N. Y. 454; *Canajoharie National Bank v. Diefendorf*, 123 N. Y. 202.

GRACE, C. J. This is an appeal from a judgment in plaintiff's favor in the sum of \$2,325.70. The action is one to recover upon a certain

\$1,750 note. The material facts in the case are as follows: The Lehr Machine & Auto Company was engaged in business in the village of Lehr. It was agent for the Emerson-Brantingham Company, for the sale and distribution of its tractors. In the spring of 1919, the Lehr Machine Company sold to the defendant a certain tractor, plow adjustment, stubble bottoms, extra plow lays, and perhaps some other small items of merchandise, taking his note for the purchase price of them in the sum of \$1,750, payable October 1, 1919, without interest. On or about the 25th or 26th day of September, 1919, the plaintiff by its president, one Ziegenhagel, purchased the note. The defendant admits the execution and delivery of the note; he denies that the plaintiff purchased the same in due course of business without notice, or that it is the owner of it. He further in substance alleges that he was induced to purchase the tractor and other personal property and to execute the note by reason of the representations and warranties of the Machine Company, to the effect that the tractor was constructed of first class material; the same was first class workmanship, simple in construction and that it could be successfully operated by the defendant or any other man of ordinary intelligence; that it could be successfully operated by the use of kerosene; that it had generally ample power to pull three breaker plows or four stubble bottoms; that defendant believed and relied upon such representations and warranties; that in truth and fact the tractor was not constructed of first class material, of first class workmanship, but was of inferior material and inferior workmanship, and was so structurally imperfect that it was incapable of doing the work that it was designed to do, and for which it was purchased; that it cannot be made to generate ample power to pull three breakers or four stubble bottoms, or even half that number; that the tractor was of no value whatsoever, and that all of this was known to the Machine Company and its agents at the time of the sale, and that the defendant was induced to sign and deliver the note by such false and fraudulent statements and warranties; that defendant notified the Machine Company, demanded that the tractor be put in order and that in the event it could not be made to work properly and in the manner warranted, it and the other personal property to be taken back by the company and the defendant's note be returned to him; that the machine company represented that the tractor could be made to work, and that the defendant was induced to retain it and continued his efforts to make the same work; that he made complaints to the agents, representatives and officers of the Machine Com-

pany concerning the tractor and that it on several occasions sent experts out in the attempt to make the tractor work, who failed in their attempt; that defendant offered to return the tractor and other personal property. The defendant further alleges and pleads a counterclaim in the sum of \$800 for loss of time and money in attempting to make the tractor work.

The case was tried to the court and jury. At the close of all the testimony plaintiff asked the court to direct a verdict in its favor. This motion was denied. The jury failed to agree; the plaintiff renewed the motion for a directed verdict. It was agreed in open court by counsel for the respective parties that the motion for a directed verdict might be argued at a later date, and the jury discharged for the present and that no objection would be made to the fact that the jury was discharged. On the 11th day of October 1921, argument of the motion was had and the court concluded that the motion for a directed verdict made at the close of all of the testimony by the plaintiff should be allowed, this on the theory that the plaintiff had purchased the note in due course of business for a valuable consideration, and without knowledge of any facts that would show that such purchase was made in bad faith.

The directing of the verdict, the order for judgment and judgment against the defendant are assigned as error, as well as that there was evidence showing that plaintiff was not a purchaser in due course; that such evidence was of such a nature that the jury would have been justified in finding that the plaintiff was not a holder in due course, and further that the evidence was of such a nature that it clearly shows there was a breach of warranty and failure of consideration so that the jury would have been justified in finding for the defendant on all the issues. Error is also specified to the effect that the verdict is not justified by the evidence.

It is clear that a verdict should not have been directed if the evidence of the purchase of the note, is of such character that different minds could draw different conclusions as to whether it showed that the note was taken in due course, or with notice or knowledge of matters which might constitute a defense or show the bad faith of the purchaser. We think the evidence is of that character and that it should have been submitted to the jury for consideration and determination.

Ziegenhagel was president of the plaintiff bank. He knew when he purchased the note that it was given for a tractor. The evidence shows that defendant made complaint concerning the tractor to the Machine

Company in the presence of Ziegenhagel, Bellen, the agent of the Machine Company, and three other persons, Britten, Brost and Steffan; and this before the time plaintiff purchased the note; that at the time he made such complaint he was talking loudly and was thoroughly angry. He further stated in answer to questions as follows: Q. And after they came in, what was said? A. And I said here is a piece of broken iron, if they can't fix the engine they can come right away out and bring the engine to town.

Q. And Mr. Ziegenhagel was present, was he, at that time?

A. Yes.

Q. And how were you talking, as to talking in a low quiet voice, or loud and angry?

A. I was quite loud.

Q. You were quite thoroughly mad, were you?

A. I was.

Q. What did anybody say?

A. Oh, they was trying to reduce me a little down and says if that matter can't be fixed that they would take the engine back without any cost to me.

The evidence further discloses that defendant had much trouble with the engine; that experts were out many times to try to fix it.

The undisputed evidence shows the note bore no interest before maturity; it was purchased but a few days prior to the time it matured, we think, that it was a matter of common knowledge that money was very scarce in North Dakota at that time, and whether the bank in the financial conditions then existing would invest money in non-interest bearing negotiable paper, was a circumstance which might be considered by the jury as bearing upon the question of the good faith of the purchaser. It is scarcely necessary to add that since Ziegenhagel was president of the bank, his knowledge was the knowledge of the bank. We are of the opinion that under the rule announced in *Sweet v. Anderson* 41 N. D. 380, 170 N. W. 869, the burden is on plaintiff to show its good faith. See also *Connelly v. Greenfield Savings Bank*, 185 N. W. 887. We are satisfied from an examination of the record that the questions of fact in this case should have been submitted to the jury, and that it was reversible error for the court not to so do.

The judgment appealed from is reversed, and the case is remanded for a new trial. Appellant is entitled to his costs and disbursements on appeal.

ROBINSON, BRONSON, CHRISTIANSON, and BIRDZELL, JJ., concur.

JAMESTOWN GAS COMPANY, a corporation, Appellant, v. T. J. AHEARN, Respondent.

(188 N. W. 169.)

Corporations — in suit for conversion, held defendant might show under general denial that he disbursed moneys in accordance with direction of officers of plaintiff corporation.

In an action for the conversion of money, where the complaint alleges that the defendant wrongfully and fraudently converted money which he had received while acting as manager for the plaintiff (a corporation), the defendant may show, under a general denial, that he properly disbursed such moneys in accordance with the directions of the officers of the plaintiff corporation.

Opinion filed April 12, 1922. Rehearing denied May 5, 1922.

From a judgment of the District court of Stutsman county, *Nuessle, J.*, plaintiff appeals.

Affirmed.

C. S. Buck, for appellant.

That justification should be pleaded is laid down as a rule in 31 Cyc. p. 215; and 38 Cyc. p. 2075. *McClaren v. Cramer*, 26 N. D. p. 244.

"A settlement of the cause of action pleaded in the complaint cannot be proved under a general denial. The fact of such settlement presents an affirmative defense which must be specifically averred. That was not done in the answer; for the reason is not properly before us for

consideration. Plaintiff objected to its admission in evidence on the express ground that it had not been pleaded." *Mitchell v. Land Co.*, 19 N. D. 736.

Divet, Holt, Frame and Throp and Harry E. Rittgers, for respondent.

"In an action for the conversion of moneys collected defendant was allowed to show, without specially pleading it, that an agreement of agency existed between the parties by which the defendant was entitled to retain the money." *Bowers on Conversion*, § 531, p. 388; *Wilder v. Co.* 38 N. Y. Supp. 75; *Phoenix etc. Co. v. Walrath*, (Wis.) 10 N. W. 151; See also *Bowers on Conversion*, §§ 532 and 533.

"It is manifest that any plea alleging matter of justification or excuse (as a license, from the plaintiff—and authority derived from the law, etc.) is equivalent to the plea of not guilty since it must involve a denial of the conversion. * * * A conversion is wrong and cannot be justified. Where the appropriation is rightful there is no conversion; therefore, a plea showing that fact directly contravenes the complaint and is not confession and avoidance or in justification." *Bowers on Conversion*, § 534, pp. 389, 390; *Nichols v. Co.* (Minn.) 73 N. W. 415; *Searcy v. State* 93 Ind. 556; *Stewart v. Mills*, 18 Fla. 57; *Leary v. Moran*, 156, Ind. 560; *Tum Inden v. Jurgens*, 32 Misc. (N. Y.) 660; *Cleveland v. R. R. Co.*, 58 N. E. 559; *Gould on Pleading*, § 57; *Miller v. Knapp*, (Pa.) 19 Atl. 555.

"We think it is well established that, under a general denial, * * * the conversion of the goods is put in issue and the defendant may introduce any and all evidence which goes to show that there was no conversion; and we think the defendant may show under such denial that the taking of the goods was with the plaintiff's consent and in pursuance of an agreement between the parties." *Bowers on Conversion*, § 535; *Haynes v. Coal Co.* (Ida.) 81 Pac. 114.

"In trover a valid authority for appropriation or destruction of the property involved may be proven under the general issue and in bar of the action." *Bowers on Conversion*, § 541; 38 Cyc. 2075 and cases cited.

"In trover not guilty puts in issue every matter which might be pleaded in bar except a release." *Ryan v. Young*, (Ala.) 41 So. 954; *Barrett v. City* (Ala.) 30 So. 36.

"A general denial admits any evidence going to controvert the facts which plaintiff is bound to establish." *Abbott's Tr. Ev.* (3rd ed.) 1677; *Gandy v. Cowart* (Ala.) 50 So. 355; *Ency. Pleading and Practice*, Vol.

21, p. 1096; *Miller v. Knapp*, (Penn.) 19 Atl. 555.

"The burden is on plaintiff in an action charging conversion to prove the act of conversion by showing a wrongful disposition or a wrongful withholding of the property. * * * To maintain the action some wrongful act on the part of the appellant must be shown." *Taugh-er v. Co.* 129 N. W. 747, (N. D.); *McClellan v. Nicholson*, 24 Minn. 176; *Nichols v. Co.* (Minn.) 73 N. W. 415; *Drew v. Spaulding*, 45 N. W. 472.

CHRISTIANSON, J. This action was brought to recover the sum of \$654.25, which the plaintiff alleges that the defendant received, while employed as its manager between October 1, 1914, and June 1, 1919, and thereafter took and converted to his own use. The answer contains a general denial and two counterclaims—one counterclaim being for \$106.62, which it is alleged that the plaintiff owes to the defendant by reason of overtime or labor performed by him, outside of the class of work which he was employed to perform during the year 1918; the second counterclaim is for a note in the sum of \$636.94, executed and delivered by the plaintiff company to the defendant, on May 1, 1916. No objection was made to these counterclaims; and it was stated, upon oral argument, that there was an understanding between counsel that these counterclaims might be interposed and tried in this action so that the entire controversy between the parties might be determined.

The evidence shows that the plaintiff is a utility corporation which, during all the time involved in this controversy, was engaged in manufacturing and furnishing gas to consumers in the city of Jamestown. The defendant, Ahearn, prior to 1911 lived in Iowa. He was, however, a stockholder in the plaintiff corporation and was related to some of the other stockholders, nearly all of whom resided at Jamestown. In March 1911, the gas plant was injured by an explosion, and defendant, Ahearn, was requested by the officers of the plaintiff corporation to come to Jamestown to assist in repairing the plant. He came to Jamestown as requested and worked for the company for a period of some six months, for which he claims it was agreed that he was to receive a salary of \$75 per month, or a total of \$450 for the services he then performed. He claims that he received only \$75 and that the company owed him \$375 for the service so performed. In April, 1914, Ahearn returned and was again employed to perform work for the company as general utility man,

and later in that year he became general manager of the corporation, at a salary of \$75 per month, which salary was gradually increased until, in 1919, he was receiving a salary of \$200 per month.

Upon the trial of the action it was admitted that \$105 of the amount which the complaint charged the defendant with having converted had been properly applied by him on a debt owing to him by the plaintiff company; also that an error of \$7 had been made in the calculation and that the sum of \$542.25, represented the actual amount claimed by the gas company to have been converted by the defendant. It was also admitted that the note pleaded as a counterclaim had been executed and delivered and that it had never been paid. Upon presentation of defendant's case, he was permitted to testify, over objection, that, at a meeting of the stockholders and the officers of the company, held on May 8, 1916, it was agreed that a number of unsecured claims outstanding against the plaintiff company, including the balance due the defendant for the services performed in 1911, in the sum of \$375, and \$105 due him on his salary in 1914, should be paid off as fast as possible out of moneys received by the gas company in course of its business.

The defendant also testified that, during 1917 and 1918, owing to the scarcity of men, he found it necessary to perform a great deal of common or menial labor such as shoveling coal, digging and filling ditches, cleaning generators, and work of that kind; that he performed this work in the evenings, after he had worked the regular hours at his duties as general manager, and on holidays; that the amount claimed for, and reasonable value of, such services were as follows: For the year 1917, \$128, for the year 1918, \$106.62; that the officers of the gas company knew that he performed such services, and expected to be remunerated therefor; that at the annual meeting of stockholders held in 1918, at which the officers of the gas company were present, he informed them that he desired to return to Iowa; that the stockholders and officers insisted on his remaining and continuing in the service of the gas company; that he thereupon informed them all that he would stay only on the condition that he was paid for the extra work he had performed during the years 1917 and 1918; and that it was fully understood at that time that he would continue in the service of the gas company only on the condition that he was paid for the extra work performed in 1917 and 1918.

The undisputed evidence is to the effect that the gas company had paid the defendant only \$75 for the services rendered in 1911, and that it owed him a balance of \$375 for such services. The evidence is, also,

to the effect that the defendant had the right and was fully authorized to employ men to perform menial labor, such as to shovel coal, dig and fill ditches, and to pay them for such labor out of funds in his hands belonging to the gas company, without consulting any of the officers of the company. The plaintiff contends, however, that the defendant should not have been permitted to introduce any evidence relating to the balance due on the 1911 salary, or the amount claimed to be owing for extra labor performed in 1917 and 1918, for the reason that these matters were not specially pleaded. In other words, it is contended that the evidence relating to the balance due on the 1911 salary, and the amounts claimed owing for extra work performed in 1917 and 1918 was not admissible under a general denial. In our opinion this contention cannot be sustained. The complaint charges the defendant with having unlawfully and fraudulently taken and converted to his own use certain moneys belonging to the plaintiff, which had come into his hands and under his control as manager of the plaintiff company.

The defendant, by his general denial, put in issue all the material averments of the complaint. Under the issues thus formed the plaintiff had the burden of proving that the defendant had converted to his own use the moneys which it claimed that he had converted, and the defendant, under his general denial, might properly introduce any evidence which had a logical tendency to disprove any fact which the plaintiff must establish, in order to prevail in his action. Pomeroy, Code Remedies, (3d ed.) p. 731. This rule is peculiarly applicable in actions for conversion. See Pomeroy's Code Remedies (3d ed.) p. 721.

"Under a general denial in the same action, or a specific denial of the conversion any facts may be proved in defense which go to show that there was no conversion." Pomeroy's Code Remedies (3d ed.) p. 746.

The Cyclopedia of Law and Procedure (38 Cyc. 2075) says:

"All defenses are admissible under the general issue, except matters of confession and avoidance; and defendant having tendered such an issue, may offer evidence of any fact which tends to negative either the act of conversion, the wrongfulness alleged, plaintiff's ownership, or his right of possession.

The evidence of which plaintiff complains tended to show that defendant had not converted the money, but had disbursed the same in accordance with the directions of the officers of the plaintiff corporation. If this was true, of course the money had not been converted as alleged in the complaint. A situation quite analogous to the one presented here was

considered by this court in *Heiszler v. Beddow*, 23 N. D. 34, 135 N. W. 660. The holding of the court in that case is stated in paragraph one of the syllabus thus: .

"Under a general denial in an action for the conversion of money alleged to have been given to the defendant to be applied in payment of a debt to a third party, defendant may put the plaintiff to proof of the allegations of his complaint, and may himself show that the money was really received in payment of a debt due to him from the plaintiff. Such evidence, however, may not be introduced merely for the purpose of proving a counterclaim, or obtaining an affirmative judgment."

This disposes of all assignments of error argued on this appeal. It follows from what has been said that the judgment appealed from must be affirmed.

It is so ordered.

GRACE, C. J., and ROBINSON, BIRDZELL, and BRONSON, JJ., concur.

JOHN BRUFFARTS and EMIL WOLD, Appellants, v. E. E. OBER, JOE KLEIN, JOHN W. MILLER and JOHN HALLAM, Respondents.

(188 N. W. 174.)

Appeal and error — directing verdict held not error; where evidence failed to sustain plaintiff's cause; directing verdict will not be reversed where right, though based on erroneous motion.

For reasons stated in the opinion, it is *held* the court did not err in directing the jury to return a verdict of dismissal of the action, which result was in effect the same as if a motion had been properly made at the close of all the evidence for a dismissal of the action on the ground that there was no evidence to sustain plaintiff's cause of action; though the reason for the directing of the verdict was based on an erroneous motion of the court, the result arrived at was right.

Opinion filed April 11, 1922. Rehearing denied May 5, 1922.

An appeal from the judgment of the District court of Hettinger county, *Lembke, J.*

Judgment affirmed.

Jacobsen & Murray, for appellants.

A motion cannot be made at the close of plaintiff's case until the plaintiff has rested. It cannot be made at the close of the entire case until both parties have rested. *Chicago, Great Western Ry. Co. v. Mohan*, (Ill.) 58 N. E. 395; See 38 Cyc. 1585, ¶ B, note 91; *Kaley v. Van Ostrand* (Wis.) 114 N. W. 817; *Mattauch v. Riddle Automobile Co.* (Iowa) 115 N. W. 509.

Error in overruling motion at the close of plaintiff's case is waived by the defendant's introducing subsequent testimony. See 38 Cyc. 1590, cases cited under note 50; *McBride v. Wallace*, 15 N. D. 548; *Ward v. McQueen*, 15 N. D. 153.

A misjoinder of parties plaintiff or defendant is no grounds for the direction of a verdict. See *Groenmiller v. Kaub*, (Kans.) 73 Pac. 100; See *Heinlen v. Heilbron et al.*, (Cal.) 12 Pac. 673.

"The misjoinder of two parties as plaintiffs, when the cause of action is in one alone, is no ground for a dismissal of the complaint as to both. It is a mere irregularity which may be corrected at any time, before or after judgment, by striking out the name of the party improperly joined." *Gagle v. Vesser et ux* (Iowa) 114 N. W. 3; *Noziska et al. v. Aten*, (S. D.) 152 N. W. 694; See 18 C. J. 1186, § 101; 31 Cyc. 177, ¶ B.

"An improper joinder of defendants is not a ground for abatement but the cause may be prosecuted to a final judgment against the defendants properly joined." *Posch v. Lion Bonding & Casualty Co.*, (Minn.) 163 N. W. 131.

V. H. Crane, for respondents.

The want of a right of action is essentially different from a defect of parties plaintiff, and is not waived by a failure to demur on the ground. 30 Cyc. 31 (V.)

A petition in an action for a tort which joins several parties as defendants, if it states a joint act, and relative to a tort, which may, from its nature be joint or committed by persons in combination, is not open to attack on the ground of misjoinder of parties defendant. *Stuart v. Bank of Stplehurst*, 78 N. W. 298.

Where the domestic animals of different owners unite in committing an injury, the wrong is not a joint wrong of the owners, but each owner must be sued separately for the damage done by his beasts. *Cooley on*

Torts, 3d ed. 704; Cogswell v. Murphy, 46 Iowa, 44; Denny v. Carrell, 9 Ind. 72; Nohre v. Wright, et al., 108 N. W. 865; 1 R. C. L. 1106, ¶ 49; 2 Cyc. 410 (b); 3 C. J. 145, ¶ 455; 22 L. R. A. note p. 64.

A joint recovery cannot be had against tort feasons where there is no concert of action or common intent, and their acts are separate as to time and place. Moore v. Fryman, et al., 134 N. W. 534; 30 Cyc. 122, (Ill.); 4 L. R. A. 841 and note; 22 L. R. A., 63, note.

As applicable to the entire range of tort actions, the proposition may be stated that where wrong-doers have not acted in concert, and separate and distinct injuries are caused by the act or neglect of each, the liability is several only. Thus where animals belong to several owners do damage together, there being a separate trespass or wrong, each owner is generally liable separately only for the injuries done by his animals. 38 Cyc. 482, B and note 95; Boulger, et al., v. Northern P. Ry. Co., 171 N. W. 632; McDonough v. Russel-Miller Milling Co., 165 N. W. 504; Cooley on Torts, 3 ed. p. 244; City of Mansfield v. Bristol, 10 L. R. A. N. S. 806.

GRACE, C. J. This appeal is from a judgment of dismissal of plaintiffs' action, and for costs in the sum of \$69.60. Plaintiffs claim that they were the owners in possession of about 19 tons of hay, of the value of \$20 per ton, which was situated on a certain section of land, described in the complaint; that, during the month of October, 1919, defendants' live stock, cattle, horses, and other animals trespassed on the land and destroyed the hay; that plaintiffs were damaged in the sum of \$380. It is, in substance, alleged that the animals of each of the defendants contributed to and was the approximate cause of the damage. A further claim is made of \$100, on account of reasonable cost and value of attorneys' fees incurred or expended by them. Each of the defendants interposed a separate answer, consisting of a general denial, except Miller, who answers both by a general and a special denial. The testimony shows that Bruffarts owned a quantity of hay on one parcel of land, Wold a quantity on another, and both owned a quantity on a third parcel, all within the same section. The hay was in bunches.

There is evidence that the animals of some of the defendants did consume part of the hay and otherwise damaged some of it. It is not necessary here to analyze the evidence nor to show whose stock did the damage.

At the close of plaintiff's case, defendants made a motion for a directed verdict, on the theory that the plaintiffs, having maintained a joint action, they could not recover, for the reason that the stock of all of the defendants was not seen upon the land at the same time but upon different dates and occasions, and for the further reason that the animals of the defendants were not acting together in committing the trespass under the joint control of all or separate control of any of the defendants. This motion was renewed after the introduction of defendants' evidence, but the record does not show that it was renewed after both sides had rested. The court, not on the motion made by defendants, but evidently upon his own motion, directed a verdict on the sole theory that there was a misjoinder of parties, plaintiff and defendants, as well as a misjoinder of causes of action. These were no grounds for directing a verdict.

In case of misjoinder of parties, we are of the opinion that the proper remedy to eliminate the parties improperly joined is by motion of dismissal; the motion would ordinarily be made before issue is joined. A misjoinder or excess of parties is not reached by demurrer. Excess of parties is not to be understood as a defect of parties. Where the pleadings show deficiency of parties, demurrer is proper. *Olson v. Shirley*, 12 N. D. 106, 96 N. W. 297. Demurrer may be interposed where causes of action have been improperly united. Section 7442, C. L. 1913, subd. 5.

We are of the opinion that, in the circumstances of this case, a joint action would not properly lie, and that a separate action should have been brought against each of the defendants, if liability were claimed of each. *Cooley on Torts* (3d ed.) 704, 1 R. C. L. 1106, 2 Cyc. 410, 3 C. J. 145.

It would seem that the trial court gave the right result, but for a wrong reason. If the defendants had made a motion at the close of all the evidence for a dismissal of the action against them, it would have been proper for the court to have granted the motion, as the evidence was insufficient to support a joint verdict. The fact that it did dismiss the action for another reason, we think, in the circumstances of this case, in reality should not be permitted to change the result at which the court arrived. The action was dismissed without prejudice, so that the plaintiffs are not prevented from bringing a proper action.

Respondents are entitled to their costs and disbursements on appeal.

CHRISTIANSON, BIRDZELL, and ROBINSON, JJ., concur.

BRONSON, J., concurs in result.

J. D. HALSTEAD, Respondent v. MISSOURI SLOPE LAND & INVESTMENT COMPANY, a corporation, A. L. MARTIN and MARY J. MCGILLIVRAY, Appellants.

(188 N. W. 163.)

Appeal and error — appellant must show existence of error from the record itself.

1. A party who asserts error on appeal must show the existence thereof clearly and affirmatively from the record itself.

Appeal and error — presumption is indulged in favor of validity of trial court's action.

2. All doubtful interpretation will be resolved in favor of the validity of the action of the trial court, and where, on any reasonable contingency in the state of the record, the decision below might have been valid such contingency will be presumed.

Appeal and error — judgment consistent with opinion on former appeal not reversed, where under record parties may have agreed to submit the matter on record already made.

3. In the instant case it is *held* that a judgment rendered, after the filing of the remittitur in the district court, upon a motion based on all proceedings formerly had in the action is not shown to be erroneous by the record presented on appeal.

Interest — allowance of interest on annual installments held error.

4. For reasons stated in the opinion it is *held* that the trial court erred in allowing interest on certain annual installments stipulated to be paid by the defendants under a written agreement in suit, and the judgment is modified by disallowing such items.

Opinion filed April 1, 1922. Rehearing denied May 5, 1922.

From a judgment of the District court of Golden Valley county, *Pugh, J.*, defendants appeal.

Affirmed.

W. H. Stutsman and *L. A. Simpson*, for appellants.

H. L. Halliday, for respondent.

PER CURIAM. This is an action to recover on a written agreement in the form of a bond, executed by the defendant Missouri Slope Land & Investment Company, as principal, and A. L. Martin and Mary J. McGillivray, as sureties. On the trial of the action, the defendants claimed that the written contract sued upon was void under § 5925, C. L. 1913, which provides:

"Every contract by which the amount of damages to be paid or other compensation to be made for a breach of an obligation is determined in anticipation thereof is to that extent void, except as expressly provided by the next section."

The district court sustained the contention of the defendants, and rendered judgment in favor of the defendants for dismissal of the action. The plaintiff appealed from that decision, and this court reversed the judgment entered by the trial court, and remanded the cause for further proceedings, not inconsistent with the opinion of this court. *Halstead v. Missouri Slope Land & Investment Co. et al.* (N. D.) 184 N. W. 284. In the opinion, this court pointed out the circumstances under which the agreement in suit was executed; and the contract, and the various statutory provisions involved were set forth in full. In the concluding paragraph of the opinion it is said:

"From the evidence, it appears that the bond in suit was drawn up as a result of a conference had between the parties and their respective attorneys. It was first suggested that the bond provide that the land company pay a reasonable rental value of the land, in event it was defeated, without naming the sum of such rental. Halstead objected to this, and wanted 'a stated sum' named. When, during the course of this trial, he was asked by his counsel if there was 'any discussion at that time what would be the reasonable value of the use of the premises.' Counsel for the defendant objected, on the grounds that this 'would tend to vary the terms of a written instrument,' and this objection was sustained. There is not the slightest evidence tending to show that the sum stated, viz.,

\$500, was in excess of the reasonable rental value of the premises. There can be no question but that the owner of a tract of land has the right to contract with another with reference to the occupancy thereof, and to agree upon the rental to be paid for such occupancy. Nor is there any reason why two parties, asserting conflicting claims of ownership to a tract of land, may not contract, either with a third party or with one another, with regard to such occupancy and the rental to be paid, and leave the ownership of the rents contingent upon the adjudication of the right of ownership; that is, they may contract that a certain rental shall be paid to whoever is eventually determined to be the owner. And as we construe the contract, under the evidence before us in this case, that is precisely what the parties here did; that is, upon the record before us, we are of the opinion that the parties did not attempt to provide for a penalty, or for stipulated damages, but that they agreed upon the value of the 'use and occupancy' of the premises—that is, upon what would be a fair rental to be paid to the owner of the premises, when the question of ownership was determined." 184 N. W. 286.

Upon the filing of the remittitur in the district court, the plaintiff moved that judgment be entered in favor of the plaintiff and against the defendants, for the sum stipulated in the written agreement together with interest, namely, in the sum of \$500 for each year that the defendants had occupied the premises, together with interest on such several sums. The motion came on for hearing, and the trial court granted the motion and ordered judgment accordingly, and the defendants have appealed from judgment. In the order for judgment it is said:

"The record in said case, having been duly remitted from said Supreme Court to this court, and a certified copy of said opinion of said Supreme Court and the remittitur herein having been filed in the office of the clerk of the district court of Golden Valley county, which ordered and adjudged that the judgment of the district court, herein appealed from, be reversed and this cause be remanded for further proceedings, not inconsistent with said opinion, on September 16, 1921; and due notice of such remittance having been given the attorney for the defendants; and the plaintiff having moved this court for judgment in favor of the plaintiff and against the defendants and each and all of them, in accordance with said opinion and remittitur from said Supreme Court, and due notice of said motion for such judgment having been given to the defendants; and said motion for such judgment having been heard before this court, by Hon. Thomas H. Pugh, judge of said district

court, at the chambers of said court, in the city of Dickinson, Stark county, North Dakota, on the 30th day of September, 1921, the plaintiff then appearing by his attorney, H. L. Halliday, in support of said motion, and the defendants appearing by their attorney, W. H. Stutsman, in opposition to said motion; and this court having considered and read said remittitur and opinion of said Supreme Court herein, and all the testimony and evidence offered at the trial of said cause in district court, and all the records and files in this case, and the arguments of counsel, and being fully advised in the premises: Now, therefore, in accordance with said opinion and remittitur and order of said Supreme Court, on motion of H. L. Halliday, attorney for the plaintiff, it is hereby ordered, that the plaintiff, J. D. Halstead, do have and recover judgment against the above-named defendants," etc.

No statement of the case was settled, and we have no means of knowing what transpired in the district court, except as appears from the recitals in the order for judgment. There is in the record, what is denominated a proposed amended answer, wherein it is alleged that the written instrument set forth in the complaint was executed for the purpose of securing to the plaintiff the payment of damages likely to be incurred by reason of the loss of rent and profits, or the reasonable value of the use and occupation of the land in question, not exceeding the sum of \$500 for any one year for a period not to exceed 11 years, and that there was no intention to guarantee absolutely the payment of the sum of \$500 per year as rent for said land or as liquidated damages for the use and occupation thereof. It is also alleged that the reasonable value of the use and occupation of said land, and the rents and profits thereof, do not exceed the sum of \$200 per year during the term of years such land was in the possession of the defendant investment company.

On this appeal, the defendant asserts that the court erred in ignoring this answer, and in refusing to permit the defendants to set up and prove the facts therein alleged.

As already indicated, we have no means of knowing what transpired in the trial court, except as appears from the recitals in the order for judgment. It does not appear that permission was either obtained or requested to serve the amended answer, nor does it appear that any request was made for leave to introduce any further or additional testimony. So far as the record on this appeal shows, it is just as likely that the parties expressly or tacitly agreed to submit the matter to the court upon the record already made.

It is "elementary that the judgment comes before us with all presumptions in its favor. And the appellant had the burden of showing error. And he must present a record affirmatively showing such error. 2 Ency. Pl. & Pr. 423, 424; Erickson v. Wiper, 33 N. D. 193, 225, 157 N. W. 592. 'A mere suspicion or color of error is not sufficient, but every reasonable intendment establishing the regularity of the decision rendered must be removed, as all doubtful interpretations will be resolved in favor of the validity of the action of the trial court.' 2 Ency. Pl. & Pr. 425. Where a material fact or circumstance essential to establish the error is omitted, the presumption on appeal is that it would have sustained the decision objected to, if included. And where the record does not affirmatively show error, it will be presumed 'that every proceeding below, essential to its validity, was validly taken, and that every fact essential to its regularity was legally shown. And where, on any contingency in the state of the record, the decision below might have been valid, such contingency will be so presumed.' 2 Ency. Pl. & Pr. 425, 428—433." Raad v. Grant, 43 N. D. 546, 169 N. W. 588.

On the record before us here, we cannot say that the trial court erred in making the determination which it did; because, in the absence of further testimony, the plaintiff was, under our former decision, entitled to recover the amount stipulated in the contract, viz.: \$500 per year, as and for rental, or payment for the use and occupation, of the premises.

The trial court, however, allowed judgment not only for this amount, but also allowed interest on the various annual installments. In our opinion no such liability was assumed by the defendants under the agreement in suit. In our opinion their liability was restricted to the total amount of the installments due, with interest from the date of the breach of the agreement. The agreement was not broken until after the right of possession had been determined, and the right to the compensation agreed upon for the use and occupation had become fixed. Stutsman County v. Dakota Trust Co. (N. D.) 181 N. W. 586.

It follows that the judgment must be modified, by disallowing the items allowed as interest on the various annual installments; and, as so modified, it is affirmed. Neither party will recover costs on this appeal.

CHRISTIANSON, BIRDZELL, and BRONSON, JJ., concur.

GRACE, C. J., concurs in the result.

ROBINSON, J. (dissenting). I dissent on the ground that the judgment should be for the rental value of the land.

ALFRED H. MEYER, MARGUERITE N. MEYER, ET AL., Respondents, v. FIRST NATIONAL BANK OF CASSELTON, NORTH DAKOTA, a corporation, Appellant.

(188 N. W. 580.)

Parties—where party agrees judgment may go against him if third parties are determined to have no interest in certain property, the third parties necessary to the action.

1. Action brought to compel the specific performance of a contract for the loan of money to finance the plaintiffs in cropping certain lands which had been mortgaged by them and the mortgages were being foreclosed. A crop mortgage had been given to secure such prospective loan before the planting of the crop, and the loan contract provided that the defendants should advance the money if the real estate mortgages were not foreclosed. The defendant stipulated, however, that judgment might be entered against it in the event the court should determine that the purchaser at the foreclosure sales would not be entitled to any of the crop raised during the year for redemption. The real estate mortgages are not in evidence and neither the mortgagee nor the holder of the sheriff's certificate are made parties defendant. It is *held*:

Where, by stipulation, a party has agreed that judgment may go against him or it in the event certain third parties are determined to have no interest in property which will stand as security for the act the defendant would be required by the judgment to perform, the presence of such third party or parties is necessary to the determination of their interest, if any, and it cannot be decided in their absence.

Specific performance—under the facts held judgment not supported in absence of evidence negating outstanding interest in crop.

2. As the proof in the instant case does not negative an outstanding interest in the crop, the judgment is not supported by the evidence.

Specific performance—in tenant's action for specific performance of an agreement to finance cropping of lands, held that mortgagee and certificate were necessary parties.

3. In a tenant's action for specific performance of an agreement to finance plaintiff's tenants cropping of certain lands involving possible

loss of crops by foreclosure of land mortgage, where proof does not negative an outstanding interest in the crop, *held*, that mortgagee and certificate holders are necessary parties, in view of Comp. Laws 1913, § 7406.

Appeal from a judgment of the District court of Cass county, *Cole, J.*

Reversed and dismissed.

S. L. Nuchols, for appellant.

Wm. Langer, for respondents.

BIRDZELL, C. J. This is an appeal from a judgment decreeing the plaintiff to be the owners of certain real property described in the complaint, and as such entitled to crops grown thereon during the period of redemption from foreclosure sales; also decreeing that the defendant shall pay to the plaintiffs the sum of \$3,000, which the defendant had agreed to loan to the plaintiffs to enable them to crop the land during the year 1922. The facts are stipulated, and may be stated in substance as follows: March 1, 1919, Henry N. and Agnes G. Meyer purchased a large tract of land from John S. Dalrymple. To secure payment of part of the purchase price they executed and delivered real estate mortgages upon the property securing approximately \$150,000. In 1921, the grantees and mortgagors transferred the property to the plaintiffs subject to the mortgages. In September, 1920, the plaintiffs in this action, with the exception of Clyde Smuch, delivered to the defendant five promissory notes, each in the sum of \$5,000, drawing interest at 8 per cent. The interest was paid September 1, 1921, and the notes renewed. To secure the payment of the renewal notes, the plaintiffs executed and delivered to the defendant a chattel mortgage upon all the crops to be grown in 1922 upon certain described parts of the real property. As a part of the consideration for the chattel mortgage upon the crops, in addition to the renewal of the notes aggregating \$25,000, it was agreed that the defendant should furnish the plaintiffs \$3,000 in cash to be used in the payment of labor and other expenses in connection with the farming of the land for the season of 1922, with the understanding, however, that the real estate mortgages upon the property would not be foreclosed until after the harvesting of the 1922 crop. The mortgagee, Dalrymple, commenced foreclosure by advertisement in January, 1922, pursuant to which the property would regularly have been sold (and presumably was sold) on March

6th. The plaintiffs notified the defendant that they would be unable to redeem from this foreclosure, unless they could realize a sufficient sum from the crop raised in 1922.

In addition to the stipulation of facts, the parties have agreed as follows:

"That if the court determines that the purchaser at the foreclosure sales pursuant to said foreclosure of said real estate mortgages, or his assigns, will be entitled to any crop raised upon the real estate described in the complaint herein, during the year 1922, in the event the said real property is not redeemed from said foreclosure sales, then the court shall decide this action in favor of the defendant. But if the court decides that the plaintiffs, as owners of the equity of redemption in said real property, are entitled under the law to the crop grown upon said real property in the year 1922, in the event no redemption from said foreclosure sales is made, then the court shall decide this action in favor of the plaintiffs and require the defendant to pay over to the plaintiffs the sum of \$3,000.00, either in a lump sum or in installments, from time to time, in such sums as is necessary to pay the expenses of platting the said land to crop."

The trial court found the facts to be as stipulated and upon these findings made conclusions of law to the effect that—

The mortgage of the defendant upon the crops for the year 1922 constitutes "a prior and superior lien and right to the crop to be raised on said premises in the year 1922, to any other claim or right particularly under the mortgage sale to be made on March 6th under foreclosure proceedings, and saving and excepting that seed liens, liens for labor and the for threshing would be superior liens saving and excepting the fact that the \$3,000.00 for which the chattel mortgage was given by plaintiffs to defendant on the first day of September, 1921, was given for the express purpose of providing money to be advanced from time to time by said defendant to the plaintiffs to pay for seed, for labor, for threshing and other necessary expenses for raising the crop on said last-described premises in the year 1922.

"(2) That defendant is and will be fully protected in said chattel mortgage as against any purchaser at the foreclosure sale on March 6, 1922, of the premises herein mentioned, or the sale of the same at any adjourned date hereafter, during the redemption year following the sale under statutory provisions."

Pursuant to these findings and conclusions there was a judgment decreeing the plaintiffs to be the owners in fee of the real property described and as such—

“entitled to the crop grown on the said real property for the year 1922, in the event that no redemption from foreclosure sale is made; that the defendant pay over to the plaintiff the sum of \$3,000 in installments from time to time in such sums as to pay for putting said land to crop and to pay for labor, threshing, and other necessary expenses for raising the crop on the land described in the complaint.”

The specifications of error are that the conclusions of law are not supported by the findings of fact; that the findings of fact are contrary to the conclusions of law; and that there is no evidence to support the judgment.

The trial court, in a memorandum opinion after discussing certain legal propositions, stated:

“The court cannot decree specific performance in this case. The matter is largely a friendly issue between the parties so that a speedy determination may be had from our highest court that the litigants herein may act advisedly. The defendant itself, I understand, is willing to advance the money for the purpose specified, provided it is secure in so doing.”

Presumably, the court acted upon its understanding of the willingness of the defendant to advance the money when it entered the judgment requiring it to do so, for it was stated that specific performance could not be decreed, and it was so decreed. The only possible basis in the record for assuming a willingness on the part of the defendant to advance the money appears in that portion of the stipulation, hereinbefore quoted, which shows that the condition upon which the defendant had agreed to advance the money had been broken, namely, the nonforeclosure of the mortgages, and that it was still willing to advance the money, provided the court held that the purchaser at the foreclosure sales to be later made would not be entitled to any crop raised on the real estate described in the complaint during the year 1922. What the interest or right of the purchaser at the sheriff's sale may be is dependent upon the relations that may exist between the party in possession of the mortgaged property and such purchaser. These rights and interests, both in the land and in the crops, are dependent upon the status of the party in possession, whether as an owner of the equity of redemption, a tenant, or a cropper, or, perhaps, upon express provisions in the mortgages foreclosed.

The stipulated facts do not negative the existence of an interest of such third parties in this crop.

The mortgagee, Dalrymple, is not a party to these proceedings, and at the time the judgment below was rendered it could not be known who would purchase the land at foreclosure sales, nor is any certificate holder a party to the action or judgment. Neither are the mortgages in evidence. Manifestly, in the absence of the party or parties in whose favor such interest, if any, may exist, the court cannot possibly determine, with any degree of finality, the question submitted by the stipulation and upon which the parties have consented that the judgment should be contingent.

The condition upon which the defendant signified its unwillingness to complete the loan to the plaintiffs was that the certificate holder would be entitled to any crop raised on the premises. It is impossible on this record to determine whether or not he might have any such right. Consequently it is clear, in our opinion, that the evidence does not support the conclusions of law and the judgment to the effect that the chattel mortgage is necessarily superior to such interest or right. To determine such right, not only must the actual status be shown, but the mortgagee and the certificate holder are necessary parties to the action. Section 7406, C. L. 1913; 1 Pomeroy's Equity Jurisprudence (4th ed.) § 114; Pomeroy's Code Remedies (3d ed.) § 249.

For the foregoing reasons the judgment must be reversed, and the action dismissed.

ROBINSON, CHRISTIANSON and BRONSON, JJ., concur.

GRACE, J. (specially concurring). It is my view of this appeal that it presents no legal questions for decision. I therefore concur in the reversal of the judgment and the dismissal of the action.

CARL SEMMLER and SUSANNA SEMMLER, Respondents, v.
BEULAH COAL MINING COMPANY, a corporation, et al., Ap-
pellants.

(188 N. W. 310.)

Vendor and purchaser — upon conveyance by quitclaim of interest in land contract, grantee secures right to enforce payment of unpaid purchase price.

1. Upon a conveyance by quitclaim of the right, title, and interest of a vendor in a land contract, the grantee therein secures all of the rights of the vendor including the right to enforce payment of the unpaid purchase price.

Vendor and purchaser — purchaser cannot void enforcement of installment payments on the ground that the holder of the sale contract is then unable to convey title as required.

2. In a land contract containing independent covenants for the payment, upon installments, of the purchase price and for the payment of taxes, the vendee, upon failure to perform such independent covenants, is not in a position to avoid proceedings to enforce the breach of such covenants upon the ground that the holder of the contract is then unable to convey title as required by the contract.

Vendor and purchaser — vendor's assignee of land contract held not required to be then able to perform by transferring title in action by vendee's assignee to quiet title.

3. Where the assignee of the vendee's land contract, in an action to quiet title, asserts that proceedings in cancellation of the contract for failure to pay installments of the purchase price and taxes, are invalid because the assignee of the vendor can not convey title by warranty as required by the contract, it is *held*, for reasons stated in the opinion, that the assignee of such vendee, at the time of the cancellation proceedings, was not required by the contract then to be able so to perform.

Opinion filed May 12, 1922.

Action in District court, Mercer county, *Pugh*, J.

Defendants have appealed from a judgment in favor of the plaintiffs.

Judgment reversed.

Newton, Dullam & Young, for appellants.

A contract of this character may be assigned by either party thereto in the absence of a covenant or stipulation to the contrary. 4 Cyc. p. 20; 39 Cyc. p. 1663; 27 R. C. L. p. 560.

The vendor conveyed his interest in the land and assigned the contract of sale by transferring the legal title to H. H. Kenyon under the quit-claim deed in evidence. 39 Cyc. 663; 27 R. C. L. 560; *Robertson v. Read*, 52 Ark. 381; 14 S. W. 387; 20 A. S. R. 188.

The general principle in equity is that from the time the contract for the sale of land is entered into the vendor as to the land is a trustee for the purchaser and the vendee as to the purchase money is a trustee for the vendor, and every subsequent purchaser from either, with notice, is subject to the same equities as would be the party from whom he purchased. 1 Story Eq. Juris. §§ 396, 784, 789; *Champion v. Brown*, 6 Johnson Chancery 398; 10 A. D. 343; *Wilkins v. Summerville*, 66 Atl. 893, Vermont, 11 L. R. A. (N. S.) 1183; *Veith v. McMurtry*, Neb., 42 N. W. 6.

The plaintiffs cannot inquire into the sale and transfer of the land, and the assignment of the contract by the vendor. 39 Cyc. 1665; *Watson v. Willard*, 9 Pa. St. 89.

The purchaser assigned the contract and all of his interest therein to the First State Bank of Beulah to secure the payment of a certain note for \$1000.00 due July 1st, 1916. This assignment was permissible according to well established principles. 39 Cyc. 1673; *Braten v. Jones*, 5 Wis. 117; *Niggeler v. Maurin*, 34 Minn. 118, 24 N. W. 379; *Barrows v. Hoveland*, 40 Nev. 464, 58 N. W. 947.

And such an assignment may be made even to the vendor. 39 Cyc. 1670.

Sullivan, Hanley & Sullivan, for respondents.

"Under a contract to execute and deliver or cause to be executed and delivered, a deed to land with covenants of general warranty, the vendor himself must unite in the conveyance and covenants." *Armstrong v. Palmer* (Tex.) 218 S. W. 627; *Wolfore v. Jackson*, 96 S. E. 237 (Va.); *McVey v. Payne*, (Ky.) 39 S. W. 419; *Miner v. Hilton* 44 N. Y. S. 155, 15 App. Div. 55.

The vendee in the contract was entitled to a deed conveying the personal covenant of warranty of the vendor, and the substitution of a third

person without his consent essentially varies the terms of the contract. Paul v. Shaw (Kan.) 119 Pac. 546; Ann. Cases 1913B 956 and note; McVeety v. Harvey Mercantile Co. 24 (N. D.) 249; Ann. Cas. 1915B 1037; Buswell v. O. W. Kerr Co. (Minn.) 128 N. W. 459; 21 Ann. Cas. 837.

Statement.

BRONSON, J. This is an action to quiet title in certain coal lands. The salient facts are not seriously in dispute; largely, they are stipulated. They are as follows: Adjacent to the town site of Beulah, N. D., lie a fractional 80 acres of land, underlaid, for some 45 acres, with valuable lignite coal. On June 22, 1915, the owner thereof, one Juzeler, executed a contract for a deed therefor to Carl Semmler, the plaintiff. This contract expressed a consideration of \$2,450, of which \$105 was paid at the time of its execution. For the balance of the consideration, the contract provided annual payments thereafter covering a period of six years. The contract contained the usual provisions in case of default and prescribed that time was of the essence of the contract. Pursuant to this contract, Semmler entered into possession, sunk a shaft, installed certain mining machinery, and mining buildings. With this outfit he mined a quantity of coal on the premises. In accordance with his testimony the value of the improvements so placed by him upon the premises amounted to \$8,600. On November 16, 1915, Semmler assigned his contract to the defendant First State Bank of Beulah. This assignment provided that it should be void if Semmler paid to the bank one note for \$1,000 bearing even date therewith and due July 1, 1916. The money he received from the bank was invested in the mining property. Other moneys were advanced by the bank aggregating, in toto, \$2,600, all of which were invested in mining improvements. Through such improvements, certain liens were created against the property. On June 16, 1916, Semmler quit-claimed his interest in the mining property to his wife.

On October 18, 1916, the First State Bank assigned its contract and its indebtedness against Semmler to one Mounts. The latter was then connected with a town-site company. He entered negotiations with the bank for the purpose of securing title to the property, understanding that the same was in the market and that the holder must relinquish his contract. He paid the bank \$2,600 and interest; also, the liens against the premises. His total payments, so made, aggregated \$4,600.

On February 7, 1917, Juzeler quitclaimed the land to one Kenyon, now deceased. Kenyon was then cashier of the First State Bank. No payments were ever made by Semmler upon the contract excepting the sum of \$105. On February 14, 1917, Kenyon instituted statutory proceedings to cancel the contract for defaults of Semmler in failing to pay taxes and yearly payments stipulated in the contract. Pursuant to such proceedings, Kenyon declared the contract forfeited on March 19, 1917.

On August 3, 1917, Kenyon quitclaimed the land to the defendant coal company, which was then organized as a North Dakota corporation. Later, it reorganized as a Minnesota corporation with substantially the same stockholders, officers, and directors, taking over the property from its predecessor, the North Dakota corporation. Mounts, above mentioned, was and is the secretary of the coal company. He was reimbursed by the company for the payments made by him to the bank. Semmler ceased his mining operations on July 3, 1916, and since that time has not been in the actual occupancy of the land or the mine. The coal company, in August, 1917, commenced to improve the mining property. They have been in possession of the land ever since. Extensive improvements have been made aggregating about \$200,000. This coal company has mined some 100,000 tons of coal upon this land. In March, 1917, Carl Semmler instituted an action against Kenyon to restrain the cancellation proceedings. Demurrer was interposed, to the complaint, by reason of failure to state a cause of action, and was sustained. Judgment, accordingly, was entered in June, 1917, dismissing such action. In July, 1920, this action was instituted by Carl Semmler and his wife to quiet the title in the land. Trial was had in April, 1921. The plaintiff then tendered the full amount due upon the contract. This tender was refused. Thereafter, in August and September, 1921, further evidence was taken. Plaintiff's testimony is to the effect that these lands were worth \$27,000 when taken by the defendant. Testimony of the defendants on the contrary is to the effect that such lands, without the improvements, were not worth more than \$30 per acre, and that plaintiff's improvements were not of any substantial value. The trial court made findings in favor of the plaintiff. These findings incorporated the undisputed facts above stated. The court finds specifically that plaintiff's improvements were worth \$7,500; that the value of the use and occupation of the lands since August, 1917, is \$10,000; that the value of the premises when taken by defendants was, and is now, \$2,485. The trial court concludes that the contract was not legally canceled. This conclusion is based upon the

ground, as it appears from his memorandum opinion, that plaintiff was entitled to a deed containing the personal covenant by the vendor, and that Kenyon, who obtained his land from Juzeler on the quitclaim deed, was not entitled to receive forfeiture of the contract because he could not make conveyance in accordance with the terms thereof. The trial court ordered the defendants to pay the plaintiff \$5,400 net, for use and occupation, and \$11,000 for value of the land and improvements, if defendant desired to retain plain title, with certain other alternative provisions. Judgment was accordingly entered on December 6, 1921. The defendants have appealed.

Decision.

Upon the record no questions of fraud are presented. No equitable considerations are presented to vacate or set aside the cancellation proceedings. As assignee of the vendee in the contract the plaintiff, the vendee's wife, asserts that the cancellation proceedings are invalid because the assignee of the vendor cannot convey title with personal covenant of warranty by the vendor, as required by the contract.

Upon the making of the contract for the sale of land, where the vendee takes possession, a relation more than personal is created between the parties. A privity of estate arises. In equity, an estate passes to the vendee. In equity, the estate is measurable as a fee subject to the vendor's lien. In equity, there exists an equitable conversion. *Roby v. Bismarck Nat. Bank*, 4 N. D. 156, 160, 59 N. W. 719, 50 Am. St. Rep. 633; *Clapp v. Tower*, 11 N. D. 556, 93 N. W. 862; *Nearing v. Coop*, 6 N. D. 345, 349, 70 N. W. 1044; *Woodward v. McCollum*, 16 N. D. 42, 49, 111 N. W. 623; *Earley v. France*, 42 N. D. 52, 57, 172 N. W. 73; *Shelly v. Mikkelson*, 5 N. D. 22, 36, 63 N. W. 210. In law, the vendor retains the legal estate, but, in reality through the interposition of equity, this legal estate is retained for purposes of enforcing the vendor's rights under the contract and the payment of the unpaid purchase price.

This equitable estate possessed by the vendee may be sold and assigned in the absence of restriction in the contract. 39 Cyc. 1665; 27 R. C. L. 563. This right the vendee herein recognized. He assigned this right, first to the bank, for security; later, to his wife. This legal estate possessed by the vendor, and recognized in equity as a vendor's lien, may be conveyed or assigned. 39 Cyc. 1663; 27 R. C. L. 560. The vendor

herein recognized this right by conveyance to Kenyon, who later conveyed to the coal company.

The vendor's conveyance by quitclaim deed to Kenyon operated to transfer to Kenyon all of the vendor's right, title, and interest in the estate, at law, or in his vendor's lien, in equity. It thereby, gave to Kenyon all of the rights possessed by the vendor including the right to enforce the vendor's lien and collect the balance of the unpaid purchase price pursuant to the contract. 39 Cyc. 1664; 27 R. C. L. 560; Witt v. Boothe, 98 Kan. 554, 158 Pac. 851, 853; Greenfield v. Taylor, 141 Minn. 399, 170 N. W. 345.

In February, 1917, when cancellation proceedings were instituted, Kenyon, not the vendor, was then the person authorized to maintain the same. It was then the duty of the holder of the contract to pay the balance of the purchase price to Kenyon, the assignee of the vendor. Bldg. & Loan Ass'n v. Page, 46 W. Va. 302, 33 S. E. 336.

But it is contended that, since Kenyon received his right by quitclaim and not by warranty deed, he was not in a position to assure the contract holder of a conveyance to the vendee with warranty as required by the contract. This contention must be answered by considering the contract. The vendee therein agreed to make installment payments upon the purchase price annually, commencing in 1915 and ending on January 2, 1921. He further agreed to pay all taxes and assessments that might thereafter be levied or assessed upon the premises. The vendor agreed, upon prompt and full performance, to make conveyance; that warranty deed would be furnished upon full payment of the purchase price. All of these covenants by the vendee to make installment payments upon the purchase price and to pay the taxes and assessments were independent covenants excepting the covenant to pay the last installment of the purchase price or taxes and assessments that might then accrue or become due. These independent covenants of the vendee were not coincident and contemporaneous with the covenant of the vendor to convey by warranty deed. In February, 1917, the cancellation proceedings were instituted to cancel the contract for failure to pay installments upon the purchase price due in January, 1916, and in January, 1917, and for failure to pay taxes.

By the contract the vendee did not require that all of the covenants be coincident and contemporaneous. It was first the duty of the vendee to perform his independent covenants before he was placed in a position to demand performance by the vendor. Loveridge v. Coles, 72 Minn. 57,

64, 74, N. W. 1109; Diggle v. Boulden, 48 Wis. 477, 482, 4 N. W. 678. Accordingly, the independent covenants of the vendee, broken at the time of the cancellation proceedings, were not excused by the fact or the possibility of inability by the vendor or his assignee to then perform, at a time when performance was neither required nor demanded under the contract. *Martinson v. Regan*, 18 N. D. 467, 472, 123 N. W. 285; *Golden Valley Land Co. v. Johnson*, 25 N. D. 148, 160, 164, 141 N. W. 76; *Shelly v. Mikkelson*, 5 N. D. 22, 27, 63 N. W. 210; *Townshend v. Goodfellow*, 40 Minn. 312, 314, 41 N. W. 1056, 3 L. R. A. 739, 12 Am. St. Rep. 736; *Easton v. Montgomery*, 90 Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123; *Gray v. Smith (C. C.)* 76 Fed. 525; *True v. N. P. Ry. Co.*, 126 Minn. 72, 77, 147 N. W. 948; *Duluth Loan & Land Co. v. Klov Dahl*, 55 Minn. 341, 342, 56 N. W. 1119.

This is not an action for specific performance or for rescission, nor is it an action upon the covenants. It is an action to quiet title in an estate. The plaintiffs made no tender of performance at all until after the commencement of this action. They did not assert compliance with the contract. In fact, as far as the record discloses, the vendee in the contract paid only \$105 thereupon. In the mine upon the property he invested to some extent his personal labor. Out of the mine, he took a quantity of coal. No equitable considerations are invoked. There is no proof in the record that Kenyon could not have performed as the contract required when performance came due. The question here is not the kind of title the vendee or his assignee is entitled to receive. Prior to the commencement of this action he made no tender nor any demand for any title. See *Paul Co. v. Shaw*, 86 Kan. 136, 119 Pac. 546, 37 L. R. A. (N. S.) 1123, Ann. Cas. 1913B, 956. The assignee of the vendee now demands her estate in the land without compliance with the contract and without the right of the vendor's assignee to enforce a compliance because the vendor has not tendered a warranty deed which, thus far, pursuant to the contract, it has not become his duty so to do.

The judgment must accordingly be reversed, and judgment entered dismissing the action. It is so ordered, with costs.

BIRDZELL, C. J., and ROBINSON, and CHRISTIANSON, JJ., concur.

GRACE, J. (dissenting). It is wholly unnecessary to enter upon any lengthy discussion of the matters presented in this case. If the attempt-

ed cancellation of plaintiff's contract with Juzeler was of no effect, the entire defense amounts to nothing. It is true that Juzeler conveyed the land to Kenyon, and while it is stated in the answer, in substance, that such conveyance was subject to the contract between Juzeler and Semmler, that statement is of little effect unless it should further appear by competent proof that Kenyon assumed and agreed in writing to carry out the terms of the contract between Juzeler and Semmler. There is no such proof in this record, and the presumption is that there is no such condition contained in the quitclaim deed from Juzeler to Kenyon, or that such a condition was otherwise assumed in writing. If there were no proper legal assumption of that contract by Kenyon, he had no right or authority to cancel it; he was a stranger to it. The covenants in that contract were personal between Juzeler and Semmler; and, unless Kenyon in some manner bound himself legally in writing to carry out Juzeler's covenants in the contract, he had no authority to serve notice of cancellation, as he had no contract relations with Semmler.

The second reason why the notice of cancellation of the contract amounts to nothing is that there were only two payments due on the contract at the time of the alleged default; one for \$105, due January 2, 1916, and one for \$448, due January 2, 1917. There were no provisions in the contract that when there was a default in failing to pay, when due, one or more of the payments, the whole sum of the payments could be declared due. Yet that is what the notice of cancellation did; this was not authorized by the contract, and Kenyon had no authority or power to declare due the whole of the payments stipulated. This alone was sufficient to prevent Semmler from making the redemption. Semmler might well be able to redeem the actual amounts due for which the notice of cancellation could have been legally served, where he could not redeem for the whole amount due on the contract, which without any authority was declared to be due. We think, therefore, the foreclosure proceedings of the contract were absolutely void, and that Kenyon got no additional rights thereby, nor did he succeed thereby in terminating the rights of Semmler to the land. The present suit is the only one where the merits of the controversy have been litigated. There is sufficient evidence to sustain the findings of the court and the judgment.

The plaintiffs in this action tendered the balance of the contract price remaining unpaid, the interest thereon, together with all taxes on the land. They have, therefore done full equity and are entitled to the equitable relief awarded them by the judgment in this case.

The trial court found specifically that plaintiff's improvements were worth \$7,500; that the value of the use and occupation was \$10,000; and that the value of the premises when taken by defendant was \$2,485—a total of \$19,925. The court ordered the defendants to pay the plaintiffs \$5,400, net, for the use and occupation, and \$11,000 for the value of the land and improvements, a total of \$16,400; for this amount judgment was entered in this case. The findings of the court and the judgment are sustained by substantial evidence. It is clear that the attempted cancellation of the contract was absolutely void, and that it was in full force and effect, and was so at the time of the commencement of this action, and still so remains.

JOHN LOFTHOUSE, Respondent, v. GALESBURG STATE BANK,
a corporation, Appellant.

(188 N. W. 585.)

Appeal and error—error cannot be based on refusal to direct verdict at close of plaintiff's case unless renewed at close of evidence.

1. No error can be predicated on the denial of a motion for a directed verdict made at the close of plaintiff's case, unless such motion is renewed at the close of all the evidence.

Appeal and error—court's reference to witness as hostile, where explained as a reference to erroneous admission of witness' letter, held not prejudicial error; instruction that party holding storage tickets might be held for conversion and refusal to instruct that plaintiff must have demanded grain and had demand refused to make defendant liable for conversion held not error.

2. Errors assigned upon instructions, given and refused, and upon rulings on the admission of evidence, are considered found to be non-prejudicial.

Opinion filed May 12, 1922.

From a judgment of the District court of Traill county, *Cole*, J., defendant appeals.

Affirmed.

I. A. Acker, for appellant.

"The sale and delivery alone does not constitute a conversion of the property. It becomes necessary in order to show conversion that a demand and refusal to deliver should be shown." *Sanford v. Duluth and Dak. Elev. Co.* 2 N. D. 14; *Bank v. Elevator Co.* 11 N. D. 286; *Cit. Nat. Bank v. Osborne*, *McMillan Elev. Co.* 21 N. D. 335; *Towne v. St. Anthony & Dak. Elev. Co.* 8 N. D. 200; *Bank v. Elev. Co.* 11 N. D. 287; *Best v. Muir*, 8 N. D. 44; *Marshal v. Andrews*, 8 N. D. 364.

Under the law, the elevator could comply with its obligations to the owner or person entitled to possession by delivering to such person an equal quantity of wheat of like grade, and only upon a demand by the person entitled to the possession thereof, and a refusal on its part would it be liable for conversion. No different rule could be applied to the defendant bank in this action in case it had bought the wheat *Bank v. Elev. Co.* 11 N. D. 287; *Best v. Muir*, 8 N. D. 44; *Marshal v. Andrews*, 8 N. D. 264; *Towne v. Elev. Co.* 8 N. D. 200; *Sanford v. Elev. Co.* 2 N. D. 6.

Spalding & Shure, for respondent.

"A demand followed by refusal is only evidence of a conversion." *More v. Burger et al.*, 15 N. D. 345; *Taugher v. N. P. Ry. Co. et al.*, 21 N. D. 111.

"Demand was unnecessary under the well established principle that it would have been unavailing." and in the syllabus it is said that "demand and refusal need not be made before the commencement of the action in case a demand would be obviously unavailing, as when, by pleading and proof, the property is shown to be detained under a claim of absolute right." When it has passed beyond the control of defendant, a demand would likewise be unavailing. See also *Consolidated Land and Investment Co. v. Hawley*, 7 S. D. 229; *Taply v. Forbes*, 84 Mass. 20; *Crampton v. Valido Marble Co.* 60 Vt. 291; *Hahn v. Sleepy Eye Mill Company*, 21 S. D. 324.

Demand is not necessary when conversion can otherwise be shown. *Crampton case*, 2 M. A. L. 93; 26 R. C. L. 1123, note 10; 21 Enc. Pl. & Pr. 1083; 38 Cyc. 2071; 38 Cyc. 2032, notes 76 and 84.

And the sale constitutes a conversion.

CHRISTIANSON, J. This is an action for the alleged conversion of certain wheat on which plaintiff claims a lien by virtue of the provisions of a written contract. The case was tried to a jury, and plaintiff recovered a verdict in the sum of \$204. Judgment was entered pursuant to the verdict, and the defendant has appealed from the judgment.

The first contention advanced by the defendant on this appeal is that the court erred in refusing to direct a verdict in his favor. The contention cannot be sustained. The record shows that, when plaintiff rested in chief, defendant moved the court to direct a verdict in its (defendant's) favor. This motion was denied. Thereupon defendant proceeded to introduce its evidence. The motion for a directed verdict was not renewed at the close of all the evidence. It is the settled rule in this state that the error, if any, in denying a motion to direct a verdict for the defendant, made at the close of plaintiff's case, is waived or cured unless it is renewed at the conclusion of all the evidence. The rule was first announced in *Bowman v. Eppinger*, 1 N. D. 21, 44 N. W. 1000, and has been reaffirmed in many cases. See *Illstad v. Anderson*, 2 N. D. 167, 49 N. W. 659; *Moore v. Booker*, 4 N. D. 543, 62 N. W. 607; *Colby v. McDermont*, 6 N. D. 495, 71 N. W. 772; *Tetrault v. O'Connor*, 8 N. D. 15, 76 N. W. 225; *Garland v. Keeler*, 15 N. D. 548, 108 N. W. 484; *Madson v. Rutten*, 16 N. D. 281, 113 N. W. 872, 13 L. R. A. (N. S.) 554; *McBride v. Wallace*, 17 N. D. 495, 117 N. W. 857; *Pease v. Magill*, 17 N. D. 166, 115 N. W. 260; *Landis Mach. Co. v. Konantz Saddlery Co.*, 17 N. D. 310, 116 N. W. 333; *Buchanan v. Occident Elev. Co.*, 33 N. D. 346, 157 N. W. 122; *Halverson v. Lasell*, 33 N. D. 613, 157 N. W. 682. No motion for a new trial was made. Hence the sufficiency of the evidence to sustain the verdict may not be reviewed by the Supreme Court. *Horton v. Wright, Barrett & Stilwell Co.*, 43 N. D. 114, 174 N. W. 67.

The grain which is claimed to have been converted was produced by one Eggers upon land belonging to the plaintiff. And the plaintiff claimed a lien thereon by virtue of the provisions of the written contract under which Eggers cropped the premises. Eggers was called as a witness by the plaintiff. During his examination the trial court in explaining certain rulings stated that Eggers was a hostile witness. It is contended that this remark constituted prejudicial error. After a careful examination of the record, we are unable to see wherein this remark could have prejudiced the defendant. When defendant's counsel excepted to such remarks, the trial court specifically stated to the jury that he did not mean to imply that there was any actual hostility, but merely that there was a

diversity or hostility of interest.

Error is also predicated upon the admission in evidence of a certain letter written by Eggers to the plaintiff. We are inclined to agree with defendant's counsel that this letter was admissible, but we are unable to see wherein the defendant could have been prejudiced by its admission.

Error is also assigned upon certain instructions. The evidence in this case did not show that the defendant received any wheat at all, but merely that it received some storage tickets. And it is contended that a party who has received and holds such tickets cannot be held liable for a conversion of the grain for which the tickets were issued. The rule contended for was declared by some early decisions of this court; but those decisions were in effect overruled by *Dammann v. Schibsbys Implement Co.*, 30 N. D. 15, 151 N. W. 985. And the instructions to which exception is taken were not erroneous under the rule announced in the case last cited.

The defendant requested the court to instruct the jury that the plaintiff could not recover "unless it has been proven by the plaintiff that the grain was demanded from the defendant and that the defendant refused to deliver the same." That "only upon a demand by the plaintiff and a refusal on the part of the defendant would the defendant be liable for conversion." Under the evidence in this case we do not think the plaintiff was entitled to have the instruction given. See *More v. Burger*, 15 N. D. 345, 107 N. W. 200. See, also *Dammann v. Schibsbys Implement Co.*, *supra*.

Certain errors are also assigned upon rulings on certain questions propounded to witnesses. Little or no argument is presented in support of these assignments. We have, however, examined them all, and are unable to see wherein defendants could have been prejudiced by such rulings.

It follows from what has been said that the judgment appealed from must be affirmed. But in view of the state of the record, and in order that the rights of the defendant may be fully protected, such affirmance is without prejudice to the right of the defendant to present a motion for a new trial in the trial court. Respondents will recover the costs on this appeal.

BIRDZELL, J., concurs.

ROBINSON, J., concurs in the result.

BRONSON, J. (specially concurring). I concur in the affirmance of the judgment. The appellant complains that the trial court erred in refusing to direct a verdict for the reasons that the plaintiff had failed to prove any demand; that the evidence failed to establish that the defendant, at any time, converted any grain belonging to one Eggers, or that it had taken any grain from plaintiff's possession; and that no evidence was introduced to prove the value of the grain alleged to have been converted. I am of the opinion that, in any event, the trial court did not err in refusing to direct such verdict upon such stated grounds.

Otherwise, I concur in the opinion of Mr. Justice Christianson.

GRACE, J. (dissenting in part and concurring in part). Section 7843, C. L. 1913, provides:

"No motion for a new trial shall be necessary to obtain, on appeal, a review of any questions of law or of the sufficiency of the evidence, unless, before the taking of the appeal, the judge shall notify counsel of the party intending to take the appeal that he desires such motion to be made."

On the merits of the case, I concur in the result arrived at in the majority opinion.

JOHN B. FRIED, Respondent, v. MARY LONSKI, Appellant.

(188 N. W. 582.)

Frauds, statute of — statute as to contracts for sale of real property held to render wholly invalid contract falling within; specific performance of oral contract for sale of realty not compelled without part performance.

1. Section 5963 C. L. 1913 which provides that "no agreement for the sale of real property, or of an interest therein, is valid unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or his agent thereunto authorized in writing; but this does not abridge the power of any court to compel the specific performance of any agreement for the sale of real property in case of part performance thereof," affects the validity of a contract, falling within the statute, and renders such contract wholly invalid; and specific performance thereof may not be compelled unless there has been suf-

ficient part performance to take the contract out of the provisions of the statute.

Frauds, statute of — held available as defense under general denial.

2. Where a complaint alleges generally a contract for the sale of real property, without stating whether it was in writing or not, the above quoted statute of frauds is available as a defense under a general denial.

Opinion filed May 12, 1922.

From a judgment of the District court of Stutsman county, *Coffey, J.*, defendant appeals.

Reversed.

Geo. W. Thorp, Harry E. Rittgers, for appellant.

"Where the defense is available under a general denial, it seems that timely objection should be made to evidence of the oral contract, on the ground that it is incompetent under the statute of frauds." *Erickson v. Wiper*, 33 N. D. 193.

Under the provisions of our code, the court is authorized to and should allow amendments such as this to conform with the proof and in furtherance of justice. *French v. Co.*, 29 N. D. 426; *Southern Com. Co. v. Wier*, (S. D.) 148 N. W. 597.

"The courts are practically unanimous that the mere payment of a portion of the purchase money, unaccompanied by any other act, does not amount to part performance of an oral contract, sufficient to take the case out of the statute of frauds." 25 R. C. L. 267, and long list of cases cited from all the federal courts from nearly every state. *Merchants State Bank of Fargo v. Ruettell*, 12 N. D. 519; *Heran v. Elmore* (S. D.) 157 N. W. 820; *Story's Eq. Vol. 2*, 760.

"One who makes a contract to sell property of which he had no title, nor the certain means of procuring title, present no facts upon which damages to him may be predicated, if the purchaser withdraws from the contract." 24 N. D. 268.

A court of equity will not decree specific performance and aid the plaintiff in a mere speculation where the plaintiff refuses to publish and expose his title. *Brugman v. Charlson* (N. D.) 171 N. W. 882, 884; 25 R. C. L. 246, § 49 and cases cited.

C. S. Buck, for respondent.

"Where a complaint alleges the contract generally without stating whether it was in writing or not, the statute of frauds is not available as a defense, unless specially pleaded." *Abraham v. Durward*, 180 N. W. 783.

"A contract to sell or a sale of any goods of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so contracted to be sold or sold, and actually receive the same or unless some note or memorandum in writing of the contract of sale be signed by the party to be charged or his agent in that behalf." (Session Laws, 1917, chap. 202, p. 4); *Browne*, (*Browne. St. of Frauds*, 5th ed. § 135) says:

"As the statute of frauds affects only the remedy upon the contract, giving the party sought to be charged upon it a defense to an action for that purpose, if the requirements of the statute be not fulfilled, it is obvious that he may waive such protection, or rather that, except as he undertakes to avail himself of such protection, the contract is perfectly good against him."

This principle has been recognized and enforced by this court. *Erickson v. Wiper*, 33 N. D. 193, 203, 204, 157 N. W. 592; *Groff v. Cook*, 34 N. D. 136, 157 N. W. 973.

CHRISTIANSON, J. This is an action brought by a vendor to compel the specific performance of a certain alleged executory contract for the sale of land. The trial court made findings and conclusions in favor of the plaintiff, and the defendant has appealed from the judgment entered thereon and demanded a trial anew in this court.

In his complaint the plaintiff alleges:

"That on the 20th day of October, 1920, he entered into a contract with the defendant wherein and whereby he agreed to sell to the defendant and the defendant agreed to buy from him lot 151 in Jones & Venum's addition to the city of Jamestown for the agreed price of \$2,800, on the following terms, to wit, that the defendant was to pay within one week from said 20th day of October, 1920, the sum of \$1,200 in cash and assume the payment of a mortgage now existing on said premises in the sum of \$1,600, and that on the 20th day of October, 1920, the defendant herein paid to the plaintiff in cash the sum of \$100 to apply upon the purchase price of said lot 151.

"That on the 28th day of October, 1920, plaintiff herein tendered to the defendant a good and sufficient warranty deed of conveyance for the above premises with the proper amount of revenue stamps attached

thereto, which deed conveyed to the defendant herein the above described lot 151 in Jones & Vennum's addition to the city of Jamestown, and that the defendant refused to accept said deed and refused to pay the balance of \$1,100 in accordance with the agreement entered into on the 20th day of October, 1920."

The prayer for judgment is:

"That the defendant herein be required to specifically perform the contract entered into between herself and the plaintiff herein on the 20th day of October, 1920, and accept the deed of conveyance for said lot 151 in Jones & Vennum's addition to the city of Jamestown, N. D., and pay to the plaintiff the sum of \$1,100 with interest thereon at the rate of 6 per cent. per annum from the 28th day of October, 1920, and for such other and further relief as shall be equitable, and for his costs and disbursements herein."

To this complaint the defendant interposed a general denial, and the case came on for trial upon the issues thus framed. At the commencement of the trial the defendant's counsel objected to the introduction of any evidence on the ground that the complaint failed to state a cause of action, in this, that it failed to allege that the contract sued upon was in writing. And during the examination of witnesses defendant's counsel at the very first opportunity objected to the introduction of any and all evidence offered relating to oral negotiations or arrangements between the plaintiff and the defendant on the ground that the statute required all contracts like the one sought to be enforced in this suit to be in writing; and that the prior oral negotiations would be merged in the written contract. These objections were all overruled. At the conclusion of plaintiff's case, the defendant moved for judgment on the ground that the plaintiff had failed to establish a contract; that there was no contract in writing as required by law; that under the statute all contracts relating to the sale of land were invalid unless in writing; that the payment relied upon as part performance was not part performance; that the evidence adduced showed that the plaintiff was not the owner of the premises; and that no deed, executed by the plaintiff Fried, had been tendered to the defendant. This motion was denied.

The defendant introduced no evidence, so the only evidence adduced was that offered by the plaintiff. The evidence so introduced, shows that the plaintiff is a real estate dealer in the city of Jamestown. The defendant, who is a widow, came to see the plaintiff some days prior to October 20, 1920, with respect to the purchase of a house. He showed

her several houses at various prices. Among others was one referred to as the Anderson house; and, according to the testimony of the plaintiff, the defendant stated that she would take this house at \$2,500. A day or two thereafter a daughter of the defendant called plaintiff on the telephone and stated that her mother had decided that she would rather have another house which the plaintiff had shown her, known as the Dancer house, which house the plaintiff had offered to the defendant for \$2,800. In said telephone conversation the daughter stated that the defendant would pay \$1,200 in cash and assume a \$1,600 mortgage against the property. Thereupon the plaintiff sent his clerk, one Gasal, out to the farm where the defendant was living and obtained a check for \$100 signed by one of the defendant's sons as payment on the Dancer house. The plaintiff did not own the property at any time. It had merely been listed with him by the owner, under an arrangement whereby the plaintiff was to act as a broker in making sale, and was to receive as compensation all he received over \$2,500. Shortly after Gasal returned with the \$100 check from the defendant, Gasal and Fried went to see Dancer and Dancer and his wife executed a deed to Gasal for the property involved in this suit. It was understood that this deed was to be used in transferring the title to Lonski, and that the owner, Dancer, was not to be paid until Fried had received the money from Mrs. Lonski. There is no contention that Fried or Gasal ever paid Dancer for the property, or that they agreed to pay him otherwise than out of the moneys received from Mrs. Lonski. Some two or three days after the deed had been executed by Dancer and his wife to Gasal, Fried received another telephone call from one of defendant's sons to the effect that the defendant had changed her mind and did not want to purchase the property at all, and some days later the defendant, Mrs. Lonski, came to plaintiff's office, and stated that she was unable to raise the money required and desired to be relieved from the contract.

The appellant contends that the evidence in this case does not establish a valid contract, that the alleged oral contract referred to in the evidence adduced by the plaintiff was invalid under the statute of frauds, and that there was not such part performance as to render it enforceable. The respondent, on the other hand, contends that the defendant is in no position to assert the invalidity of the contract for the reason that the statute of frauds was not specially pleaded. The statute involved reads:

"No agreement for the sale of real property, or of an interest therein, is valid unless the same, or some note or memorandum thereof, is in writ-

ing and subscribed by the party to be charged, or his agent thereunto authorized in writing; but this does not abridge the power of any court to compel the specific performance of any agreement for the sale of real property in case of part performance thereof." Section 5963, C. L. 1913.

The question thus presented has never been determined by this court. In *Erickson v. Wiper*, 33 N. D. 193, 157 N. W. 592, and *Groff v. Cook*, 34 N. D. 126, 157 N. W. 973, the statute was in no manner raised in the court below either by pleading or by objection to the evidence, but was attempted to be raised for the first time in the appellate court. In *Abraham v. Durward* (N. D.) 180 N. W. 783, we held that the statute of frauds embodied in the Uniform Sales Act affected only the remedy upon the contract, and that—

"Where the complaint alleges the contract generally, without stating whether it was in writing or not, the statute of frauds is not available as a defense unless specially pleaded."

In the decision in that case, however, we pointed out that the statute there involved was quite different from the statute quoted above. The statute involved in the *Abraham Case* provided that "a contract to sell or a sale of any goods * * * of the value of five hundred dollars, or upwards shall not be enforceable by action," unless the requirements of the statute are fulfilled. The statute involved here says that "no agreement for the sale of real property, or of an interest therein, is valid," unless the requirements of the statute are fulfilled. In other words, the statute of frauds embodied in the Uniform Sales Act by its terms purports to affect the remedy only; whereas, the statute of frauds involved in this case by its terms "affects the validity of the contract." That was the conclusion reached by the Circuit Court of Appeals of this circuit in construing this statute. See *Thos. J. Baird Inv. Co. v. Harris*, 209 Fed. 291, 126 C. C. A. 217. The same conclusion was reached by the Supreme Courts of South Dakota and California in construing statutes identical with § 5963, C. L. 1913. See *Jones v. Pettigrew*, 25 S. D. 432, 127 N. W. 538; *Feeney v. Howard*, 79 Cal. 525, 21 Pac. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162.

The distinction pointed out by these courts there between the provisions of the different statutes of fraud, and the resultant effect as regards the mode of pleading the statute, has (as was intimated in *Abraham v. Durward*) been recognized by the courts and legal writers generally.

The Encyclopedia of Pleading & Practice says:

"While there is no little conflict of opinion regarding the proper mode of taking advantage of the statute of frauds, it may be laid down as a sound and generally accepted rule, with certain exceptions in some jurisdictions, to be noticed hereafter, that, unless it appears otherwise that the contract declared on is obnoxious to the statute, the party seeking its protection must specially insist on it in his pleadings. The reason for this rule is obvious. A parol agreement is neither illegal nor void under the law. The statute of frauds requiring the contract to be in writing is simply a weapon of defense which the party entitled may or may not use for his protection. If he does not specially by plea or answer set it up and rely upon it as a defense he cannot afterwards avail himself of its benefits." 9 Ency. Pl. & Pr. pp. 705—707.

"In those states where a contract obnoxious to the statute is void, and not merely voidable, it is held that the objection may be taken at the trial without pleading the statute." 9 Ency. Pl. & Pr. p. 712.

See, also, Wood on Statute of Frauds, § 537.

In *Jones v. Pettigrew*, supra, the court said:

"In considering the other questions raised by plaintiff, it is well first to note the difference between our statute and the old English statute of frauds, which statute is still found in some of the states. Under the old English statute the contract was valid, the statute declaring it to be not enforceable. Thus the statute went merely to the remedy, prescribing the rules of evidence and declaring that without certain evidence the contract could not be enforced. Under our statute, however, the contract is invalid unless certain requisites for a valid contract exist. * * * 'The statute of England, and those which are copied after it, do not touch the contracts embraced in them, nor declare that they shall be illegal or void unless put in writing. They do not affect their substance, but merely declare that no action shall be brought upon them unless they are in writing, and signed by the party to be charged; or, what amounts to the same thing, they prescribe as a rule of evidence that in all actions where an enforcement of them is sought oral proof of them shall not be admitted. Accordingly, where those statutes prevail, contracts which were legal and actionable before the statute are legal still, and they may be acted on and enforced by the courts whenever the proofs consist of such writings as the statutes require. But the effect of statutes which reach contracts themselves, and make them void, is widely different from that of those which extend to the remedy only, and make them simply not actionable.' * * *

"Considering now the difference between these two classes of statutes—that, under one the contract is valid but not enforceable without certain proof can be made, while under the other the contract itself never becomes valid until it is entered into in the manner prescribed by statute or unless certain part performance prescribed by statute has taken place—we see that, upon the trial, if one is attempting to prove a state of facts which brings the particular case under the bar of a statute such as we have in South Dakota, it would be an attempt to prove an invalid contract by perfectly competent evidence; while in the other case it would be an attempt to enforce a contract which, under the law, was absolutely valid, but by means of incompetent evidence. * * *

"Under a statute such as ours, rendering the contract invalid, the defendant was not called upon to plead the statute as a defense. In view of his general denial, it was incumbent upon the plaintiff to prove the contract, and to prove one that was valid." 25 S. D. 435—439, 127 N. W. 539—541.

In *Feeney v. Howard*, *supra*, the California court said:

"We think it clear upon principle that under our statute of frauds and system of pleading it is sufficient to deny the contract without referring to the statute. The old chancery idea that the statute must be specially pleaded grew out of and is based upon the assumption that a parol contract within the statute had some kind of validity. And one of the objects of the pleadings in chancery being for the discovery of evidence, we can readily see how the doctrine arose. But our statute declares, not merely that no action shall be maintained upon contracts within its operation, but that they are 'invalid.' A parol contract within such a statute is void." 79 Cal. 535, 536, 21 Pac. 988, 4 L. R. A. 826, 12 Am. St. Rep. 162.

We are agreed that under the pleadings in this case, the defendant was in position to invoke the statute of frauds upon the trial.

We are also agreed that the contract sought to be enforced is within the statute of frauds, and that there was no such part performances thereof as to take it out of the operation of the statute. The only part performance claimed is the payment of \$100 on the purchase price. The overwhelming weight of authority is to the effect that part payment of the purchase price is not in itself sufficient part performance to take a contract out of the statute of frauds and warrant the court in compelling specific performance thereof. 5 Pomeroy's Equity Jurisprudence, § 2246 (Pomeroy's Equitable Remedies, § 824); 2 Story's Equity Jurispru-

dence (14th ed.) § 1046; 26 Am. & Eng. Ency. L. 2d ed.) p. 54; 36 Cyc. 650.

It follows from what has been said that the judgment appealed from must be reversed, and the case dismissed. That will be the judgment of this court.

BIRDZELL, C. J., and ROBINSON and BRONSON, JJ., concur.

GRACE, J. (specially concurring). Plaitniff brought this action to enforce specific performance of an alleged contract claimed to have been made between the defendant and him, whereby it is claimed she agreed to purchase certain premises, consisting of a house and lot, located in the city of Jamestown, at the agreed purchase price of \$2,800.

The complaint is in the ordinary form in such actions. The answer is a general denial. If we are correctly informed of the facts, Fried never was at any time the owner of the premises. As we understand the facts, he merely had a right as a broker to find a purchaser for the premises. The terms of agency were not reduced to writing. He was not authorized by the owner of the premises in writing or otherwise, so far as the record shows, to make a contract of sale in his own name. In such circumstances, we think it is not necessary to cite authority to demonstrate that he had no legal right to make in his own name a sale of the premises, nor a contract therefor.

As we view the matter, there was no contract, as he was without authority to make one. There is no contract therefore to specifically enforce. The result arrived at in the principal opinion is correct, and I concur in it.

MRS. ISAAC LaPOINT, Respondent, v. HODGINS TRANSFER COMPANY, a corporation, Appellant.

(188 N. W. 166.)

Municipal corporations — violation of ordinance penalizing failure to properly fasten a horse on a street constitutes negligence per se.

1. The violation of a municipal ordinance penalizing the failure to properly fasten a horse upon a street, constitutes negligence per se.

Negligence — proximate cause question for jury.

2. Where the minds of ordinary prudent men might reasonably draw different conclusions upon a statement of facts affecting the proximate cause of an injury, the question is properly for the consideration of the jury.

Municipal corporations — whether failure to fasten unattended horse was proximate cause of injuries to plaintiff held for the jury.

3. Where a pedestrian traversing a sidewalk in a public street was injured through being bitten and knocked down by a horse stepping upon the sidewalk and, where such horse was a member of a team attached to a wagon left unattended and not fastened at all pursuant to the provisions of a municipal ordinance, it is *held*, for reasons stated in the opinion, that the question whether the violation of the ordinance proximately caused the injuries, was for the jury.

Opinion filed April 12, 1922. Rehearing denied May 15, 1922.

Action in District court, Ward county, *Moellring, J.*

The defendant has appealed from an order denying judgment non obstante, or, in the alternative, a new trial.

Affirmed.

Fisk, Murphy & Nash, for appellant.

Where a person had not knowledge and is not chargeable with knowledge of the danger his act will not constitute proximate cause. *Alwell v. Skobis* (Wis.) 105 N. W. 777; 29 Cyc. 495; *Cole v. German Savings Society* (Fed.) 63 L. R. A. 416; *Kelly v. Bennett*, (Pa.) 19 Am. St. Rep. 594; 7 L. R. A. 120; *Stuart v. Ripon*, 38 Wis. 584.

In order to render the violation of a statute or ordinance actionable negligence, the consequences which resulted from such negligence must

have been those contemplated by its provisions. 29 Cyc. 438; *Denton v. Kans. R. Co.* 103 Pa. 558; Ann. Cas. 1915D, 640; 3 Corpus Juris pp. 92-93; *Putermann v. Simon* (Mo.) 105 S. W. 1098; *Reed v. S. Express Co.* (Ga.) 51 Am. St. Rep. 62; *Corcoran v. Kelly*, 113 N. Y. Supp. 686.

The violation of the ordinance was not the proximate cause nor the effective cause. The vicious propensity of the animal was. See particularly *Smith v. Donahue*, (N. J.) 60 Am. St. Rep. 652; *Reed v. S. Express Co.* (Ga.) 51 Am. St. Rep. 62.

Palda & Aaker, for respondent.

"The questions of fact as to the character and extent of plaintiff's injuries, and whether he was guilty of contributory negligence in the premises, and also whether the fact that the team was left unfastened and unguarded in a public street was the proximate cause of the injury, were settled by the verdict." *Bett v. Pratt* (Minn.) 23 N. W. 237; *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U. S. 474.

"It is not necessary that an animal should be vicious to make the owner responsible for injury done by it, through the owner's negligence. The viciousness of the animal is an essential fact, only when, but for it, the conduct of the owner would be free from fault." *Gary v. Arnold*, 175 Ill. (A) 365; *Asher v. Monday*, 9 Ky. (L) 332; *Lyman v. Dale*, (Mo.) 136 S. W. 760.

"If the owner or keeper is guilty of negligence in handling an animal, he is liable regardless of scienter." Cases supra; *Bett v. Pratt*, (Minn.) 23 N. W. 237.

Non-compliance with a statute or ordinance prescribing the performance of a duty imposed for the benefit or protection of others is negligence per se. *Osborne v. McMasters*, 40 Minn. 103; 41 N. W. 543; *Corrall v. B. C. R. R. Co.* 38 Ia. 120; *Peyton v. Texas, R. R. Co.* 17 La. 430; *Weber v. Kansas City R. Co.* (Mo.) 18 Am. St. Rep. 541.

"The violation of a statute passed for the protection of the public is negligence per se." *Schell v. DuBois*, (Ohio) 113 N. E. 664; *Thompson*, in Vol. 1 of his work on Negligence at § 10.

"The violation of the statute enacted for the protection of persons and their property constitutes negligence per se." *Walker v. Klopp* (Neb. 1916) 157 N. W. 962.

Statement.

BRONSON, J. This is an action for personal injuries. The defendant has appealed from an order denying judgment non obstante or, in the alternative, a new trial. The facts are: On July 26, 1918, upon a street in Minot, the plaintiff was severely bitten in the right arm by a horse of the defendant. The plaintiff, then aged 72 years, was walking upon the sidewalk with her daughter. The defendant's team, one of the horses of which occasioned the injuries, was attached to a garbage wagon then engaged in hauling garbage, pursuant to defendant's contract with the city. In accordance with some of the testimony, the team was then unattended. The driver came from a building near some 30 seconds to a minute after the plaintiff was bitten. The team was not fastened in any manner.

An ordinance of the city of Minot then in force provides as follows:

"Unlawful to Leave Team Loose in Street.—Any person who shall leave any horse, horses, mule, mules or other animals attached to any carriage, wagon or sleigh in any street, avenue, alley or other uninclosed place within the city, without properly fastening such animals, shall be subject to a fine of not less than one dollar, nor more than nineteen dollars for each offense."

One witness, a pedestrian then passing by, testified that the noise and the shaking of the harness attracted his attention. He heard the snap of the horse's teeth. He turned around and saw the horse pulling back, just at the edge of the sidewalk. He saw the plaintiff down on the sidewalk and her daughter and another persons picking her up. The plaintiff testified that the horse stepped on the sidewalk. No evidence was introduced concerning knowledge by the defendant of the vicious propensities of the animal nor concerning plaintiff's contributory negligence. The jury returned a verdict in plaintiff's favor for \$2,400.

Decision.

The propriety or validity of the ordinance is not questioned. But the plaintiff maintains that it has no application; that it is a mere traffic regulation; that its sole purpose is to prevent runaways with attendant injuries to pedestrians and other property. Reliance is placed upon the case of *Putermann v. Simon*, 127 Mo. App. 511, 105 S. W. 1098. In that case, the ordinance involved provided that any person who shall leave a

horse standing in a public place without being fastened or so guarded as to prevent its running away shall be deemed guilty of a misdemeanor. This ordinance does not state its purpose. It is general in character. It does not attempt to distinguish between the act of a horse, not properly fastened, stepping upon a sidewalk and biting a pedestrian lawfully there, so as to knock her down and severely injure her, and the act of such horse, not properly fastened, running away and, upon a sidewalk, similarly knocking down and injuring a pedestrian lawfully there. As far as the ordinance is concerned, the former act is not absolved and the latter included. In either event, the ordinance as a lawful regulation served to give assurance, pursuant to its terms, to a pedestrian, lawfully traversing a sidewalk, that the municipal duty so imposed was performed. The violation of this ordinance constituted negligence per se. *Thompson, Negligence*, vol. 1, § 10; *Morrison v. Lee*, 22 N. D. 251, 255, 133 N. W. 548, 550, 38 L. R. A. (N. S.) 412; *Leidgon v. Jones* (N. D.) 179 N. W. 714, 716; *Gary v. Arnold*, 175 Ill. App. 365; *Schaar v. Conforth*, 128 Minn. 460, 151 N. W. 275.

Pursuant to the instructions and through their verdict, the jury have found that the horse was left unattended without proper fastening upon a street. The evidence supports such finding. The only question remaining is whether the violation of the ordinance was the proximate cause of the injuries. Upon definite instructions in this regard, the jury found that it was. No exceptions are taken to the instructions. The defendant contends, however, that the evidence is insufficient to warrant such finding: That if the horse had been attended, or properly fastened, perchance, with an ordinary tie strap to a lug or hitching post, the horse, nevertheless, could have reached around, readily, and bitten the plaintiff. However, the minds of ordinary prudent men might reasonably draw different conclusions concerning what would constitute a proper fastening, and whether a horse, properly fastened, would or could step on a sidewalk and thus bite and injure the plaintiff. *Felton v. Ry. Co.*, 32 N. D. 223, 235, 155 N. W. 23; *Farmers' Mercantile Co. v. N. P. R. Co.*, 27 N. D. 302, 316, 317, 146 N. W. 550; 29 Cyc. 632. Obviously, one purpose of the statute was to lessen such dangers and to prevent such injuries. The fact that the horse stepped upon the sidewalk and the physical surrounding facts presented to the jury more than mere probabilities that the violation of the statute proximately caused plaintiff's injuries.

See note L. R. A. 1917E, 250. We are of the opinion that the question of proximate cause was for the jury.

The order is affirmed, with costs.

GRACE, C. J., and CHRISTIANSON, BIRDZELL, and ROBINSON, JJ., concur.

AMERICAN LOAN & INVESTMENT COMPANY, a corporation,
Respondent, v. B. P. BORASS, C. A. STEBERG, C. D. OLSON
and THEODORE T. MOEN, Appellants. and A. G. BJERKEN.
Garnishee.

(188 N. W. 302.)

Vendor and purchaser—in vendor's action for installments due, held that purchaser in possession and in default were not entitled to rescind on payment of liquidated damages.

1. The following language appeared in a written contract for deed: "Either party hereto shall fail or refuse (except for imperfect title) to comply with the provisions of this contract on his part to be performed, shall forfeit or pay to the other party the sum of \$2,000, which sum is hereby fixed and agreed upon as liquidated damages to be sustained by either party from failure or default on the part of the other."

It is *held* defendants being in possession, exercising dominion over the land described in the contract, and also being in default are not in position to invoke this clause of the contract.

Vendor and purchaser—vendor may recover against purchaser unpaid installments due and past-due interest.

2. The vendor in a contract may maintain an action to recover against the vendee, the amount of an unpaid installment or installments, which are due, and for all past due interest.

Opinion filed May 15, 1922.

Appeal from the judgment of the District court of Barnes county.
Englert, J.

Judgment affirmed.

Combs & Ritchie, for appellants.

"The actual damages arising from the breach of a contract for the purchase or sale of real estate have been frequently held to be of such an uncertain and unascertainable nature as to warrant the construction that a sum named to be paid on a breach is liquidated damages and not a penalty." *Davis v. Isenstei et al.* (Ill.) 100 N. E. 940; 19 A. & E. Cyc. of Law 419.

"The contract may, however, if it clearly so provides, limit the right of the vendor in case of the purchaser's default, to a termination of the contract and a forfeiture of the purchaser's rights thereunder, which will be exclusive, and in a certain sense permit a defaulting purchaser to terminate the contract by his own default." *K. P. Min. Co. v. Jacobsen*, 83 Pac. 728, 4 L. R. A. (N. S.) 755 and notes; *L. R. A.* 1916C, 893, 27 R. C. L. 645, § 406; *Potter Realty Co. v. Derby*, 147 Pac. 548; *Potter Realty Co. v. Breitling*, 155 Pac. 179.

"Under an agreement, in a contract for the sale of land for a price payable in installments, that on default of any payment or condition of the contract all payments should be forfeited to the vendor, the parties having agreed upon their own remedy for a breach, the remedy is exclusive, and the vendor cannot compel the purchaser to pay." *Mitchell v. Hughes*, 157 Pac. 965; *Davin v. Isenstein*, (Supra.)

"The right of the vendor to recover the purchase price may be affected by specific covenants in the contract, thus the vendor may under the terms of the contract, be confined to declaring the sale of and retaining the money deposited as liquidated damages." 39 Cyc. 1902 ¶ 2.

John O. Hanchett, for respondent.

"The courts are not inclined to permit one to take advantage of his own default, and hence where the vendor has not terminated the contract but seeks to enforce it, a vendee who has defaulted in paying the purchase price will not be held to be authorized to take advantage of his default in this regard as a defense to the balance of the purchase price, unless the terms of the contract clearly require this construction." *Wait v. Stanley*, L. R. A. 1916C, 886, 893; 27 R. C. L. p. 613, *Title Vendor and Purchaser*, ¶ 367; *Higbie v. Farr*, 10 N. W. 592, (Minn.) *Hedrich v. Firke*, 135 N. W. 219 (Mich.) *Rush, Admr. v. State*, 20 Ind. 436; *Smith v. Mohn*, 25 Pac. 696, (Cal.); *Wilcoxson v. Stitt*, 4 Pac. 629 (Cal.);

Amanda Con. Gold Min. Co. v. Peoples, M. & N. Co. 64 Pac. 218 (Col.)

GRACE, J. This is an appeal from a judgment in plaintiff's favor in each of the above cases. The facts being similar in each case, they were tried as one case. An opinion in the one first above entitled will dispose of both. There is no dispute in the facts, and they need not be set out further than to afford an intelligent comprehension of the issues.

On June 14th, plaintiff was the owner and in possession of the S. E. $\frac{1}{4}$ of section 29 and the N. $\frac{1}{2}$ of the N. $\frac{1}{2}$ of section 32, township 138, range 59, Barnes county, which was sold to the defendants for the agreed price of \$24,000. The terms of the sale were expressed in a written contract for deed. The terms of sale were \$2,000 cash in hand upon the execution of the contract; \$1,000 on or before November 1, 1920; \$2,000 March 1, 1921; \$750 March 1, 1922; and \$750 annually thereafter until the whole remaining from time to time was fully paid, with interest at 6 per cent., payable annually on March 1st of each year. The cash payment was made and at least constructive possession of the premises was taken by the purchaser.

The following is a part of the contract:

"It is mutually agreed by and between the parties hereto, that the covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, administrators and assigns of the respective parties; that time is of the essence of this contract, and that either party hereto who shall fail or refuse (except for imperfect title) to comply with the provisions of this contract on his part to be performed, shall forfeit and pay to the other party the sum of \$2,000, which sum is hereby fixed and agreed upon as liquidated damages to be sustained by either party from failure or default upon the part of the other."

The installments of \$1,000 and \$2,000 due, respectively, November 1, 1920, and March 1, 1921, were not paid, nor was the annual installment of interest of \$942.30. Plaintiff brought an action at law for the recovery of them. It was awarded judgment for these amounts, together with its costs, a total of \$4,104.33.

The assignments of error are to the effect that the court erred in permitting the entry of the judgment, and that the evidence is insufficient to support the findings of fact of the court and the judgment. It is not disputed that these installments were past due and remained unpaid after

the contract became effective. There are but two questions presented which need any discussion. A disposition of them will wholly dispose of this appeal. The first of these grows out of that clause of the contract above set forth, and relates particularly to that portion of it which in substance provides that—

“Either party hereto who shall fail or refuse (except for imperfect title) to comply with the provisions of this contract on his part to be performed, shall forfeit or pay to the other party the sum of \$2,000, which sum is hereby fixed and agreed upon as liquidated damages to be sustained by either party from failure or default upon the part of the other.”

The second question is whether the plaintiff may bring an action at law to recover for the amount of the installments of the purchase money due on the contract, or whether its remedy is by an action at law for damages or at the proper time, one in equity for specific performance. As to the first, it would seem little more is needed to dispose of it than to state certain facts. It is conceded that the defendants purchased the land; that they made an initial payment of \$2,000 of the purchase price. It also sufficiently appears from the evidence that they had constructive possession of the land; they received the rents of it for the year 1920, that is, after the deduction of the expenses of threshing, their share was placed in storage and storage tickets issued therefor to them. The amount of these storage tickets was garnisheed in this action. When they purchased the land, they acquired an interest, the vendor holding fee title as security for the unpaid purchase price.

The contract was in the nature of a mortgage; it would require foreclosure proceedings to cancel defendants' equitable interest, unless there were a voluntary cancellation of it by agreement between the vendor and vendees, which there has not been. There was some conversation between the defendants and Isensee, the president of the land company, wherein the defendants, through Mr. Olson, stated in effect that they had decided they could not go on with the transaction, would abandon it and turn the land back; that they would be willing to stand \$1,000 forfeiture on each contract; they wanted to know if they could not get back part of the money they had paid. The company, through Isensee, offered to do that on the 200-acre tract if the defendants made good on the other contract for the purchase of the other tract of land, which they did not do.

There is no testimony that the company agreed to accept, nor that it did accept, the forfeiture of the contract. Exhibit 6, a letter written by

one Moen, one of the defendants, to Isensee, agent of the plaintiff, stated that he could not make the payments on the farm, and further stated: "So you will have to consider it your own." The letter further states that—

"They (defendants) said at that time that they wanted to wait and see how much the crop come to, then send in the balance, but now they say that they don't want any more to do with it. * * * They decided to drop it."

The plaintiff replied to the letter, stating in substance that it would hold each personally responsible for the performance of the contract and would insist that the payments be made. The defendants yet have constructive possession of the land and are in position to exercise dominion over it; they leased it in 1921. In this situation, they could not very well invoke the forfeiture clause of the contract; they cannot retain the land, exercise dominion over it, and at the same time claim to cancel the contract, especially not where the only basis for cancellation is their own default.

As to the second question, we are of the opinion that as between the original parties to the contract (vendor and vendee), where the contract contains covenants whereby the purchaser agrees to pay the purchase price in installments and he is in possession, the vendor may sue for each installment as it becomes due. *Warvelle on Vendors*, Vol. 2, § 900; *Sparta Bank v. Agnew*, 45 Wis. 131; *Shell v. Mikkelson*, 5 N. D. 22, 63 N. W. 210. It is not necessary here to notice other remedies which the vendor has in a proper case against the purchaser, in case of his non-performance, such as, for instance, that of specific performance or an action for damages; the only questions here are such as we have above decided. There is no contention that plaintiff's title to the land is imperfect.

The judgment is affirmed. Respondent is entitled to his costs and disbursements on appeal.

BIRDZELL, C. J., and BRONSON, CHRISTIANSON, and ROBINSON, JJ.,
concur.

AMERICAN LOAN & INVESTMENT COMPANY, a corporation,
Respondent, v. B. P. BORASS and C. D. OLSON, Appellants, and
A. J. BJERKEN, Garnishee.

(188 N. W. 304.)

Liquidated damage — provision of land sale contract.

1. The following language appeared in a written contract for deed: "Either party hereto who shall fail or refuse (except for imperfect title) to comply with the provisions of this contract on his part to be performed shall forfeit or pay to the other party the sum of \$2,000, which sum is hereby fixed and agreed upon as liquidated damages to be sustained by either party from failure or default on the part of the other."

Vendor and purchaser — in vendor's action for installments due, held that purchaser in possession and in default were not entitled to rescind on payment of liquidated damages.

2. It is *held* defendants being in possession, exercising dominion over the land described in the contract, and also being in default are not in position to invoke this clause of the contract.

Vendor and purchaser — vendor may recover against purchaser unpaid installments due and past due interest.

3. The vendor in a contract may maintain an action to recover against the vendee the amount of an unpaid installment or installments, which are due, and for all past due interest.

Opinion filed May 17, 1922.

Appeal from the judgment of the District court of Barnes county,
Englert, J.

Judgment affirmed.

Combs & Ritchie, for appellants.

John O. Hanchett, for respondent.

GRACE, J. This action is a companion case to American Loan & Investment Co. v. B. P. Borass, C. A. Steberg, C. D. Olson, and Theodore T. Moen ante, 1036; 188 N. W. 302. It was presented to this court with

that case upon the same brief and argued at the same time. The decision of it is ruled by the decision in that case.

The judgment appealed from is affirmed. The respondent is entitled to its costs and disbursements on appeal.

BIRDZELL, C. J., and ROBINSON, BRONSON, and CHRISTIANSON, JJ.,
concur.

BISMARCK TRIBUNE COMPANY, Appellant, v. F. J. JOHNSON,
County Auditor of Burleigh County, North Dakota, EDWARD J.
PATTERSON, GRANT PALMS, C. L. MALONE, C. A. SWAN-
SON, and B. O. WARD, County Commissioners of Burleigh County,
North Dakota, Respondents.

(188 N. W. 308.)

Counties — county auditor is not required to secure competitive bids for printing for primary election supplies.

In the printing of election supplies for a primary election the mandatory duty is not imposed upon the county auditor to secure competitive bids, pursuant to chap. 49, Laws of 1921.

Opinion filed May 23, 1922.

Action in District court, Burleigh county, *Nuessle, J.* Plaintiff has appealed from an order sustaining a demurrer to the complaint.

Affirmed.

E. T. Burke, for appellant.

F. E. McCurdy, for respondents.

BRONSON, J. The complaint alleges, among other things, that the plaintiff is a domestic corporation and a taxpayer; that on June 28th,

1922 a primary election will be held in Burleigh County for the selection of candidates for county and state offices to be elected at the general election in November following; that it is the duty of the county commissioners to advertise for competitive bids for printing election supplies; that the defendant county auditor has pretended to make a contract with the Knight Printing Co. for printing election supplies without any competitive bids or advertising therefor, and without any agreement as to the price to be charged therefor; that the amount to be paid will exceed \$300.00 and will be paid contrary to the provisions of § 3296 C. L. 1913; that plaintiff submitted a bid in writing covering all such election supplies; that it has complied with the provisions of § 3296 C. L. 1913 as amended and is the lowest bidder for all such work. The complaint prays that the defendants be restrained from recognizing the contract of the Knight Printing Co. and from paying any moneys thereupon.

The defendants interposed a demurrer to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The trial court sustained the demurrer. The plaintiff has appealed.

The sole question presented, all procedural or other objections being waived, is whether chap. 49, Laws of 1921 (§ 3296, C. L. 1913, amended), requiring county commissioners to advertise for competitive bids, applies to printing or furnishing of election supplies. Chap. 49, Laws of 1921, provides (concerning the erection of county buildings) that the county commissioners shall make contracts therefor after advertising for bids; that the provisions of this section shall apply to all contracts for fuel, stationery, and all other articles for the use of the county, or labor to be performed therefor, when the amount to be paid for the same during any year exceeds \$300.

The prototype of this statute is first found in Territorial Laws, in § 45 of chap. 21, Levissee's Political Code, relating to counties and county officers. This section 45 requires the county commissioners to advertise for bids in the erection or repair of county buildings. It was amended by chap. 31 of the territorial laws of 1887, requiring the provisions of such section to apply to all contracts for fuel, stationery, and all other articles for the use of said county, or labor to be performed therefor, when the amount to be paid therefor exceeds the sum of \$100. It will be noted that chap. 49, Laws of 1921, has amended the territorial laws in this respect by changing the limit of \$100 to \$300.

Section 957, C. L. 1913, provides that, at all general or special elections for county, state, etc., officers, all ballots cast shall be printed and distributed at public expense as thereafter provided; that the printing of ballots and cards of instructions for the electors in each county shall be a county charge, and for municipalities a municipal charge, the payment of which shall be provided for in the same manner as other county and municipal expenses.

Section 958, C. L. 1913, provides that, except as otherwise provided in this chapter, it shall be the duty of the auditor of each county to provide printed ballots for each election for public officers, etc.

Section 964, C. L. 1913, provides that the county auditor shall, at least five days before any election, have the ballots printed, etc.

Section 966, C. L. 1913, provides that the county auditor shall cause to be printed on cards full instructions to the electors, etc.

Section 968, C. L. 1913, provides that the county commissioners shall provide, at county expense, suitable ballot boxes for each election precinct in the county.

Sections 957, 958, 964, and 966 find their prototypes in chap. 66 of the Laws of 1891. This chapter enacted the so-termed Australian Election Law for the selection of public officers at elections. Through this law the auditor in each county was made a part of the election machinery, with certain specific duties imposed concerning elections. Under this act no duties were specifically assigned to the county commissioners. Pursuant to § 496, Revised Codes of 1895, the duty was imposed, for the first time, upon the county commissioners to provide suitable ballot boxes for each election precinct at county expense. The duties imposed upon county auditors under such Australian Election Law have not been substantially changed since its enactment. It is apparent that under the Australian Election Law (chap. 66, Laws of 1891) the mandatory duty was not imposed upon the county auditor to make the county commissioners a part of the election machinery in the printing and preparation of ballots for election purposes, so as to require the printing of ballots upon competitive bidding. It is further evident that subsequent amendments and legislation have not changed the powers and duties possessed by the county auditor under the Australian Election Law with respect to the printing and preparation of ballots for election purposes. In the absence of specific legislative direction, accordingly, the powers and the duties of the county auditor concerning the printing of election supplies remains now as it did then under the Australian Election Law. It may

be noted that the provision in chap 49, Laws of 1921, requiring the submission of competitive bids, has always referred, since territorial days, to powers of county commissioners. For instance, county commissioners have the power to erect or repair county building (§ 3295, C. L. 1913). to construct and repair bridges (§ 3275, C. L. 1913). To such powers, the provisions of said chap. 49 apply. The legislature, however, has seen fit to impose upon the county auditor, not upon the county commissioners, the mandatory duty to prepare, print, and distribute election ballots. Whether or not this is wise legislation rests with the legislature, and not with the courts.

In *Knight v. County Com'rs of Cass County*, 14 N. D. 340, 103 N. W. 940, this court held that the purchasing committee, consisting of the county auditor, county treasurer, and the chairman of the board of county commissioners, authorized under § 3275, C. L. 1913 (then § 1906, R. C. 1899), to furnish blank books, stationery, and other things, necessary for the performance of the duties of county officials, were not bound, pursuant to the provisions of said chap 49 (then chap. 59, Laws of 1899) to furnish blank books, blanks, and stationery upon competitive bids; that it was only for such articles as were purchased by the board of county commissioners that contracts must be let to the lowest bidder; that the purchasing committee was not included within the restrictions of § 1925, R. C. 1895 (now chap 49, Laws of 1921). It is true that in 1899 the legislature struck out the word "stationery" in the stated provision in chap. 49, but it was reinstated by the legislature in 1905. Chap. 72, Laws of 1905. Accordingly in that case this court determined that the requirement of a competitive bid applied only to powers exercised by county commissioners, and not to a power possessed by a purchasing committee. Furthermore, chap. 49 does not include in its terms election supplies or ballots unless it be included in the phrase "all other articles for the use of the county." Election supplies, however, concern state officials as well as county officials. They serve a state use as well as a county use. It would be a strange construction to read into such phrase "election supplies," and thus to impose upon the county commissioners a specific power concerning elections which the law from its inception has not attempted so to prescribe. Although, in our opinion, there appears no objection to the county auditor exercising his discretion by requesting the county commissioners to make a contract for the printing of election supplies from competitive bids, nevertheless there is no statutory requirement making it mandatory upon him so to do. In the absence of such

statutory mandate, competitive bids are not required. *Braaten v. Olson*, 28 N. D. 235, 243, 148 N. W. 829; *Price v. Fargo*, 24 N. D. 440, 139 N. W. 1054. Furthermore, some 10 years ago the executive department construed the question presented consonant with our conclusions. See opinion of Ass't. Atty. Gen. Young on Election Supplies, April 25, 1912. Op. Atty. Gen. 1911-12, p. 131. The construction presented by the executive department upon such question is entitled to consideration by this court. See *O'Laughlin v. Carlson*, 30 N. D. 213, 218, 152 N. W. 675. The order of the trial court is affirmed, with costs.

BIRDZELL, C. J., and CHRISTIANSON, ROBINSON, and GRACE, JJ., concur.

H H. LEACH, Respondent, v. A. L. NELSON and LEILA NELSON,
Appellants.

(189 N. W. 251.)

Pleadings — presenting amendments upon the merits the real issue, should be liberally allowed.

1. Amendments to pleadings that serve to present, upon the merits, the real determinative issues, should be liberally allowed in the interests of justice and the expedition of termination of litigation.

New trial — where amendments to answer were allowed and subsequently the court erroneously ruled that the amendment was no defense, a new trial will be ordered.

2. Where, during the course of a trial, amendments to an answer have been tendered and, in part, have been allowed by the trial court for the purposes of receiving evidence, and thereafter the trial court erroneously determines that the proposed amendment allowed constitutes no defense, a new trial will be ordered.

Frauds, statute of — mortgages — where purchaser assumes debt and mortgagee agrees to look to the mortgage lien, held that mortgagors are sureties for the debt; mortgagee is bound to preserve the mortgage lien and his default is a defense to mortgagors' liability; mortgagee's duty through agreement to preserve the mortgage lien is not within the statute of frauds.

3. Where a mortgagee, knowing that the mortgaged premises are

about to be transferred to a purchaser who has assumed and agreed to pay the mortgage debt, agrees that he will look wholly to the mortgage lien for payment, it is *held*:

(a) That the mortgagors become sureties for the payment of the mortgage debt.

(b) That it is the duty of the mortgagee to preserve and protect the mortgage lien.

(c) That the failure of the mortgage to preserve and protect the mortgage lien was a defense to the liability of the mortgagors upon their note which evidences the mortgage debt.

(d) That § 7007 C. L. 1913 (§ 121 Neg. Inst. Law) requiring a renunciation to be in writing to exempt personal liability does not apply.

(e) That the consequent duty imposed upon the mortgagee, through his agreement, arises upon equitable considerations and is not within the statute of frauds.

Opinion filed May 23, 1922.

Action in District court, Ramsey county, *Burr, J.*

From a judgment ordered by the trial court the defendants have appealed.

Reversed and a new trial granted.

Flynn, Traynor & Traynor, for appellants.

The general rule is to allow amendments; to refuse is the exception. *Nashua Savings Bank v. Lovejoy*, 1 N. D. 211; *Anderson v. Bank*, 5 N. D. 80; *Bigelow v. Draper*, 6 N. D. 152; *Finlayson v. Peterson*, 11 N. D. 45; *Sheterlund v. Deal*, 12 N. D. 123; *Kerr v. Grand Forks*, 15 N. D. 294; *Barker v. More*, 18 N. D. 82.

It is the rule to interpret liberally the right to amend and that a variance between the pleading and the proof shall not be deemed material unless it has actually misled the adverse party. *Maloney v. Geiser Mfg. Co.* 17 N. D. 195; *Robertson v. Mosea*, 15 N. D. 351; *Halloran v. Holmes*, 13 N. D. 411.

"It is a defense to an action on a note by the payee against the maker that it was given under an agreement that no suit should be brought thereon against the maker." 8 C. J. 741; *Richardson v. Thomas*, 38 Ark. 387; *Monroe v. Martin* (Ga.) 73 S. E. 341.

"It is essential to an equitable estoppel that the person asserting the

estoppel shall have done or omitted some act or changed his position in reliance upon the representations or conduct of the person sought to be estopped." 21 C. J. 1080 and 1113, also 21 C. J. 1133.

"An obligation is extinguished by a release therefrom given to the creditor, upon a new consideration, or in writing, with or without new consideration." Section 5833, Compiled Laws of N. D. 1913; *National Bank v. Guthrie*, (S. D.) 78 N. W. 995.

If it appears that the facts are such that amendment can be made and that thereby on a new trial a different result would be likely, in other words, if it appears that justice has not been done, at least a new trial should be granted. *Reick v. Daigle*, 17 N. D. 365; *Welch v. N. P. Ry. Co.* 14 N. D. 19; *Mechan v. G. N. Ry. Co.* 13 N. D. 432; *Kerr v. Anderson*, 16 N. D. 36; *Aetna v. Schroeder*, 13 N. D. 10.

A. E. Wheeler, and Middaugh, Cuthbert & Smythe, for respondent.

The testimony under consideration in this case does not come within any of the recognized rules for the admission of parol testimony. Its purpose and effect was to establish a contract different in terms from that of the written contract. This testimony should have been excluded, and its admission was prejudicial error. *First Nat. Bank v. Prior*, 10 N. D. 146, 86 N. W. 362; *Sargent v. Cooley*, 12 N. D. 1, 94 N. W. 576; *Rieck v. Daigle*, 17 N. D. 365, 117 N. W. 346, 17 Cyc. 589, 644 2 Enc. Ev. 453; *Dan. Neg. Inst.* 80; 4 *Am. & Eng. Enc. Law* 2d ed. 146; See also 5889, *Comp. Laws* 1913.

It is elementary that, when separate writings are executed between the same parties at the same time, in the course and as parts of the same transaction and intended to accomplish the same general object they are construed as one and the same instrument, etc." 8 C. J. under the topic of Bills and Notes, p. 196.

The same rule is true with reference to subsequent agreements. *Foster v. Furlong*, 8 N. D. 282; *Heaton v. Myers*, 4 Colo. 59; *Swan v. Craig*, (Neb.); *Marshall Field Co v. Oren Ruffcorn*, (Ia.) 90 N. W. 618; *Bank v. Kelley*, 30 N. D. 84.

Statement.

BRONSON, J. This is an action upon a promissory note. The plaintiff is a resident of Minneapolis; the defendants reside in the state of Washington. Jurisdiction was secured by attaching certain real estate

owned by the defendant A. L. Nelson. The complaint alleges the making of a promissory note for \$1,000, secured by a mortgage upon realty in Minneapolis; that at the time of making the note there was a prior mortgage upon such realty; that such mortgage has been foreclosed and absolute title has ripened in the holder thereof, through failure of the defendants to redeem, by reason whereof the plaintiff has no security for the payment of the note. The answer admits the making and the non-payment of the note. It alleges that the mortgaged real estate was deeded to the defendant A. L. Nelson; that he gave a mortgage to the plaintiff; that thereafter the defendants obtained the plaintiff's permission to sell the mortgaged property, and his release and discharge of any further liability upon the note; that upon obtaining such release and discharge they transferred such property; that, if plaintiff has suffered any loss through the foreclosure of the mortgage, it has occurred through his carelessness and neglect in failing to make redemption.

At the commencement of the trial, the defendants moved to amend the answer by alleging that at the time of making the note it was agreed that the defendants should not be held personally liable thereon, and that the plaintiff would rely solely upon the real estate security. Upon objection of the plaintiff the court overruled the motion. Later, at the trial, the defendants again moved to amend, as above stated, and, further, that the note was delivered conditionally upon the agreement that plaintiff would not hold the defendants personally liable, that he would rely solely upon the real estate security, and that defendants would not have delivered such note excepting upon such representations and agreements. Again, the trial court, upon objection made, overruled the motion. The court stated that the defendants could show a conditional delivery but they could not vary the terms of a written instrument; that if the defense was a good defense the court would allow it. The court suggested that the defendants should make an offer of proof. The defendants requested that the court permit them to introduce their testimony over objection so that they might not be compelled to again retry the case. The trial court, expressing doubt upon the questions, stated that he would allow the introduction of the testimony. Later, when testimony was offered concerning a conditional delivery, the court stated that he had allowed the first amendment offered; that the amendment concerning the conditional delivery was still another offer which the court would reject. Defendants then offered to prove that at the time of delivering the note the plaintiff knew and agreed that the defendants were signing such

note upon the understanding that they would not be held personally liable, that the plaintiff would look solely to the real estate security for the payment thereof, and that the note should not be delivered unless he so consented. This offer was rejected. At the conclusion of the evidence the defendants again renewed their motion to amend the answer as requested, upon the ground that the evidence introduced justified such proposed amendments, and that same would not operate to the prejudicial disadvantage of the plaintiff. The court overruled the motion so far as conditional delivery was concerned and reserved ruling upon the other. Accordingly upon such issues and proposed issues there appears in the record evidence to the following effect: The promissory note was made payable at Minneapolis; it was delivered to the plaintiff at Minneapolis.

Mrs. Nelson gave testimony as follows: The defendants (makers of the note) are husband and wife. She is the mother of defendant A. L. Nelson. She has had all the transactions with the plaintiff concerning this note and the property. The plaintiff never saw the defendants. There was a farm in Polk county that stood in the name of the son. She made the arrangements to trade this land for the Minneapolis property, which was transferred by the plaintiff and the title placed in her son's name. The note in suit was given as a part of the purchase price. At the time of the original transaction, it was agreed between her and plaintiff that her son and daughter-in-law should not be held personally liable upon the note; that the plaintiff would rely solely upon the real estate security. In making this transaction she expressly told the plaintiff that she did not want her son and his wife to be held personally liable on the note, and the plaintiff made her understand that he would depend upon the lien. Later she made a deal with Rev. Scharf to trade her equity in the Minneapolis property for some land in St. Louis county. The Reverend wanted the money owing Leach to be paid. She went to the plaintiff and explained about her deal with the Reverend. She told him that she did not want her son and his wife to be held liable for any part of this debt. He stated that they would not be held liable; that he was perfectly satisfied with the mortgage; that the property was worth \$8,000 or \$9,000, and he was perfectly satisfied to take the lien upon the property. She then gave the Reverend a note for \$400 and one for \$600. She has paid the \$400 note, but not the other. She told him that the Reverend was taking over the property subject to the mortgages. She gave these notes to the Reverend instead of paying off this \$1,000 mortgage, and the Reverend agreed to pay such \$1,000 mortgage. That,

furthermore, she owed one Rogers \$2,000. He wanted a second mortgage on this Minneapolis property. He and Mrs. Nelson saw plaintiff. In their presence, plaintiff again stated that he would not hold her son and daughter-in-law personally liable. She further testified that she was not aware of the foreclosure upon the property until she was advised by Rogers after sheriff's deed was issued. Mr. Rogers testified: That in his presence the plaintiff stated to, and promised, Mrs. Nelson that he would not hold her son or his wife personally liable upon the note. That he took a mortgage upon the Minneapolis property for \$2,000. That this was subject to a mortgage for \$2,500 and the plaintiff's mortgage. The mortgage for \$2,500 was foreclosed. He had redeemed from the foreclosure within the period of time allowed after the plaintiff's period of redemption expired. That he was ready to pay plaintiff's mortgage if the plaintiff had redeemed from the foreclosure. The plaintiff testified that the note signed by the defendants was delivered to him by Mrs. Nelson. He denied all conversations and agreements to the effect that he would not hold the defendants personally liable or that he would look solely to the real estate security. He filed a notice of intention to redeem from the foreclosure. He expected to redeem. He had a client in Wisconsin whom he expected to furnish the money, but this client arrived a day too late.

The jury returned a special verdict as follows:

I. "Did the parties to this action make and enter into an oral agreement to the effect that the plaintiff would release and discharge the defendants from any liability under the note in issue and look to the real estate mortgaged for payment of the note?" Answer: "Yes."

II. "If such agreement was made, was it made at the time the note was executed or was it made some time thereafter?" Answer: "At some time after the execution of the note."

III. "Was the failure of the plaintiff to redeem from the foreclosure of the first mortgage due to his own carelessness and neglect?" Answer: "Yes."

Later, upon motion of the plaintiff, trial court-ordered judgment for the plaintiff for the full amount of the note, with interest. Accordingly, judgment was entered. The defendants have appealed therefrom.

In a memorandum opinion, the trial court based its order largely upon the ground that the defendants made an oral agreement after the execution of the note to release their personal liability thereon, and that,

under the provisions of § 7007, C. L. 1913, providing for renunciation, such agreement must be in writing.

The defendants contend that the trial court erred in not permitting the amendments offered, and in determining, pursuant to the evidence and the findings of the jury, that defendant's liability upon the note was not discharged.

Decision

During the trial, for purposes of receiving evidence, the trial court, in effect, allowed the amendment to the complaint concerning the agreement not to hold personally liable the defendants, and rejected the proposed amendment concerning a conditional delivery. This court has heretofore held that the power to amend pleadings is inherent in the courts where there is no jurisdictional defect; that the statute (§ 7482, C. L. 1913) is merely declarative of this view (*Morgridge v. Stoeffer*, 14 N. D. 430, 434, 104 N. W. 1112; *Rae v. Railway Co.*, 14 N. D. 507, 510, 105 N. W. 721); that the authority vested in courts to allow amendments to pleadings is conferred to promote the ends of justice, and should be liberally exercised by the courts to that end; that the controlling principle in determining an application to amend is, or should be, whether the proposed amendment, if allowed, would further the ends of justice, and, further, that an amendment should be allowed if it be in the interests of justice and if it does not change substantially the claim or defense. *Northwestern Mut. Savings & L. Ass'n v. White*, 31 N. D. 348, 359, 153 N. W. 972; *Patterson Land Co. v. Lynn*, 27 N. D. 391, 416, 147 N. W. 256. It is evident upon the record in this case that the interests of justice require the submission of the issue tendered concerning plaintiff's agreement if such constitutes a defense. Further, it is apparent that the trial court would have so permitted if it had considered such issue sufficient to constitute a defense.

The plaintiff, however, was entitled to proper notification of the issues with which he would be confronted, and, if necessary, to an opportunity of preparing to meet such issues. The practice of tendering new issues from time to time throughout the course of the trial, of course, may not be commended. Nevertheless, amendments should be favorably considered where they serve to present the real determinative issues without prejudice to the rights of the parties and to aid in the administration of justice and the expedition of litigation.

The note involved was made in, and was payable in, Minnesota. The Uniform Negotiable Instruments Law was adopted in Minnesota in 1913. (chap. 272, Laws 1913 Gen. St. 1913, §§ 5813—6009); in North Dakota in 1899 (chap. 113, Laws 1899) § 7007. C. L. 1913 (§ 122, N. I. L.), provides that a holder may expressly renounce his rights against any party to the instrument before, at, or after its maturity, but a renunciation must be in writing unless the instrument is delivered up to the person primarily liable thereon. The same statutory provision in Minnesota is § 5934, Gen. St. 1913.

The Negotiable Instruments Law provides that in the hands of any holder, excepting a holder in due course, the note is subject to the same defenses as if nonnegotiable. Section 6943, C. L. 1913.

Upon the record, facts might be found by a jury which would warrant the existence of legal relations between the parties other than that evidence by the contract contained in the note alone.

Concerning the mortgaged real estate, the parties occupied the relation of mortgagors and mortgagee. When the defendants, as mortgagors, sold and transferred the mortgaged property, and the purchaser assumed and agreed to pay the mortgage debt to the plaintiff, the purchaser, then, as to such debt, became the principal, and the mortgagors, the sureties. 27 Cyc. 1356; Jones on Mortgages, § 741. The mortgagors then possessed a right or claim in the mortgaged property to the extent of the plaintiff's mortgage. If they had been compelled to pay the mortgage debt, they would have been subrogated to the mortgagee's rights. 27 Cyc. 1359. "The grantee, as soon as the mortgagee knows of the arrangement, becomes directly and primarily liable to the mortgagee for the debt for which the mortgagor was already liable to the latter, and the relation of the grantee and the grantor, towards the mortgagee, as well as between themselves, is thenceforth that of principal and surety for the payment of the mortgage debt." Union Mut. L. Ins. Co. v. Hanford, 143 U. S. 187, 190, 12 Sup. Ct. 437, 438 (36 L. ed. 118, 120); Johns v. Wilson, 180 U. S. 440, 21 Sup. Ct. 445, 45 L. ed. 613, 617. See 27 Cyc. 1356; Iowa Loan & Trust Co. v. Schnose, 19 S. D. 248, 103 N. W. 24, 9 Ann. Cas. 255; Herd v. Tuohy, 133 Cal. 62, 65 Pac. 139; Fanning v. Murphy, 126 Wis. 545, 105 N. W. 1056, 4 L. R. A. (N. S.) 666, 110 Am. St. Rep. 946, 5 Ann. Cas. 435; Pratt v. Conway, 148 Mo. 291, 49 S. W. 1028, 71 Am. St. Rep. 602; Jones on Mortgages, § 740.

Upon being advised that the purchaser had assumed the mortgage debt, the plaintiff knew, as a matter of law, that he might maintain an

action directly against such purchaser to recover the amount of such mortgage debt. *McDonald v. Finseth*, 32 N. D. 400, 155 N. W. 863, L. R. A. 1916D, 149; 27 Cyc. 1349. Further, he knew that upon such transfer and assumption of the mortgage debt the relation of principal and surety would exist between the purchaser and the mortgagor, and that the lien of his mortgage and the enforcement thereof was necessary to preserve and protect the mortgagors' rights, as sureties, in such transferred property.

If it be conceded that the plaintiff was not bound to recognize this relation so as to discharge the mortgagor as to the principal debtor (*Jones on Mtgs.* § 741), yet, upon the record, the facts are sufficient to warrant a finding that the plaintiff, by his consent and voluntary action, did so discharge the mortgagors as principal debtors, and did recognize the relation of suretyship; that voluntarily the plaintiff agreed to not hold the mortgagors personally liable for the mortgage debt; that voluntarily he agreed to look solely to the mortgage lien for the payment of such mortgage debt; that the mortgagors, through their mother, made settlement with the purchaser through notes for such mortgage debt; that one of these notes, in fact, since has been paid; that through such voluntary agreement and consent of the plaintiff the defendant mortgagors parted with title, notes, and money. Thus might the mortgagors be lulled into a sense of security that both their rights and their obligations would be protected by the action of the plaintiff, satisfied to rely wholly upon the mortgage lien. Thus might they, with full reliance upon plaintiff's agreement, refrain from keeping guard to see that the mortgage security was enforced. Such an agreement was valid at least to the extent of recognizing the relation of the mortgagors, as sureties, upon the transfer and the assumption of the mortgage debt. *First Nat. Bank v. Watkins*, 154 Mass. 385, 28 N. E. 275. It recognized and gave emphasis to this secondary liability of the sureties in equity by consenting to look solely for payment to the mortgage lien. *Tripp v. Vincent*, 3 Barb. Ch. (N. Y.) 613.

The plaintiff contends that his consent and agreement, if so made, amounted to a renunciation of the mortgagors' personal liability upon the note, and as such it must be in writing, pursuant to § 7007, C. L. 1913; that principles of novation apply, to the transaction, and that a novation of the debt could not occur except by a contract in writing, since the note did not become due until two years after its execution. These contentions overlook the legal relations established between the parties

by their voluntary acts. Relations that were beyond the mere contract relation evidenced by the note. The resultant duties, rights, and obligations of the mortgagors, the mortgagee, and the purchaser arose by operation of law through their voluntary action. In such case, the duty of the mortgagee arises upon equitable considerations. *Merriam v. Miles*, 54 Neb. 566, 74 N. W. 861, 69 Am. St. Rep. 731. If the mortgagee had extended for the purchaser the time of paying the mortgage debt, or if he had released the mortgage lien knowing the relations between the parties, it is evident that it would not have required a written renunciation of defendants' liability upon the note, or that the note should have been surrendered to the defendants. Under such circumstances the mortgagee was bound to recognize the equitable rights of the mortgagors, and he could not deal with the equity of redemption prejudicial to the mortgagors' right of subrogation. *Calvo v. Davies*, 73 N. Y. 211, 29 Am. Rep. 130. See *Union Stove & Machine Works v. Caswell*, 48 Kan. 689, 29 Pac. 1072, 16 L. R. A. 85. See *Iowa Loan & Trust Co. v. Schnose*, 19 S. D. 248, 103 N. W. 22, 9 Ann. Cas. 259. Thus, should similar principles apply when the mortgage lien is lost, not through direct action of satisfaction or extension, but through neglect of duty. If the transaction be regarded as a novation, it is not within the statute of frauds because the duty consequent upon plaintiff's agreement is implied by law. *Urquhart v. Brayton*, 12 R. I. 169, 171, 20 Cyc. 282. Pursuant to these legal relations established by the parties, the plaintiff possessed a mortgage lien which was collateral security for the mortgagor's relation as sureties, so recognized by the plaintiff. It was plaintiff's duty to preserve and protect this security so that the sureties might not suffer loss. If, through his neglect, there was loss, it was proper that he be held accountable therefor to the sureties. See *State Bank v. Edwards* (N. D.) 177 N. W. 677; *Scandinavian Amer. Bank v. Westby*, 41 N. D. 276, 172 N. W. 666. Likewise, if the facts be so found by a jury, the failure of the plaintiff to perform his duty was a legal defense to the defendants for their liability upon the note. See *Hampe v. Manke*, 28 S. D. 501, 134 N. W. 60; *First Nat. Bank v. Watkins*, 154 Mass. 385, 28 N. E. 275. The amendment offered, tendering this issue, should have been allowed when tendered. The plaintiff was entitled to know and to be fully apprized, then, that it was necessary for him to meet such issue. See *Patterson v. Lynn*, 27 N. D. 391, 416, 147 N. W. 256. Accordingly, it is ordered that a new trial be granted, and that all costs shall abide the event.

ROBINSON and GRACE, JJ., concur.

BIRDZELL, C. J. (concurring in part and dissenting in part). I concur in the order of reversal and remand, and in a portion of the reasoning upon which the conclusion is based in the principal opinion. There are two propositions, however, upon which I am not in accord with the views of the majority of the court as expressed in that opinion. It is held that the trial court should have permitted an amendment to the answer, submitting an issue as to a conditional delivery of the note. The first amendment offered was to the effect that it was agreed at the time of the giving of the note that the defendants were not to be held personally liable thereon, and that plaintiff would rely solely upon the real estate security referred to in said note to make payment of the indebtedness thereby represented. The court, while denying this motion to amend in the first instance, afterwards permitted evidence to be introduced as though the amendment had been allowed. Later, during the progress of the trial, the defendants' attorney sought to show that the defendants sent the note in suit to Mary A. Nelson, mother of the defendant A. J. Nelson, to be by her delivered to the plaintiff *on condition* that the plaintiff would agree to look solely to the real estate security for payment. This evidence was objected to and the objection sustained on the ground that neither the answer nor the amendment, which the court had in effect allowed, submitted any issue as to *conditional* delivery. Whereupon the defendants' attorney made an offer of proof to the effect that the defendants authorized Mary Nelson to deliver the note to Leach if he would agree to rely solely on the real estate security, that this condition was communicated to Leach, and he agreed thereto.

The original answer submitted as defenses a release from personal liability on the note through the sale of the equity of redemption in reliance upon a release and discharge from further liability on the note. Also that plaintiff's loss, if any, was due to his own carelessness and neglect in allowing the property to be foreclosed without making redemption. I can see no error in the refusal of the trial court to permit the amendments offered at the trial, in so far as there was a refusal. In my opinion, neither of the amendments presents a defense; the first, because the evidence in support of it would contradict the terms of a written instrument. The written promise of the defendants is a promise to pay money, and of course evidences a personal obligation to that effect.

If it can be shown that there was an oral agreement whereby they should not be held liable for the payment of money, any other purported obligation of the writing could be as effectually contradicted, and there would be nothing left of the so-called parol evidence rule, and no sanctity to the written obligation. It is difficult to conceive of evidence more strongly contradictory of the terms of a note than that presented in the instant case. The note purports to be an obligation to pay money; but the evidence offered would establish that, instead of its being such an obligation, it was nothing more than a contract to allow the payee to dispose of an equity of redemption through the foreclosure of a mortgage. It could be as readily shown that a parol agreement was made whereby stock was to be received as the equivalent of the cash. This clearly could not be shown. *Perry v. Bigelow*, 128 Mass. 129.

The nature of the question is not altered, in my opinion, by the statement of substantially the same defense in terms of *conditional* delivery, as was done in the second amendment offered. The *defendants* offered to show that the condition was assented to. Hence, at the time the note was in fact delivered, it was delivered to become as effective as it ever would be at any subsequent time, and it would never become effective as an obligation to pay money. Nothing could happen in the future that would enlarge or restrict its effect under the agreement sought to be shown. The agreement, being inadmissible because repugnant to the contract contained in the note, does not become any the less repugnant by being stated in terms of conditions. To illustrate: If a contemporaneous agreement between A. and B. that a certain note delivered by A. to B. might be discharged by the delivery of a cow cannot be shown because repugnant to the note, neither could it be shown that, at the time the note was delivered, A. stated that he would not deliver it unless B. would agree to accept a cow in lieu of the money. The note being in fact delivered, the agreement in the second instance is just as repugnant to the note as in the first. The essence of the whole matter is that the so-called parol evidence rule is supposed to prevent encroachment upon the definite terms of written agreements by showing that wholly different terms were in fact agreed upon. It seems to me to be clear that the trial court did not err in denying the amendments.

There is another holding in the principal opinion with which I am not in accord. It is said that it was the plaintiff's duty to preserve and protect the security so that the sureties might not suffer loss, and that if through his neglect there was loss, the plaintiff might be held ac-

countable therefor. While I recognize the soundness of this principle, it seems to me that, in view of the facts in this case, there is danger of it being misapplied. It must be conceded under the facts here that the only neglect or failure to preserve or protect the security was that found by the jury in the special verdict, and consisted in the failure of the plaintiff to redeem from the foreclosure of the first mortgage. I am of the opinion that where a creditor holds a second mortgage as security for an obligation for which sureties are also liable to him, he would not, under ordinary circumstances, lose his rights against the sureties by failing to redeem from a first mortgage foreclosure. In other words, a creditor is not bound to advance his own funds to redeem from a first mortgage foreclosure sale in order to protect his second mortgage at the peril of losing rights against sureties who are also liable to him on the obligation secured by the second mortgage.

I am of the opinion, however, that the note in suit was legally discharged as the personal obligation of the makers if, at the time the property was sold, it was agreed between the parties that the payee would look to the property alone, and this was followed by a settlement on the basis of such contract. Under facts somewhat similar to those in the instant case, the Supreme Court of Massachusetts said (*First National Bank v. Watkins*, 154 Mass. 385—387, 28 N. E. 275, 276:

"An agreement to 'look to the mortgaged property alone for the payment of the note' would be, in effect, an agreement to discharge the defendant from all liability upon it, which if made upon a valuable consideration, would be a good defense to a suit for payment of it; although a new and independent contract, it would be unreasonable to permit a plaintiff who has made such an agreement to collect his note of the maker, and to compel the maker to seek his remedy by a suit to recover back from the payee as damages the sum which was paid. * * *

"If there was an agreement purporting to be made in reference to the defendant's sale of the equity of redemption in the mortgaged property in the form of an offer that the defendant might, if he chose, refrain from paying the note, and from taking measures to secure payment of it out of the proceeds of the mortgaged property, and that the plaintiff would look to the property alone for the payment of it, and the defendant, relying upon the offer, did refrain from making any effort to have the property applied to the payment of the note when it became due, and thereby suffered detriment, there would be a sufficient consideration for the agreement."

This reasoning, in my opinion, is applicable under the facts in the instant case.

I agree that § 7007, C. L. 1913 (§ 122, Negotiable Instruments Law), requiring renunciation to be in writing, does not apply. In my opinion, however, § 7004 (§ 119, Negotiable Instruments Law), which provides that a negotiable instrument may be discharged "by any other act which will discharge a simple contract for the payment of money" does apply.

CHRISTIANSON, J., concurs.

M. E. LOUCKS, Respondents, v. J. H. PHELPS, County Superintendent of Schools of Divide County, North Dakota, and CARL SCHULTZE, C. L. RUPPERT, and A. L. STAKESTON and G. F. LOUCKS, and CARL SCHULTZ, CHARLES BISSONNETTE AND EARL A. STORM, County Commissioners of Divide County, North Dakota, Appellants.

(189 N. W. 107.)

Schools and school districts — statute providing for the organizing new common school district held not to repeal statute for annexing territory.

Chap. 197, Laws 1919, which provides for the organization of new common school districts is construed, and it is *held*:

1. This statute did not repeal § 1146, C. L. 1913 relating to the annexation of territory to common school districts.

Schools and school districts — statute for organizing new common school district held not to permit annexing of territory.

2. The statute does not authorize the creation of a new common school district from an entire existing common school district and portions of adjacent common school districts. In other words the statute may not be used for the purpose of annexing territory to an existing common school district.

Opinion filed April 26, 1922. Rehearing denied June 5, 1922.

Appeal from the District court of Divide county, *Lowe, J.* Defendant.

ants appeal.

Affirmed.

Olaf Braatlien, State's Attorney, Divide County, and *C. J. Fisk*, for appellant.

"It is for the board to determine before taking action on such petition, whether the jurisdictional prerequisites in fact exist which such statute prescribes, but the petition need not show the existence thereof." *School Dist. v. Thompson*, 27 N. D. 464; *Greenfield School Dist. v. Hannaford* Special School Dist. 20 N. D. 397; *State ex rel. v. Clark*, 21 N. D. 523.

In the construction of statutes, it is the duty of the court to ascertain and give effect to the intention of the legislature. In order to do this, the courts are often compelled to construe "or" as meaning "and" and again "and" as meaning "or." *U. S. v. Fisk*, 70 U. S. 445, L. ed. 243; *Sutherland on Statutory Construction* § 252.

"Words and clauses in different parts of a statute must be read in a sense which harmonizes with the subject-matter and general purpose of the statute." 2 *Lewis Sutherland Statutory Construction*, 90 § 370.

Funke & Eide, for respondent.

It is well settled that the board of county commissioner proceedings under the provisions of chap. 197 of the Session Laws for 1919, has no jurisdiction and is without power to create a common school district out of any portion of a special school district. *Nicholson v. Ferguson*, 23 N. D. 153.

A paper is filed when it is deposited with the proper officer to become a part of the permanent records of his office. *Bergerson v. Hobbs* (Wis.) 71 N. W. 1056.

A paper is filed when it is delivered to the proper officer and by him received to be kept on file. *Beebe v. Morrell* (Mich.) 42 N. W. 1119; *Appleton v. Warder* (Minn.) 43 N. W. 791.

"Or" is a disjunctive particle that marks an alternative generally corresponding to "either" as "either this or that." *Austin v. Oakes*, 48 Hun. (N. Y.) 492, N. Y. S. 307.

"The word 'or' marks an alternative and generally corresponds in meaning to the word 'either.'" *Caster v. McClellan*, (Ia.) 109 N. W. 1020.

It signified that one of two things may be done, but not both. *Caster v. McClellan, supra.*

CHRISTIANSON, J. This is an appeal from a judgment in a certiorari proceeding. The writ was issued to review the proceedings of the county superintendent and the board of county commissioners acting together, and, so acting purporting to organize a new common school district. The material facts are as follows: On May 12, 1921, there was filed with the county superintendent of schools of Divide county a petition signed by more than two-thirds of the electors residing in all of sections 19 to 36, inclusive of township 163, range 95 west, and in all of sections 1 to 18, inclusive, of township 162, range 95 west praying that such territory be organized as a new school district. At the time these petitions were filed sections 19 to 36, both inclusive, of township 163, range 95 west constituted a part of the Mentor school district; section 3, the N. $\frac{1}{2}$ of section 10, the E. $\frac{1}{2}$ of section 4, and the N. E. $\frac{1}{4}$ of section 9, of township 162, range 95 west constituted the whole of Coalfield school district; and sections 1, 2, 5, 6, 7, 8, 10, 12, 13, 14, 15, 16, 17, 18, the S. $\frac{1}{2}$ of section 10, the W. $\frac{1}{2}$ of section 4 the S. $\frac{1}{2}$ of section 9 and N. W. $\frac{1}{4}$ of section 9, in township 162, range 95, constituted a portion of Brown school district. The three districts, namely, Mentor, Coalfield, and Brown, were all common school districts. The lines of the old and the

CANADA						
30	29	28	27	26	25	
31	32	33	34	35	36	
6	5	4	3	2	1	
School	MENTOR				School	
SCHOOL DIST						
7	8	9	10	11	12	
18	17	16	15	14	13	
NOONAN						
SCHOOL DIST						
30	29	28	27	26	25	
HERMIT SOG LINE						
31	32	33	34	35	36	
NOONAN RR						
6	5	4	3	2	1	
MISS						
7	8	9	10	11	12	
18	17	16	15	14	13	
19	20	21	22	23	24	
School	BROWN				Church	
SCHOOL DIST						
30	29	28	27	26	25	
31	32	33	34	35	36	

CANADA						
30	29	28	27	26	25	
31	32	33	34	35	36	
6	5	4	3	2	1	
<div style="display: flex; justify-content: space-between;"> School MENTOR School </div>						
SCHOOL DIST						
7	8	9	10	11	12	
18	17	16	15	14	13	
19	20	21	22	23	24	
30	29	28	27	26	25	
<div style="display: flex; justify-content: space-between;"> HERMIT 500 LINE </div>						
31	32	33	34	35	36	
<div style="display: flex; justify-content: space-between;"> 4 3 ON. RR </div>						
6	5	NOONAN	2	1		
<div style="display: flex; justify-content: space-between;"> WALFIELD SCHOOL DIST </div>						
7	8	9	10	11	12	
18	17	16	15	14	13	
19	20	21	22	23	24	
<div style="display: flex; justify-content: space-between;"> School BROWN Church </div>						
SCHOOL DIST						
30	29	28	27	26	25	
31	32	33	34	35	36	

“The board of county commissioners and county superintendent may organize a new school district from another district or from portions of districts already organized, if in their judgment the organization of a new district is desirable and necessary, upon being petitioned so to do

by at least two-thirds of the school voters residing in the proposed district."

Section 1148, C. L. 1913, provides:

"Whenever the board of county commissioners and county superintendent of schools shall be petitioned to organize a new school district or to change the boundaries of districts already organized, the county superintendent shall give public notice, for at least thirty days, to the residents of the districts whose boundaries will be affected by the organization of the new district, by mailing a notice to that effect to each school officer of such districts, and by publishing the same in the official newspaper of the county published nearest that district."

Upon receiving and filing the petitions, the county superintendent notified the board of county commissioners. Thereafter at a meeting of the county commissioners and the county superintendent of schools a date was fixed for hearing the petition, and notice of such hearing given as required by law. The hearing was set July 5, 1921. The petition was not filed with the county auditor until on the date of hearing. On the date fixed, namely, July 5, 1921, the parties interested appeared, and the matter was presented to the county superintendent and the board of county commissioners, but no action taken until July 30, 1921. On that day an order was entered granting the petition. In this proceeding the relator, Loucks, attacks the validity of the order so entered on the ground, among others that chap. 197, Laws 1919, does not authorize the county superintendent of schools and the board of county commissioners to create a new school district by taking an entire existing school district and adding thereto portions of other districts. This contention was sustained by the trial court, and after careful consideration we have reached the conclusion that the trial court's determination is correct.

It is apparent that a literal reading of chap. 197, Laws 1919, does not authorize this to be done. It is contended, however, by the respondents that the word "or" in the statute should be read "and," and that when so read it authorizes a new district to be formed from an entire existing school district and portions of adjacent school districts. If chap. 197, Laws 1919, was the only statutory enactment on the subject, the proposed construction would indeed have much force. Our laws, however, contain other provisions regarding the annexation of territory to existing school districts. Section 1146, C. L. 1913, as amended by chap. 213, Laws 1917, relating to the annexation of territory to a common school district, reads:

"The board of county commissioners and county superintendent of schools upon being petitioned so to do by a majority of the school voters residing in the districts whose boundaries will be affected, shall submit to the qualified voters at the next annual school election any proposal to change the boundaries of any school district or to consolidate two or more districts already organized. Upon ratification of the proposed change of boundaries the county commissioners shall arrange the boundaries as directed."

It is apparent, and it does not seem to be denied, that the real object sought to be accomplished by the organization of the proposed new school district was to annex to the then existing Coalfield school district certain territory belonging to Mentor and Brown school districts. In fact the petitions asked that the new school district be given the same number as Coalfield school district, namely, No. 16. It is conceded that a petition as prescribed by § 1146, C. L. 1913, was at no time presented to the board of county commissioners and the county superintendent of schools. Manifestly, if chap. 197, Laws 1919, can be utilized as contended for by the respondents in this proceeding for the real purpose of annexing adjacent territory to an existing common school district, then § 1146, C. L. 1913, is in effect, rendered nugatory. If possible these statutes should be so construed as to be both effective. Section 1146, C. L. 1913, has not been repealed unless it is repealed by implication. It is elementary that repeals by implication are not favored.

"It is a reasonable presumption that all laws are passed with a knowledge of those already existing, and that the legislature does not intend to repeal a statute without so declaring." Lewis Sutherland, St. Const. (2d ed.) § 267. "The intention to repeal will not be presumed, nor the effect of repeal admitted, unless the inconsistency is unavoidable, and only to the extent of the repugnance." "A later and an older statute will, if it is possible and reasonable to do so, be always construed together, so as to give effect, not only to the distinct parts or provisions of the latter, not inconsistent with the new law, but to give effect to the older laws as a whole, subject only to restrictions or modifications of the meaning, when such seems to have been the legislative purpose." "It is the duty of the court to so construe the acts, if possible, that both shall be operative." "There must be such a manifest and total repugnance that the two enactments cannot stand." "One statute is not repugnant to another unless they relate to the same subject and are enacted for the same purpose." It is not enough that there is a discrepancy between different

parts of a system of legislation on the same general subject; there must be a conflict between different acts on the same specific subject." "When there is a difference in the whole purview of two statutes apparently relating to the same subject, the former is not repealed." Lewis Sutherland St. Const. (2d ed.) § 247. "An implied repeal on the ground of repugnancy will not result in any case unless both the object and the subject of the statutes are the same; and if their objects are different both statutes will stand, though both relate to the same subject, because in such case the conflict is apparent only, and when the language is restricted to its own object, the two will run in parallel lines without meeting." 26 Am. & Eng. Ency. L. p. 727.

It is the function of the courts to interpret law, and not to make law. In the interpretation and construction of statutes the primary rule is to ascertain and give effect to the intention of the legislature. The rules of interpretation and construction quoted above have for their sole object the discovery of the legislative intent, and they are valuable only in so far as, in their application, they enable us the better to ascertain and give effect to that intent. Whenever it is necessary to effectuate the obvious intention of the legislature the courts have power to change, and will change, "and" to "or," and vice versa. But "courts" will construe 'or' as 'and,' vice versa, only where from the context or other provisions of the statute, or from former laws relating to the same subject and indicating the policy of the state thereon, such clearly appears to have been the legislative intent." 25 R. C. L. p. 978. While we are free to admit that the proposition has caused us consideration difficulty, and we are not free from doubt as to the proper interpretation of chap. 197, Laws 1919, we are satisfied that § 1146, C. L. 1913, remains in full force and effect. If this is true, can it be possible that the legislature by chap. 197, Laws 1919, intended to authorize territory to be annexed to common school districts in a manner in which they had impliedly said in § 1146, C. L. 1913, that it must not be annexed? Manifestly such construction should not be given to chap. 197, Laws 1919, unless the plain and unequivocal language of the statute requires it to be so interpreted. See *Sorenson et al. v. Tobiason et al.* (N. D.) 188 N. W. 41. That situation does not exist here. Chap. 197, Laws 1919, is couched in ambiguous language. And we do not feel justified in saying that the legislature intended thereby to provide a new mode of annexing territory to an existing common school district. In other words, we are of the opinion that when it is sought to change the boundaries of an existing common school district by annexing

thereto territory lying in adjacent school districts, the procedure is governed by § 1146, C. L. 1913.

It follows from what has been said that the judgment appealed from is right, and must be affirmed. It is so ordered.

ROBINSON, BRONSON, and BIRDZELL, JJ., concur.

GRACE, C. J., concurs in the result.

McCAULL WEBSTER ELEVATOR COMPANY, a corporation, Respondent, v. ELIZABETH HOFFMAN, ET AL., Appellants.

(188 N. W. 305.)

Mortgages — party cannot retain redemption money and deny right to redeem.

In this case it is *held*:

1. That when a party accepts redemption money he cannot deny the right to redeem and retain the money.

Mortgages — when party has taken a lien on land with active or constructive notice of a prior right, his mortgage is subject thereto.

2. That when a party takes a lien on the land, with actual or constructive notice of a prior right, his mortgage is subsequent and subject to the prior right.

Opinion filed May 18, 1922. Rehearing denied June 5, 1922.

Appeal from a judgment of the District court of Hettinger county, *Berry, J.*

Affirmed.

Jacobsen & Murray, and *J. P. Cain*, for appellants.

Subrogation can be had only upon agreement, either express or implied, that the prior lien should be kept alive for the benefit of the party

paying it. *Quaschneck v. Blodgett*, 32 N. D. 603. Especially see 616 of the opinion, from which we quote.

"It is well settled that in the absence of an agreement, express or implied, that the claims which have been paid shall be kept alive for the benefit of the mortgagee who makes the advance for such payments, no subrogation can be had."

One, who, having no interest to protect, voluntarily pays off an encumbrance upon the land of another, is not subrogated to the rights of the holder of such an encumbrance, unless there is an agreement, either express or implied, between the person discharging the encumbrance and either the debtor or the creditor, that he shall be subrogated to the rights of the encumbrancer." *Pollock v. Wright*, (S. D.) 87 N. W. 585.

"The doctrine of subrogation is not applied for the mere stranger or volunteer, who has paid the debt of another, without any assignment or agreement for subrogation, without being under any legal obligation to make the payment, and without being compelled to do so for the preservation of any rights or property of his own." Also see *Mavity v. Stover et al.*, (Neb.) 94 N. W. 834.

Otto Thress, for respondents.

"Where the proceeding is one in which the cause is retried *de novo* the judgment is vacated." 2 R. C. L. 118.

"An appeal which brings up the entire case for trial *de novo* in the appellate court operates to annul the judgment in the absence of a statute providing otherwise." *Bank of America v. Wheeler*, (Conn.) 73 Am. Dec. 683; *Stalbird v. Beattie*, 36 N. H. 455, 72 Am. Dec. 317; *Fort v. Fort*, 118 Tenn. 103, 11 Ann. Cas. 964; *Jenkins v. State* (Neb.) 82 N. W. 622.

"Where an appeal is taken, the judgment appealed from is vacated and annulled and the litigants are, with respect to their legal rights, where they were at the commencement of the suit." *Riley v. Melia*, (Neb.) 92 N. W. 913.

ROBINSON, J. This is an appeal from a judgment subjecting the mortgage liens of Carl Tallmadge and his father to the prior rights of the plaintiff because they had both actual and constructive notice of such prior liens. The facts are not in dispute. In May, 1917, the Moreau Lumber Company, of Aberdeen, S. D., owned the land in question and

contracted to sell the same to Anna Bernauer for \$1,525. She made default in payment, and the lumber company obtained a judgment foreclosing the contract unless on or before May 10, 1918, she pay or deposit with the clerk of the court the sum due, \$1,467.66. Claiming as mortgagees the right of redemption on May 10, 1918, the plaintiffs deposited with the clerk of the court \$1,467.66, and at once commenced this action and filed a *lis pendens*. In the meantime Carl Tallmadge, who was the agent of Anna Bernauer, paid to the lumber company \$1,467.66 and obtained an assignment of the judgment to himself and also a deed of the land. Then he presented the papers to the clerk of the court and received the redemption money, \$1,467.66. Then he quitclaimed the land to Anna Bernauer, and subsequently, on June 18th, put on record her mortgage to his father to secure a loan of \$2,500 and interest, and a commission mortgage to himself for \$557.50. As the trial court finds, the loan was not completed or any money paid on it until June 28, 1918, and as agent of Anna Bernauer, Carl Tallmadge received the deposit from the clerk of the court and used the same as part of the purchase price of the land. Certain it is that as agent of Anna Bernauer he received the assignment of the judgment, the deed, and the redemption money. He cannot be heard to say that he received the same as a wrongdoer.

The mortgage under which plaintiff put up the redemption money was adjudged void, but that is a matter of no consequence. A party may not accept redemption money, deny the right to redeem, and retain the money. If Carl Tallmadge did not pay to Anna Bernauer the money, or use it for her benefit, that is a matter between them. He may still have to account to her. He admits that, so far as it concerns Anna Bernauer, the judgment which gives the plaintiff a prior lien on the land is right, but claims that it is wrong in giving the lien prior to the mortgages subsequently recorded for a loan subsequently made, with actual and constructive notice of the plaintiff's prior right. In all that Carl Tallmadge did he acted as agent for Anna Bernauer, and as agent for his father, and defendants cannot deny the fact that he had actual and constructive notice of the facts. As an honest man he had no reason or excuse for defending the action or taking the appeal.

Judgment affirmed, with costs against the appellants.

BRONSON, J. (specially concurring). I concur in the affirmance of the judgment. The Moreau Lumber Company held the legal title to the

land. Anna Bernauer possessed the land under a contract for a deed from the company. Pursuant to legal proceedings had to cancel this contract, it was adjudged that the same should be canceled unless the sum of \$1,467.66 was paid on or before May 10, 1918. Theretofore Anna Bernauer made on May 4, 1917, two mortgages: One for \$2,500, recorded May 8, 1917, to E. F. Tallmadge; another a commission mortgage for \$557.50 recorded October 25, 1919, to Carl E. Tallmadge. The latter was the regular agent of the former, his father, for placing loans on real estate in North Dakota. The plaintiff had a mortgage on this land which in February, 1919, was adjudged by this court to be invalid as against Anna Bernauer. See *Bernauer v. McCaull-Webster Elev. Co.*, 41 N. D. 561, 171 N. W. 282. On May 9, 1918, Carl E. Tallmadge paid to the Moreau Lumber Company its claims against the land, namely, the amount due from Anna Bernauer, and a mortgage on the premises, all amounting to approximately \$2,700. He received an assignment of the judgment against Anna Bernauer, a satisfaction of the \$1,000 mortgage, and a deed of the land to himself. He testified that he was getting this for himself, to protect himself. At this time he had not made payment of the \$2,500 to Anna Bernauer excepting fees of \$500 guaranteed to her attorneys on April 17, 1918. On May 10, 1918, the plaintiff deposited with the clerk of court \$1,467.66, the amount necessary to redeem the defaults of Anna Bernauer under her contract. The clerk of court paid this money to Carl E. Tallmadge. He testified that he gave Anna Bernauer credit for such money so paid. On May 21, 1918, he deeded the land to Anna Bernauer. Thereafter the record title accordingly showed Anna Bernauer to be the owner of the land subject to a first mortgage for \$2,500 to E. F. Tallmadge, and a second mortgage to Carl E. Tallmadge for \$557.50.

The appellant presents the questions: First. Is the mortgage of the plaintiff, declared void by this court, prior to the mortgages of the Tallmadges? Second. Does the payment of \$1,467.66 made by the plaintiff to the clerk of court constitute a lien prior to such mortgages? I am clearly of the opinion that the plaintiff is entitled in equity to a lien prior to the Tallmadge mortgages. It is not a question of the priority, of plaintiff's making payment to the clerk of court as a redemptioner. A status must be given plaintiff's payment in accordance with the recognition accorded thereto by the Tallmadges. The son was the full agent of his father in negotiating the \$2,500 mortgage and in making payment of the loan to Mrs. Bernauer. Their statement of the disposition of this

loan shows that some moneys out of the proceeds were used in making the purchase from the Moreau Lumber Company. On May 10, 1918, it was necessary for Anna Bernauer to pay the sum of \$1,467.66 in order to retain any title whatever in the land. Manifestly the payment of \$1,467.66 by the plaintiff to the clerk operated, pursuant to the recognition given by the Tallmadges, to retain and preserve the title of Anna Bernauer. This amount was received by the Tallmadges. Pursuant thereto Carl Tallmadge gave a deed to the land to Anna Bernauer. Accordingly the basis of the title, both of Anna Bernauer and the Tallmadge mortgages, is this payment made by the plaintiff. The position of Carl Tallmadge is not aided by his contention that he bought the Moreau Lumber Company's title for himself or to protect himself. As the owner of the land and the person entitled to receive redemption money from Anna Bernauer, he could not receive this money as redemption money and at the same time claim that the person paying the same should not equitably be regarded as a redemptioner. Accordingly the actions of the Tallmadges in placing this loan and making payment thereof recognized the title of Anna Bernauer to be based upon, and to proceed from, the payment of this redemption money by the plaintiff. Principles of equity require, therefore, that the amount so paid be regarded as a lien prior to the mortgages of the Tallmadges.

The judgment of the trial court accordingly should be affirmed.

BIRDZELL, C. J., and CHRISTIANSON, J., concur.

GRACE, J. (specially concurring). I concur in the principles of law enunciated in the syllabus and in the result arrived at in the principal opinion.

JACOB GUNTHER, Respondent, v. GEORGE F. BAKER, Appellant.

(188 N. W. 575.)

Landlord and tenant — plaintiff tenant held entitled on sale of property to instructed verdict for items for improvements not in dispute.

Plaintiff leased land from the defendant. The lease contained a provision under which plaintiff might place improvements upon the land which he could remove at the termination of the lease or sell to the defendant at the cost of the materials used. Defendant sold the land to a third party who, in turn, sold to the plaintiff. Under contract between defendant and third party the latter was entitled to have a portion or all of the improvements made by the tenant, and when the latter purchased from the third party the value of the improvements entered into the consideration. It is *held*:

1. On the defendant's admission that in the sale of the land to the third party he had agreed to pay for the house, certain fences, and a windmill at the price of the materials, plaintiff is entitled to an instructed verdict for the amount of the items not in dispute.

Witnesses — correspondence between principal and agent held not privileged.

2. Correspondence between the defendant and his agent is not privileged.

Evidence — specific admission on which liability may be predicated held admissible, though accompanied by compromise offer.

3. A specific admission of fact upon which a liability may be predicated is admissible, though accompanied by an offer of compromise.

Landlord and tenant — in tenant's action for the value of improvements, instructions submitting law question as to whether defendant had agreed to purchase buildings from plaintiff was error; charge on conversion and market value, where plaintiff had expressly waived the tort, was error; failure to charge on question whether defendant sold land to third party with all of plaintiff's improvements was error.

4. The court's instructions to the jury are examined and *held* to be erroneous.

Opinion filed May 27, 1922. Rehearing denied June 5, 1922.

Appeal from the District court of Grant county, *Lembke*, J.

Judgment modified and conditionally affirmed.

W. H. Stutsman, for appellant.

Jacobsen & Murray, for respondent.

BIRDZELL, C. J. This is an action to recover the cost of certain materials used in constructing improvements upon land owned by the defendant. The plaintiff was lessee under a lease giving him the privilege to erect or construct buildings and fences at his own cost, with an option to sell the improvements to the lessor at the expiration of the lease at the cost of the materials or to remove the same. The plaintiff had judgment below for \$1,138.60, with interest. The defendant moved for a judgment non obstante, and the motion was denied. The appeal is from the judgment and from the order denying the defendant's motion.

Baker, the defendant, owned a section of land in Grant county which he leased to Gunther, the plaintiff, on October 31, 1917, for a period of three years. The lease contained the following stipulation:

"The first party has the privilege to erect or construct buildings or fences, this to be done at his own cost. Should he desire to sell these improvements made to second party at expiration of lease, these must be disposed of to second party at cost of material, or remove same at expiration of lease."

In June, 1920, Baker traded or sold the land to one Burghart, of Willmar, Minn., reserving the 1920 crop. Burghart later came to North Dakota, and, after some negotiations with the plaintiff, Gunther, a contract for deed was executed by them, dated August 5, 1920, under which Gunther remained in possession as purchaser of the land. At the time Burghart bought the land from the defendant he knew of the existence of the lease to Gunther. But the latter, the plaintiff in this action, claims that the land was sold to Burghart with the improvements upon it and in circumstances which entitled Burghart, as against Baker, to retain them. It is also claimed that the deal between Burghart and the plaintiff was consummated on the basis of the former's ownership of both the land and the improvements, and of the continued existence of any personal claim the plaintiff might have against the defendant, arising out of the stipulation in the lease concerning the improvements.

Some time after Gunther entered into the contract of purchase Baker wrote to the First State Bank of New Leipzig, requesting it to look after his crop interests. In reply to this request the bank suggested that it would probably be necessary for Baker to come out and settle up with Gunther, as he claimed that the value of the improvements which he had

placed upon the land was to be taken out of the crop. It was explained that Burghart claimed he had bought all of the improvements along with the land, and Baker was advised that Gunther was standing on his contract. It was further suggested that if it was impossible for Baker to come out the bank would obtain an inventory of the items for which Gunther was charging him under the contract that he might be able to check them up and close the matter through the mail. The bank further intimated that it had an option to buy the property, and it was therefore interested in keeping the improvements on the place. Following this there was considerable correspondence between the bank and Baker relating to the settlement, in the course of which Baker was given an itemized statement of Gunther's claims, amounting to \$1,138.60, none of which was disputed, but Baker claimed that Burghart knew what buildings and improvements he (Baker) was to buy, and that if he (Burghart) wanted any other improvements which Gunther might have placed on the land he would have to deal with him for them. Baker admitted that he was to buy the house at \$539, certain fences at \$134.50, and the windmill at \$110, aggregating \$783.50. There were further differences arising out of the disposition of the crop, certain hail insurance money, taxes, and pasture land rental, also relating to the manner of payment, which seemed to prevent settlement on the basis of Baker's proposition, although Gunther had agreed to settle for the amount stated in Baker's proposition (\$783.50). While the correspondence was being conducted, Baker was not aware of the fact that Gunther had purchased the land from Burghart. When he discovered this fact, he refused to pay on the ground that he was not obliged to pay Gunther for improvements of which he was deriving the permanent benefit. Ultimately, in January of the following year, Gunther withdrew his offer of settlement, and soon thereafter this action was brought. In the original complaint the plaintiff sued to recover only the sum which the defendant had in the correspondence, agreed to pay, namely \$783.50. But an amended complaint was filed in which it is alleged in substance that by the sale to Burghart the defendant had elected to purchase the improvements under the provisions of the lease and had become obligated to pay for them at their cost, \$1,139.40.

The appellant argues that, inasmuch as Burghart knew when he purchased the premises that Gunther was in possession under a lease, he must be held likewise to have known the latter's rights with respect to the improvements. From this it would follow that, as against Burghart,

Gunther could have removed the improvements; and consequently it is contended the latter was not justified in purchasing them from Burghart by including in the consideration a sum representing their value.

It is certain, however, that Gunther bought all the interest that Burghart had purchased from Baker, and Burghart testified that he had bought everything there was upon the land; that he told Baker there was any agreement between him and Gunther about the buildings, he would have to pay Gunther, and that in dealing with the latter he had said, if there was any agreement between him and Baker concerning the improvements, that was their business; that he was not concerned with any agreement between Baker and his tenant concerning his improvements; that Baker had sold him all of the property, reserving only the crops. In addition to this, the defendant, in his letter to the bank dated October 23d, said:

"And further if you will get an inventory of the actual cost of the material, placed on the land and send same to me, I will check it and advise you later what I will do. I supposed Gunther would be governed by the contract, and he should know that I had no intention of trying to beat him out of his property. The contract is as binding on my part as on his. I will most likely be up there later in the season, and until then you get the threshers' report on the grain threshed, and advise Gunther that he will get a full settlement with me before the first of the new year."

Later, upon the inventory of the material being furnished, and under date of December 10th, the defendant wrote:

"And now I will tell you what I will do with Mr. Gunther. I will take over the house with addition and finishing lumber, as mentioned in yours of November 5th:

Whole building as it stands at	\$539.00
The 14 spools barbed wire and 290 posts at	134.50
And the windmill at	110.00
	<hr/>
	\$783.50

"The balance of the fixings, if Burghart wants hem, the can deal for. Burghart fully knew what buildings were mine, and that I was to buy the house, barbed wire fence and the windmill of Gunther and leave them on the place. I told Burghart what building there was on the place that I knew of, and if there was more they belonged to the renter."

There is no dispute in the evidence that Gunther purchased all of the interest of Burghart, and, in the light of the defendant's admission, there could be no question as to the plaintiff's right to recover \$783.50. The sole controversy, therefore, relates to the difference between that sum and the amount of the verdict, \$1,138.60.

The evidence presents a question of fact for the jury as to whether the version of Burghart or of Baker represents the true contract between them. The plaintiff in this case has every right against Baker that Burghart would have had had he remained the owner of the land and had Gunther exercised his option to remove the improvements at the termination of the lease. It is therefore immaterial that the defendant did not know of Gunther's purchase.

It is contended that the court erred in admitting the correspondence between the defendant and the banker, who acted as his agent, as against the objection that it was privileged and that it was offered to prove a compromise. Clearly the relation between the defendant and his agent is clothed with no privilege which precludes a communication of the defendant to the agent from being used as an admission against interest. The record shows that the trial court properly restricted the correspondence to its value as containing admissions against interest. As will be noted from the foregoing statement and quotations, it did contain specific admissions with reference to the contract between the defendant and Burghart, from whom the plaintiff derived his rights. It is elementary that specific admissions which may accompany an offer of compromise are not excluded because of the circumstances in which they are made. 2 Jones, Commentaries on Evidence, § 291 (293).

The appellant complains of the instructions to the jury. Upon a careful consideration of the objections to the charge it does appear that errors were committed which require a reversal of the judgment unless the plaintiff will consent to a remission of all in excess of \$783.50, plus 6 per cent. interest from the date of the sale to Burghart. It is unnecessary to quote the charge at length. Suffice it to say that it does not properly present to the jury the issues of fact, accompanied by a statement of the controlling legal principles applicable. The instructions submit as the principal question for the jury to determine whether or not the defendant had agreed in the lease to purchase the buildings of the plaintiff. This is not a question of fact, but a question of law. The provisions of the lease are not in dispute. It charged upon the law of conversion and on the question of market value, though the plaintiff in his complaint had

expressly waived the tort, if any was committed, and there was no evidence of market value. It did not charge clearly, if at all, upon the principal question of fact, which is as to whether or not the defendant, in selling the land to Burghart, sold it with all the plaintiff's improvements or with only part of them. Upon this question the evidence is conflicting. We are of the opinion that, under the charge given, the jury could not have had a clear conception of the issues which they were to decide. Inasmuch as it is our opinion, further, that, under the evidence, the plaintiff would have been entitled to an instructed verdict for \$783.50, plus 6 per cent. interest from the date of the sale to Burghart, the order will be, judgment reversed, and a new trial granted, with costs to abide the event, unless the plaintiff shall file a remittitur of all in excess of \$783.50, plus interest and costs in the lower court. As so modified, the judgment will be affirmed. Appellant will recover costs on this appeal.

ROBINSON, CHRISTIANSON, and GRACE, JJ., concur.

BRONSON, J. (dissenting). This action is based upon the theory of a conversion, waiving the tort and claiming the right to recover the reasonable value of buildings and improvements upon an implied promise. The complaint alleges the construction of certain buildings, pursuant to a lease upon the land; the sale of the land together with such buildings by the defendant to one Burghart; that Burghart took possession thereof; that defendant had no right to sell such buildings; that defendant received the benefit of such buildings in the purchase price of such land which in good conscience he should pay to the plaintiff; that plaintiff elects to waive the tort and to hold the defendant for the reasonable value of such buildings upon an implied promise to pay the value therefor; that defendant elected to purchase such buildings; that in the month of October, 1920, he promised to pay plaintiff, for such buildings, \$1,139.40. For another cause of action, the plaintiff alleges that in January, 1921, the matter was compromised between the parties and the defendant agreed to pay the plaintiff \$783.50; that defendant failed to comply with such compromise, and the plaintiff now elects to sue the defendant for the full amount.

In order to understand the legal status between the parties, some additional facts beyond those stated in the majority opinion must be shown: Defendant, Baker, made to plaintiff, Gunther, on October 31, 1917, a

cropper's contract for a period of three years. Defendant Baker made to one Burghart, on June 18, 1920, a contract for deed covering the land, section 31, wherein he agreed to convey the same by warranty deed upon performance of the covenants, conditions, and stipulations therein contained. This contract contained no stipulation nor reference to any buildings or improvements. The record does not disclose the making of any deed from defendant, Baker, to Burghart. Burghart made to plaintiff, Gunther, on August 5, 1920, a contract for a deed covering said section, where Burghart agreed to convey the same by warranty deed upon performance of the covenants, conditions, and stipulations therein contained: This contract made no reference to any buildings or improvements. Burghart testified that he was told prior to the time of the contract with Baker that there was a renter's lease; that some of the buildings belonged to the renter; that he knew that some of the improvements belonged to the tenant. Upon direct examination he testified that he bought the buildings and improvements and took into consideration such buildings and improvements in fixing the purchase price; that he bought the real estate; that he did not know what went with the real estate in North Dakota, but in Minnesota through a warranty deed he would get the improvements. Further, he testified that after the contract was made defendant Baker mentioned that he had a contract with the renter entitling such renter to the building part; that he told Mr. Baker that such agreement was between him and the renter. The plaintiff, Gunther, testified that he never moved from the premises; that the buildings are still there; that on August 4, 1920, Burghart came out there to see him. He then told Burghart that he owned the buildings; that it was then understood and agreed that his lease provided for such buildings; that it was then understood that he should settle for the buildings with defendant, Baker, that on August 5, 1920, he bought from Burghart the land and these buildings upon it. Prior to October, 1920, and to the time of the contracts for a deed involved, there is no evidence in the record of any offer or agreement on the part of the plaintiff, Gunther, to sell the buildings, or on the part of the defendant, Baker, to buy the same. In fact, there is no evidence at all in the record, excepting the letters mentioned in the majority opinion, showing any desire to sell such buildings by the plaintiff, or any desire to purchase the same by the defendant. The first intimation of any controversy concerning the buildings is contained in a letter from the cashier, Sprecher, to defendant, Baker, dated October 20, 1920, wherein he states that Gunther is claiming, under the

contract, that Baker should pay him for his buildings on the place out of this year's crop, since the land had been sold to another man. At that time plaintiff had purchased the land through the contract for a deed from Burghart. In response to this letter, defendant Baker wrote to the bank the letter, dated October 23, 1920, mentioned in the majority opinion. The cashier, Sprecher, responded on November 5, 1920, setting up a statement of the property claimed by Gunther, aggregating in amount \$1,138.90. On November 26, 1920, this cashier again wrote that plaintiff, Gunther, had left storage tickets with the bank covering one-fourth of the crops raised that year; that Gunther desired a settlement in regard to the fences and buildings before these storage checks were turned over to Baker. In this connection it is to be noted that the farm contract provided for reception of one-fourth of the crop by Baker. At this time also it is to be noted that Baker had already conveyed by contract for deed to Burghart, and Burghart likewise had conveyed to the plaintiff Gunther. On December 4th, 1920, the cashier again wrote, requesting Baker to advise concerning his plans towards cleaning the matter up. In response to these letters of November 26th and December 4th, Baker, on December 10th, wrote the letter mentioned in the majority opinion. Subsequent correspondence involved the amount to be paid and the method of payment. Finally, on January 3rd, 1921, the cashier, Sprecher, advised Baker by letter that Gunther desired to accept the offer of \$783.50 in payment for the buildings upon the understanding that such amount should be paid in cash. On January 24th 1921, defendant Baker responded by stating that he had been trying to raise money to take care of this Gunther deal but he was unable so to do. He desired Gunther to take his note for the unpaid balance. Prior to this time, on January 19th, 1921, Gunther had written to Baker that settlement must be made within 10 days; otherwise his agreement to accept settlement would be cancelled. In the majority opinion it is stated "It is certain, however, that Gunther bought all the interests that Burghart purchased from Baker and Burkhardt testified that he had bought everything there was upon the land." "There is no dispute in the evidence that Gunther purchased all of the interest of Burghart and in the light of the defendant's admissions there could be no question as to the plaintiff's right to recover \$783.50." It is self-evident that the majority opinion assumes that upon the making of the contract for a deed by Baker to Burghart, a right title, and interest in the improvements erected by Gunther passed to Burghart. It ought to manifest that upon this record such assumption

is erroneous. When Burghart made this contract for a deed with Baker he had notice of the fact, and knew, that these improvements belonged to Gunther. At that time, as between Baker and Gunther, or, as between Burghart and Gunther, these improvements belonged to Gunther: No act of Baker's could deprive Gunther of these improvements without his consent. There is no evidence in the record that at that time Gunther had made, then or previously, any offer to sell such improvements to Baker or that Baker had agreed to buy them.

As a matter of fact, the farm contract between Gunther and Baker was then in force and the three-year-period thereof would not expire for many months after the date of the contract for a deed. The stipulation in such contract with Gunther provided that if he should desire to *sell* such improvements to Baker at the *expiration of lease* he should do so at the cost of material or, he should remove the same at *expiration of lease*. In accordance with the specific stipulation, the time had not then arrived for Gunther to sell, or, for Baker to buy. Can there be any question of the right of Gunther to have removed these improvements upon the termination of his cropper's contract as against Burghart who had notice and knowledge of Gunther's rights? Furthermore, on August 4th, 1920, Burghart was advised by Gunther, who was then in possession of the land, that these improvements on this land belonged to, and were owned, by him (Gunther). Nevertheless, on the next day, August 5th, 1920, Burghart agrees and assumes to sell to Gunther these very improvements, so claimed to be owned by Gunther, and concerning which he had direct information from Gunther to such effect. At that time it is manifest that Gunther had no idea nor thought that these improvements had either been sold to, or converted by, Baker: Otherwise, how could Gunther claim ownership therein? Manifestly, at that time, as between Gunther and Burghart, or Gunther and Baker, these improvements were then owned and claimed to be owned by Gunther. Then Burghart had no more right to sell the same than Baker had possessed. Manifestly, no act of conversion by Baker could have occurred when the improvements were continuously retained, possessed and claimed by Gunther and when the land was sold to Burghart and held by Burghart with knowledge that these improvements did belong to Gunther. Accordingly, the statement in the majority opinion that Gunther bought all the interests that Burghart had purchased from Baker can mean nothing more than such interest as Baker himself had in the land. The complaint is based upon a conversion with the tort waived and the right asserted to sue upon the

implied promise. Upon the facts, it is novel indeed to contend for a principle of law that one may continuously claim, possess, and own property, fixtures attached to land, and, at the same time, may assert successfully that such property has been converted by the mere act of the land owner in selling the land to one with knowledge of the possessor's rights in such fixtures. The only justification for the award of a judgment against the defendant has its basis in admissions made by the defendant in letters. These negotiations in the letters took place after the contracts for a deed had been made between Baker, Burghart and Gunther. Gunther throughout was in possession of his improvements. Gunther throughout claimed ownership therein. He asserted the right to recover for these improvements against Baker at a time when Baker was not informed that Gunther had purchased the land from Burghart; at a time, further, when Baker had the right to assume that he would receive his share of the 1920 crop, pursuant to the contract; at a time when the question concerning the improvements was one for another agreement between the parties, to be determined at the expiration of such farm contract. Then, Gunther had everything to gain and nothing to lose: Baker could not deprive him of his improvements against his consent; Burghart could not so do: They belonged to him, pursuant to the farm contract. He could not be dispossessed thereof except by his desire and agreement to sell. In one of his letters Baker expresses the sentiment that he was sick of his wrangling; that he would do anything to close it. This expresses a thought of compromise, not of legal liability. The deal between Baker and Burghart was in the nature of a land trade. The testimony of Burghart is neither clear nor concise concerning any express understanding that he was purchasing the improvements of the tenant Gunther. Furthermore, he expresses the sentiment in his testimony that he was entitled to such improvements because he received in his contract an agreement to convey by warranty deed and because a warranty deed conveys everything attached to the land. The record wholly fails to prove, prior to, or at the time of, the conveyance by contract to Burghart, that Gunther had agreed to sell; that Baker had agreed to buy, or that Burghart expressly understood that he was receiving these improvements which he then knew belonged to Gunther. The admissions subsequently made by Baker in his letters in an evident effort between the parties to compromise their difficulties are wholly insufficient in law or in equity to establish any conversion. This is further evident when the undisputed facts show that Gunther never for

a moment was deprived of these improvements and never for a moment relinquished his claim of ownership therein. This is not an action upon any covenants contained in the contracts for a deed. As stated before, it is based upon the theory of a conversion. In my opinion the judgment in this case simply awards to Gunther the sum of \$783.50 for improvements which he never sold nor claimed to have sold and which he always retained and possessed. Manifestly, the majority opinion is an illustration of a case where one may both have his cake and eat it. The judgment should be reversed and action dismissed.

JOHANN WUEST and EMIL WUEST, Respondents, v. G. E. RICHMOND and JOHN RYAN, Appellants.

(188 N. W. 573.)

Fraud — cause of action for obtaining note by fraud not dependent on finality and payment of transferee's judgment.

In an action for damages alleged to have been sustained by reason of the transfer by the defendants of a note obtained from plaintiffs by fraud and false representations, upon which the transferee had recovered a judgment against the plaintiffs, it is *held*:

1. The cause of action is not dependent upon the finality of the judgment against the plaintiffs nor upon its payment by them.

Fraud — judgment against wrong doer obtaining note should be contingent on payment of transferee's judgment.

2. Where plaintiffs have not actually sustained damages to the extent of paying a judgment previously obtained against them on account of defendants' wrongful act, but where the amount of such judgment furnishes a basis for the damages included in the verdict, the judgment rendered upon the verdict should not be absolute but contingent upon the plaintiffs' paying the judgment previously recovered against them.

Fraud — exemplary for damages for obtaining note by fraud recoverable.

In an action for damages sustained by reason of defendants' transfer of a note obtained from plaintiffs by fraud, exemplary damages may be recovered under Comp. Laws 1913, § 7145.

Appeal from the District court of Grant county, *Lembke, J.*

Judgment amended and affirmed.

Sullivan, Hanley & Sullivan, for appellants.

"It is the duty of the court to charge the jury, whether requested or not, upon every point material to the decision of the case upon which there is evidence, and to charge correctly and fully." *Moline Plow Company v. Gilbert*, 3 Dak. 239, 15 N. W. 1; See also 38 Cyc. 1626, 29 Cyc. 788; *Macen v. Ry. Light Co. v. Suthern Bell etc. Co.* 93 S. E. 531, 20 Ga. App. 827.

This doctrine was affirmed by this Court in the case of *Putnam v. Prouty*, 24 N. D. 517.

Jacobsen & Murray, for respondents.

Indebtedness is no defense for fraudulent acts. See *Fahey v. Esterley Harvesting Mach. Co.* (N. D.) 55N. W. 580; 3 N. D. 220; *Sutherland on "Damages"* Vol. 4, p. 3420, bottom of page; *Farnahm, Supervisor, etc. v. Benedict*, (N. Y.) 13 N. E. 784; *Metropolitan El. Ry. Co. v. Kneeland*, (N. Y.) 24 N. E. 381; *Osborne & Co. v. Ehrhard*, (Kansas) 15 Pac. 590.

"A principal impliedly ratifies a contract and transaction, with reference to negotiable instruments, where, with full knowledge of all the facts, he accepts and retains the benefits resulting therefrom, * * * or where he otherwise deals with them as his own." 2 C. J. 499, § 118; 2 C. J. 515, § 132.

BIRDZELL, C. J. Action for damages, claimed to have been sustained by reason of the transfer by the defendants of a note alleged to have been obtained from the plaintiffs by fraud and false representation, and upon which the transferee had recovered a judgment against plaintiffs. This is an appeal from the judgment for the plaintiffs, and from an order denying a motion for a judgment notwithstanding the verdict, or for a new trial.

In March, 1916, John and Emil Wuest entered into a contract with G. C. Richmond, for the purchase of a half section of land in Morton county. The land was later conveyed to Charles E. Richmond, subject to the contract. The contract embodied the usual provisions contained in crop payment contracts, requiring the purchasers to crop the land and to apply the proceeds of one-half the crop to the payment of interest on the principal sum and any surplus to the principal, reserving title in the vendor until the settlement is made each year. It stipulated for the making of certain improvements which should attach to and become a

part of the realty, and that, in the event the purchasers should fail to perform, the contract might be canceled and the vendor keep and retain all sums paid as liquidated damages. In 1917 the vendees took the entire crop from the land and made no payment on the contract. For this default, notice of cancellation, dated February 23, 1918, was served upon them. The vendees removed from the premises certain improvements. After the cancellation, the vendor leased the premises to a tenant whom the vendees subsequently sought to dispossess through forcible entry and detainer proceedings, in which they were unsuccessful. The vendor brought an action against the vendees to recover the value of the improvements removed from the premises, the value of the share of the 1917 crop which was not applied upon interest or upon the purchase price, and taxes for 1916 and 1917.

On the day that action was set for trial in the district court of Grant county, the plaintiff herein met the defendant Ryan, agent for the defendant Richmond, at the courthouse, and, after some talk regarding a settlement, the plaintiffs gave a note for \$1,200. The settlement was effected without the knowledge of the attorney for the Wuests, who was, at that time, in the courthouse engaged in the trial of a case. A few minutes after the settlement was made, however, the Wuests' attorney learned of it and demanded a return of the note, which demand was refused. It seems that the note was promptly sent to the defendant Richmond, who resided at Plainview, Minn., and by him transferred to the Plainview State Bank. At maturity an action was brought by the bank, and judgment obtained against the makers, the plaintiffs in this action. This action was then brought to recover damages based upon fraud in the procurement and transfer of the note in the circumstances indicated. The fraud alleged in the complaint consists in representations claimed to have been made by Ryan at the time he obtained the note, to the effect that he had talked with Murray, attorney for the defendants in the action then pending, and that he had said that Emil Wuest had no defense to the action and that judgment would be rendered against him for the full amount claimed; and that Murray had also stated that the defendants should sign the note for \$1,200 in settlement of the action. At the trial, evidence was offered to prove these allegations, all of which was disputed by the defendants, who claimed that the settlement was made upon the solicitation of the plaintiffs and upon a basis which was entirely fair.

The first assignment argued upon this appeal is that the verdict is excessive. It is for the sum of \$1,800, with interest at 6 per cent. from

September 13, 1921, and it is claimed that all in excess of the sum of \$1,548.63 is excessive and not supported by the evidence. The judgment against the plaintiffs, on account of the note, is \$1,405.07, with 6 per cent. interest from January 7, 1921, and the evidence in this case establishes that an attorney's fee of \$100 for defendant the suit brought by the bank on the note was reasonable. This accounts for \$1,548.63. The remainder of the verdict, approximately \$250, is accounted for as exemplary damages which, it is claimed, are not allowable. We think it clear that exemplary damages may be recovered in an action of this character under § 7145, C. L. 1913.

There are a number of assignments based upon the admission in evidence of exhibits, consisting of files in the previous litigation. We can see no merit in these assignments as, without the files, the character of the controversy, in settlement of which the defendants claim the note was given, could not well be understood. Neither can we see wherein assignments based upon the testimony of the court reporter and of plaintiff's counsel are meritorious. This testimony merely tended to explain the issues tried in the Plainview Bank Case, and, even though it might have been objectionable, we cannot see wherein prejudice could have resulted.

The other assignments based upon rulings on evidence have been carefully examined, and we find them to be without merit. The record shows that the defendants were not prevented from introducing abundant evidence to substantiate their claim, that the note was given in settlement of pending litigation, without being induced by any false or fraudulent representations. It also shows that they were not unduly restricted in cross-examining the plaintiff's witnesses.

It is argued that the court erred in refusing to grant the defendants' motion for a directed verdict, and in this connection it is pointed out that the judgment on the note is not paid, and that, at the time of this trial, there was a motion for a new trial pending. Conceding that the judgment in the action on the note was not paid and that, at the time of the trial, it had not become final, owing to the pendency of the motion for a new trial and to the fact that the time for appeal had not expired, it does not follow that the defendants are entitled to a directed verdict. The legal injury or damage which furnishes the basis for the plaintiffs' cause of action arises from the wrong done in obtaining and transferring the note in the manner hereinbefore stated. The legal injury is completed before the maker of the note is compelled to pay it, and exists so

long as there is danger that he may be compelled to pay. *Fahey v. Esterley Machine Co.*, 3 N. D. 220, 55 N. W. 580, 44 Am. St. Rep. 554. The defendants, however, are entitled to protection against the consequences of having to pay to the plaintiffs the judgment in this action and of being liable over, possibly, to the judgment creditor in the action on the note. Furthermore, it is certain that the plaintiffs will not be damaged to the extent of the amount of the judgment against them, unless they pay such judgment. In view of this situation, it is proper, if indeed it is not necessary, in such a case as this, to insert in the judgment a provision which will at once protect the judgment debtor and prevent the judgment creditor from realizing as damages an amount which he has not in fact suffered. The judgment in this case will therefore be modified by inserting a provision that it may be satisfied pro tanto by filing a satisfaction of the judgment obtained on the note, within 30 days from the time such judgment becomes final, and that no execution shall issue on the judgment herein until 30 days after the judgment in the case of *Plainview State Bank v. Wuest et al.*, becomes final. Furthermore, that if, through subsequent proceedings, the judgment of the Plainview Bank is reduced, the judgment in this case shall be reduced in like amount. See *Fahey v. Esterley Machine Co.*, supra; *Thayer v. Manley*, 73 N. Y. 305.

We have considered the assignments of error on the instructions and find them to be without merit. The judgment is amended, as hereinbefore indicated, and, as so amended, it is affirmed.

CHRISTIANSON, BRONSON, and ROBINSON, JJ., concur.

GRACE, J. (specially concurring). It appears plain that plaintiffs are entitled to maintain this action, but that the judgment should be modified to the extent stated in the main opinion. No question arises in this case relative to the equities of the plaintiffs, if any, in the land they purchased.

A. E. LANE, Respondent, v. J. W. ALDRICH, Appellant.

(189 N. W. 329.)

Statement — matters as to mistake and oversight in failing to execute lease stated.

1. Plaintiff and defendant made a parol agreement, whereby defendant should by a written agreement, lease for a term of five years a certain hotel building and seven lots, on which it was located, and by another and separate written agreement lease for the same period of time, certain garages situated on the same lots as the hotel. The lease of the hotel property was duly executed and delivered, but by a mistake and oversight of the parties, the lease of the garages was not executed.

Evidence — held that landlord could show mistake and oversight in not executing separate leases for garages.

2. The plaintiff brought action to recover the agreed rental of the garages, covering a period of five months, during which the defendant had use thereof.

It is *held* that it was not error to receive plaintiff's evidence showing the mistake and oversight.

Evidence — evidence of mistake and oversight in not executing separate lease held not objectionable as varying written instrument.

3. It is further *held* that the reception of such evidence in the circumstances in this case, was not vulnerable to the objection that its effect was to vary the terms of a written instrument.

Opinion filed June 14, 1922.

Appealed from a judgment of the District court of Barnes county, Engkert, J.

Judgment modified; and as modified, affirmed.

Combs & Ritchie, for appellant.

These negotiations or conversations had prior to the execution of the written lease, Exhibit 1, tended to vary the instrument, and were inadmissible because, under the statute, § 5889, it is presumed that the entire agreement was contained in the lease, Exhibit 1, and it superseded all proceeding or accompanying stipulations concerning the matter. *Harney v. Wirtz*, 30 N. D. 292, 152 N. W. 803; *Gile v. Interstate Motor Car*, 27 N. D. 108, L. R. A. 1915B, 109, 145 N. W. 732; *Putnam v. Prouty*, 24

N. D. 517, 140 N. W. 93; *Manganese Steel Safe Co. v. First State Bank*, 28 S. D. 426, 134 N. W. 886; *McCulloch v. Bauer*, 24 N. D. 109, 139 N. W. 318.

"Evidence which would entirely change the legal effect of the language used in the lease is not admissible in evidence to disclose a supposed intent of the grantor." *Finke v. Finke*, 37 S. D. 46, 156 N. W. 595.

"All the authorities agree that where in the absence of fraud or mistake, the parties have deliberately put their contract in writing which is complete in itself and couched it in such language as import a complete legal obligation, it is conclusively presumed that they have introduced into the instrument all material terms and circumstances relating thereunto." *J. I. Case Threshing Mach. Co. v. Loomis*, 31 N. D. 27, 153 N. W. 479; *Wynn v. Coonen*, 31 N. D. 160, 153 N. W. 980; *Reitsch v. McCarty*, 35 N. D. 555, 160 N. W. 694; *S. Spiegel & Son v. Alpirn (Neb.)* 185 N. W. 415; *Millard v. Millard*, 180 N. W. 429.

"Parol evidence cannot be received to vary the terms of a lease of dwelling house to show the intention of the parties as to the extent of the lessee's use of the lot but the intent must be found by an examination of the lease." *Merdith v. McCormick*, 175 N. W. 280.

"A written contract or lease, being plain and intelligible, evidence of what the parties said in negotiating for it is inadmissible. There being no ambiguity in the instrument, parol evidence was inadmissible to explain or vary its meaning." *Conklin v. Silfer*, (Ia.) 174 N. W. 573; *Phelps v. Brevoort*, 174 N. W. 281; *Stavanau v. Gray (Minn.)* 172 N. W. 885; *Richard v. Lee*, 171 N. W. 382; *Borchert v. Coons*, 171 N. W. 70.

"Evidence of any prior or contemporaneous parol agreement which tends to vary or contradict the terms of a lease is inadmissible." *Ency. of Evidence*, Vol. 9, p. 458; *Haycock v. Johnston*, 81 Minn. 49, 83 N. W. 494; *Armington v. Stelle*, 27 Mont. 13, 69 Pac. 115, 43 L. R. A. 125.

A. P. Paulson, for respondent.

It is a well established principle that courts of equity have power to reform written instruments to conform to the true intention of the parties. It follows that parol evidence is admissible for the purpose of showing that by reason, either of fraud or mistake, a written instrument does not truly express the intention of the parties. Hence, parol evidence is admissible to show the true intention of the parties. *Rittle v. Woodward*, 31 N. D. 113 (153 N. W. 951); *Forester v. Van Auken*, 12 N. D. 175, (96 N. W. 301); *French v. State Farmers Mut. Ins. Co.* 29

N. D. 426 (151 N. W. 7); Northwest Thresher Co. v. Hulburt (Minn.) 115 N. W. 159; Merchants v. Pielke (N. D.) 82 N. W. 878; Christ v. Diffenbach (Penn.) 7 Am. Dec. 624; 22 C. J. p. 1224; Dec. Ed. Vol. 17 on Reformation of Instruments; Greimer v. Swartz (Iowa) 149 N. W. 598.

"The distinction between actions at law and suits in equity and the forms of all such actions and suits heretofore existing are abolished; and there shall be in this state hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated by a civil action." Section 7355, C. L. 1913 and also § 7321, C. L. 1913; French v. State Farm Mut. Hail Ins. Co. 29 N. D. 426, (151 N. W. 7).

"Though parol testimony is in general inadmissible to vary a written instrument, yet equity will grant relief in cases of fraud and mistake, and carry the intention of the parties into execution, where the written agreement fails to express it." Tucker v. Madden, 44 Me. 206; Murray v. Drake, 46 Cal. 644.

GRACE, J. This is an action to recover the alleged agreed rental of \$55 per month of certain property consisting of two garages. The time for which rent is claimed to be due is from July 1, 1920, to December 1st of the same year. The plaintiff had judgment in the court below. This appeal is from the judgment.

The material facts are, in substance, as follows: During the times herein mentioned, plaintiff owned seven lots, 1 to 7, both inclusive, in block 18 of the original plat of Valley City. On the lots was a large hotel building, the Kindred. On the 29th day of July, 1920, plaintiff entered into a written lease with the defendant, apparently, whereby, according to the purport of its terms, she leased the property above described to defendant, except certain portions of it reserved in the lease. She reserved from the operation of the lease a basement on the west end of the hotel, the Kindred Pool Hall, a portion of the basement occupied by a Chinese laundry, a portion of the first floor occupied by the Straus Clothing Store, a portion of the building occupied as a hardware store, including the basement under the same, and the second story over that store. No other reservations were made. The term of the lease was for five years, commencing August 1, 1920, and ending August 1, 1925, with the right to extend the lease at its expiration for an additional

term of five years. The agreed rental per month stipulated in it was \$400. The building was to be used for hotel purposes. The lease was duly executed by both parties. Defendant entered into possession of the property under the lease.

Under the property described in the lease, also described in the complaint, are two garages. It is the claim of plaintiff that it was the intention and agreement between her and the defendant that a separate lease was to be executed, covering the two garages, which were situated on the same lots described in the lease of the hotel; that the agreed rental value of them was \$55 per month; that the term of the lease was the same as that of the other lease above mentioned; that she has been at all times willing to execute the lease of the garages and deliver the same to the defendant, pursuant to her agreement; that he has refused, and still refuses, to execute the lease. Plaintiff further claims that the agreement to lease the two garages was part of the same transaction as that represented by the lease of the hotel property, above described; that at the same time she prepared and delivered to him for inspection the lease of the hotel property and lots. She also prepared and delivered to him for inspection a lease of the garages, which also describes all of the lots described in the former lease. She claims, in substance, that the leasing of the hotel, including lots 1 to 7, and that of the garages, was intended and agreed by both parties to be accomplished by separate leases, and that at the time the lease of the hotel and of the lots above mentioned was executed by mistake and oversight of the parties the execution of the lease of the garages was overlooked or forgotten. Defendant in his answer admits entering into the written lease first above mentioned; concedes plaintiff's ownership of the premises, and that he is in possession of the premises; otherwise he entered a general denial to the allegations of the complaint. The relief demanded by plaintiff is that the defendant be required to execute the lease covering the garage buildings; that she recover judgment for \$275 for the five months' rent she alleges has already accrued, and her costs and such other relief as to the court may seem just and equitable.

While the action in some respects, from part of the relief demanded sounds in equity, yet primarily it is one to recover for the agreed rental of the garages for five months at \$55 per month. The legal query which arises is, conceding that the lease of the hotel described all the lots described in the lease of the garages, and that it was on its face apparently a complete lease, may the plaintiff show by parol testimony that it was

agreed by the parties that a separate lease should be made of the hotel, and of the garages, that these agreements were made at the same time, and that by mistake and oversight the lease of the garages was not executed? The defendant maintains that to permit the plaintiff to do so would be tantamount to permitting the terms of a written instrument—the lease of the hotel—to be varied by parol testimony. In view of the issues formed by the pleadings, we do not believe this contention is of any real significance. It is clear from the complaint and a preponderance of the evidence that plaintiff claimed to have executed and delivered the lease of the hotel property and of the lots to operate as a lease of the hotel only, and that she had theretofore prepared, as above stated, a separate lease of the garages, which she and defendant intended and agreed to have executed at the same as the one of the hotel; that the execution and delivery thereof was by a mistake and an oversight of the parties overlooked at the time of the execution and delivery of the lease of the hotel property.

The defendant having, among other allegations of his answer, interposed a general denial, this claim of the plaintiff became an issue of the fact. It is one of the principal issues of the case.

The trial court submitted two questions to the jury:

(1) Was it agreed between the plaintiff and defendant that the defendant was to pay a separate rental for the garage and barn at the sum of \$55 per month, and that he was and agreed to sign a separate lease therefor, as evidenced by Exhibit 2?

(2) If so, then was the failure to sign Exhibit 2, the unsigned \$55 a month lease for the garage and barn, an oversight? In other words, was the signing of it overlooked by and through a mistake?

The verdict of the jury returned on a form prepared for it by the court reads:

"We, the jury in the above-entitled action, find in favor of the plaintiff and against the defendant and assess her damages in the sum of \$275, with interest thereon at the rate of 6 per cent. from November 1st, 1920."

The above questions were answered in the affirmative. The verdict shows for itself; the evidence by a large preponderance sustains the contention of plaintiff. She, her attorney, Mr. A. P. Paulson, and the plaintiff's sister, Miss Kate C. Kern, testified in plaintiff's behalf. Their testimony is direct and certain, was given without equivocation, and wholly sustains the claim of plaintiff. The testimony of Mr. Paulson shows

that he prepared the two leases, Exhibit 1, the lease of the hotel, and Exhibit 2, the lease of the garages, at the same time, and delivered the same to Miss Kern, plaintiff's sister. This was on or about the 29th day of July, 1920. Within a day or two after these leases were drawn a copy or duplicate of each was handed to the defendant by Miss Kern, who was acting for plaintiff in having the leases drawn.

Mr. Paulson's testimony further shows that Exhibit 2 is in the same form exactly as prepared by him; that subsequently and in November, 1920, at the direction of the plaintiff, he called upon the defendant at the Kindred Hotel; that at that time he (Paulson) had both leases in his possession, and demanded of the defendant the rental claimed to be due under Exhibit 2; that defendant in reply said that he was unable to pay; that he inquired of the defendant if it was not true that he had these leases in his possession prior to the execution of the lease of the hotel proper, and he said yes; that he (Paulson) inquired how it happened that he had not executed the one for the garage; that he said it had been overlooked at the time they were at the bank, by himself and Mrs. Lane; that he had promised to sign it, but had submitted the matter to his attorney, and had been advised by him not to sign the lease, because he did not think the agreement was binding. He said, "I slipped one over on Mrs. Lane that time." This conversation occurred in the afternoon of the day the complaint was drawn, or on the day before, in the lobby of the Kindred Hotel.

It appears from the testimony that prior to the signing of the lease of the hotel property the plaintiff and defendant had two separate meetings at the First National Bank; that at the first meeting the plaintiff had the lease of the hotel property and of the garages with her. They did not sign either of the leases at this meeting. The plaintiff took the leases with her, and left the lease of the garages at the hotel. When she next went to the bank, she did not take this lease with her, but took with her only the lease of the hotel. At this second meeting at the bank, the lease of the hotel was signed by both parties and delivered by plaintiff to the defendants. Shortly after this, Miss Kern saw the defendant, and asked him if he had signed the lease for the garages. He said he would like to look it over, and to leave it with him for a time; that he would look it over and sign it. The defendant's testimony is largely contradictory of that offered by plaintiff. The only direct testimony on the part of defendant was that given by him, as a witness in his own behalf.

Defendant's principal contention is that parol testimony may not be

received to contradict or vary the terms of a written contract. This statement of a well-recognized rule of evidence is largely true as applied to negotiations and statements occurring prior to the execution of a written contract, with these important exceptions, viz. where the execution of it was procured by fraud, or where there was some accident or mistake in its execution. The rule upon which the exceptions rest is stated thus, in 10 R. C. L. 1056, § 251 :

"As a general rule, a person whose rights or liabilities are affected by a written contract may introduce parol evidence to show accident, mistake or fraud, where the writing fails to express the actual agreement, and to prove the modifications necessary to be made, whether such variations consist in limiting the scope of the contract or in enlarging and extending it so as to embrace land or other subject-matter which had been omitted through the fraud or mistake."

See citations of cases in note 18 of § 251.

The principal purpose of this action is to show that the lease of the hotel property covered only that property, and did not cover the garages, and that at the same time it was agreed that a separate lease should be made for each.

As we have above intimated, the plaintiff, from the relief demanded, has to that extent assumed the action in part one in equity ; we think, however, this assumption under the facts of this case not at all necessary, as the law afforded a plain and adequate remedy for the relief sought. The facts pleaded in the complaint were such as in reality stated an action at law to recover the agreed rental of the garages. The plaintiff was bound to plead the facts if they existed, which would show that Exhibit 1 covered only the lots heretofore mentioned and the hotel ; that it did not include the garages ; that the garages were to be rented under the terms of a separate lease, Exhibit 2 ; that Exhibit 2 by mistake and oversight was not executed. The facts thus pleaded and denied by the defendant in substance create an issue of law and of fact.

The action was not for the reformation of Exhibit 1. If it were of that character, the defendant's objections that certain of plaintiff's evidence should not be received for the reason that the reception of it would vary the terms of a written instrument would be of no force ; the very purpose of such an action implies of necessity the right to dispute the terms of the written instrument and to show by parol evidence that its stipulations do not express the real intentions of the parties. This action was not brought nor based upon that theory. It was based upon

the theory that there was an agreement between the parties to execute separate leases of the hotel property and of the garages, and that by mistake and oversight the latter lease was not executed, and that upon evidence establishing these facts plaintiff was entitled to recover the agreed rental of the garages for the time they have been occupied by the defendant. It is clear from the record that both parties tried the action on the theory that it was an action at law. The plaintiff by introducing evidence of the facts alleged in the complaint and the defendant by multifarious objections to the introduction of the evidence, which it was claimed, varied the terms of a written instrument, Exhibit 1. This was also the theory of the trial court. All of the questions of fact were submitted to the jury absolutely, and not for an advisory verdict. The court did not make any findings of fact nor conclusions of law, but it accepted the verdict of the jury as wholly determinative of all the issues of fact. Upon that verdict it made an order for judgment, and judgment was entered accordingly. That part of the prayer of the complaint which requests that defendant be required to execute the lease Exhibit 2 may be considered in this case mere surplusage.

That part of the judgment which grants other relief than the recovery of \$275 and costs and disbursements is broader than the issues, and the verdict upon which judgment was entered, the judgment should be modified so as to be effective as to the judgment for the amount just above mentioned.

Defendant in his brief states:

"We have assigned no less than 19 specific instances in which we claim the court erred during the progress of the trial of this action, but in the last analysis there are but four questions for determination in the case:

"First, the right of plaintiff to maintain the action under her pleadings and proof.

"Second, the error of the court in admitting both documentary and parol evidence over the objection of the defendant as entered and registered at the time the said proof was offered and received.

"Third, the error of the court in instructing the jury as pointed out in the assignments and specification.

"Fourth, the insufficiency of the evidence to sustain the verdict and judgment because of the reasons set forth in our nineteenth assignment of error."

Our previous discussion has sufficiently covered all the foregoing and

all the errors included therein, with the exception, perhaps, of those based upon instructions given by the court. The errors in this respect were based principally on the submission by the trial court in its instructions of the special questions above mentioned. We find no reversible error in any of the instructions complained of. We are of the opinion that the court properly submitted those questions to the jury in connection with all of the other facts of the case, and are further of the opinion that the instructions as a whole fairly stated the law of the case. The evidence is sufficient to sustain the verdict.

The appellant predicates error on the reception in evidence of Exhibit 3, a certain letter written by the defendant to the plaintiff, claiming that it is simply an offer of compromise unaccepted. It was offered in evidence, not for the purpose of showing any compromise or settlement, but as tending "to throw light on the original agreement." If it be conceded that the letter contained an offer in the nature of a compromise, that does not render it admissible in evidence, if it contained competent evidence for other purposes. *Kennell v. Boyer*, 144 Iowa, 303, 122 N. W. 941, 24 L. R. A. (N. S.) 488, Am. Cas. 1912A, 1127.

We are of the opinion that the reception of the letter in evidence did not in the circumstances of this case, and in view of the purpose for which it was introduced constitute prejudicial reversible error. All the assignments of error have been examined, and there is no reversible error therein.

The judgment is modified in the respect above mentioned, and, as so modified, is affirmed. The respondent is entitled to her costs and disbursements on appeal.

ROBINSON, J., concurs.

BRONSON, J. (specially concurring). I concur in the affirmance of the judgment for \$275 rent and costs. The complaint alleges the execution of a written lease covering the lots involved and the Hotel Kindred at a monthly rental of \$400. The tenendum and habendum clauses in written lease provide:

"To have and to hold said premises, as the same now are, for the purpose of conducting therein a hotel business * * * and the said lessee hereby agrees to use and occupy said premises as a general hotel and for the purpose of conducting therein a hotel business."

This written lease further requires the lessee to comply with certain ordinances and state laws covering, and applicable to, hotel properties. It further provides that the lessee mortgages the furnishings, fixtures and supplies in the hotel for purpose of securing rent payments due from time to time. The complaint also alleges an agreement for a lease covering two garages situated upon the lots described in the written executed lease; that it was the intention and agreement between the parties to execute a lease upon such two garages in the manner and form contained in the proposed lease attached to the complaint; that through mistake and oversight the parties failed to execute such lease; that the defendant took possession of the two garages, and has had possession thereof for five months, for which there is due \$275 as rent. The proposed lease offered in evidence covers two garage buildings situated on a portion of the lots mentioned in the written executed lease. The term is for five years; the monthly rental \$55. The tenendum and habendum clauses therein provide "to have and to hold the same for garage purposes for the term of five years," etc.

The answer admits the written executed lease, that the same is now in full force and effect between the parties, and that the defendant is in possession of the premises by virtue thereof. It generally denies the other allegations of the complaint.

Upon these issues, the action was tried before a jury. A general verdict was returned in plaintiff's favor. Upon this verdict the trial court made an order for judgment; that the plaintiff recover \$275 rent; that the proposed lease be declared to be the lease between the parties for the term of five years at a monthly rental of \$55; that monthly rentals commence on December 1, 1920, and continue until the termination of the lease. Pursuant to such order, judgment was entered.

As stated in the opinion of Mr. Justice Grace, two principal questions were submitted to the jury in the instructions of the trial court: First, whether there was an agreement to pay a separate rental for the garages and to execute a separate lease therefor; and, second, if there was such an agreement, whether the failure to execute such lease was through oversight and mistake. The general verdict of the jury has answered both of these questions in the affirmative. I am of the opinion that the evidence amply warrants such findings. The principal contentions of the defendant are grounded in the complaint that the trial court erred in permitting the introduction of oral testimony to vary the terms of the written executed lease. Upon such general ground, the defendant ques-

tions the right of the plaintiff to maintain the action under the pleadings and proof, the action of the trial court in admitting both documentary and parol evidence and in instructing the jury thereupon, and the sufficiency of the evidence to sustain the verdict.

It is evident that this action was treated as a law action. The trial court did not regard the verdict as advisory nor make findings. No reformation of any lease was requested. No reformation of the garage lease or the agreement therefor was necessary, in order to maintain this action for rent accrued. Although the prayer of the complaint requests specific performance, no specific performance is required in order to permit plaintiff to recover such rent accrued.

The gist of plaintiff's action, as alleged and as tried, is an action for rent for a period of occupancy by a lessee under an agreement for a lease. It is not an action to recover rent due for the hotel premises.

Plainly, if the complaint had made no reference to the written executed lease and had set up the facts concerning the agreement for the lease and the failure to execute the same through oversight and mistake, followed by an allegation of occupancy by the lessee and the failure to pay rent therefor as agreed, such complaint would state a legal cause of action for rent during the period of such occupancy. The issues otherwise submitted by the plaintiff, or the defendant, served to disturb this legal cause of action by injecting the allegation of a written executed lease, the terms of which, concerning the property described, cover the two garages.

By reason of the issue tendered upon the written executed lease, it became necessary for the plaintiff to explain and render inapplicable the specific written terms of this lease covering the hotel, in order to maintain an action for rent of the garages. To thus explain and render inapplicable the written executed lease, parol evidence was necessary. Such parol evidence was received by the trial court. This parol evidence, pursuant to the verdict, shows that the parties agreed upon two leases; one for the hotel property, another for the garages. It was the intention of the parties that these leases be executed at the same time; both for a similar term, but for different rentals; both covering the same lots, but different properties. Both leases, before execution, were drawn by the same attorney, but through a mistake only one, in fact, was executed. If both leases had been signed and delivered at the same time as the jury found that the parties intended and agreed, an ambiguity would have appeared concerning the application of the two leases. An apparent con-

flict would have appeared in the description of the real estate. Nevertheless from the surrounding collateral circumstances and extrinsic facts the leases could readily have been harmonized, and the properties in each intended to be leased identified. Parol evidence would have been admissible for such purposes.

The present action differs only in the respect that the lease for the garages was not executed. The intention and agreement of the parties nevertheless remain the same. If the written executed lease covering the hotel property had not been injected in this case, it would have been competent for the plaintiff to have proved by parol the intention and the agreement for the lease of the garages and the occupancy taken by the lessee pursuant thereto. Such parol testimony remained competent, when, upon the introduction of the written hotel lease, it served to prove an evident mistake and ambiguity therein, in connection with the garage lease.

In this respect it may be noted that the written executed lease is a lease for hotel purposes. The lessee agrees to use the premises for hotel purposes. The unexecuted lease is a lease for garage purposes. The evidence is sufficient to disclose that such purposes are different. Although the language of the written executed lease is intelligible, nevertheless, from the collateral circumstances and the parol evidence offered an ambiguity appears such as might be termed latent. *Harney v. Wirtz*, 30 N. D. 292, 304, 152 N. W. 803. For the purposes of explaining the ambiguity and the mistake which occasioned the same, parol evidence was admissible, even in an action tried to the jury. See *French v. Ins. Co.*, 29 N. D. 426, 438, 151 N. W. 7, L. R. A. 1915D, 766; *Durr et al. v. Chase*, 161 Mass. 40, 36 N. E. 741; 22 C. J. 1192. I agree with the opinion of Mr. Justice Grace to the effect that the reception in evidence of a letter written by the defendant to plaintiff did not constitute prejudicial error.

CHRISTIANSON, J. (dissenting). In my opinion the trial court erred in admitting in evidence the letter written by the defendant to the plaintiff. The letter reads as follows:

"Mrs. Lane: I have been thinking about our talk yesterday, and it seems Mrs. Lane as though as much as I have put in the hotel fixing up and what I intend doing right away or just as I can get money to do with, and of course you know it makes the building so much better, it

seems to me as though you would be doing no more than right to let the past rent go towards helping on the hotel. You know this last year has been a hard one, and I am trying hard to make all the improvements I can, both to benefit the hotel and also myself. Now you think this over and see if you don't think you could do this and still feel as though it has been spent on your property for better improvements. You know no one has made a cent this last year, and of course we all hope it will be better. I would be willing to do this if you make the one year gratis. I will be willing to start the rent the first day of Aug., paying the rate of \$25.00, which would be back rent coming to you of 4 months, Dec. 1 and continue at the rate of \$25.00 per month. Hoping you can see this as I do, and that instead of being enemies can continue to be friends, as we should be. Yours as ever. Jack."

It seems to me this letter contains merely an offer of compromise, and I fail to see wherein anything said therein can be construed as an admission on the part of the defendant that the leasing arrangement was as the plaintiff contends it was. According to the contention of the plaintiff, the defendant agreed to pay \$55 per month for the garage property from July 1, 1920. The letter was written on or about November 20, 1921. It will be noted that the defendant does not even offer to pay the rent claimed by the plaintiff in the future—his proposition is that he will pay \$25 per month from August 1, 1921, but nothing for any period prior to that.

The letter was written two days before the case was tried. It will be noted that the letter refers to a conversation had between the plaintiff and the defendant the day before the letter was written. Before the letter was received in evidence the plaintiff testified that in such conversation the plaintiff and defendant discussed the pending action, and that the defendant made her a proposition of settlement.

In a case like this, where there is a square conflict in the evidence, and where the case practically resolves itself into one of credibility of the parties, it is manifest that the admission of this letter was prejudicial. See Jones, *The Blue Book of Evidence*, § 291. Hence a new trial should be awarded the plaintiff on this ground alone. I express no opinion upon the other questions discussed in the opinions filed by the majority members.

BIRDZELL, C. J., concurs in dissenting opinion.

GEORGE W. POSEY, Respondent, v. STUTSMAN COUNTY BANK,
a corporation, and HARRY S. POSEY, Appellants.

(189 N. W. 315.)

Auctions and auctioneers—one who was hired to clerk an auction sale held not liable to owner for purchaser's failure to make settlement in accordance with advertised terms.

1. Where one was hired at a stated consideration to clerk an auction sale, with the agreement that the bank, of which he was the cashier, would take all paper at 95c on the dollar, and where, at the public auction held, a purchaser bought and received certain property without making settlement in accordance with the terms advertised for the sale, it is *held*, for reasons stated in the opinion, that the clerk was acting under a contract of employment and that the evidence failed to show any breach of duty, whether impliedly assumed or expressly contracted, by such clerk.

Opinion filed June 15, 1922.

Action in District court, Stutsman county, *Nuessle, J.* to recover on a contract. Defendants have appealed from the judgment.

Reversed.

A. W. Aylmer and *A. L. Aylmer*, for appellants.

Notwithstanding the general rule that a verdict on conflicting evidence will not be disturbed it has been held that the reviewing court will nevertheless reverse where the evidence overwhelmingly preponderates against the verdict. 4 Corpus Juris, 861 (21); *Merchants Bank v. Streep*, 186 N. W. 98 (N. D.)

Nor is it sufficient that the conflict should be in respect of some matter or question which, on all the proof is shown to be immaterial. 4 Corpus Juris, 861 (22); 4 Corpus Juris 856 (88).

An entire judgment, jointly binding on several parties if reversed as to one must be reversed as to all. 4 Corpus Juris p. 1182, (36).

The effect of several obligations is that, although they concern the same subject-matter, each obligor is liable only for his several promise, and cannot be held for the other. 13 C. J. 574, (74).

Where parties are bound severally only, their liability is separate and

distinct, and in the absence of statute they cannot be sued jointly. 13 C. J. 574 (80).

With reference to the construction of an agreement, the intention of the parties is to be deducted from the language employed by them, and the terms of the contract where unambiguous, are conclusive, in the absence of averment and proof of mistake, the question being, not what intention is expressed by the language used. 13 C. J. 524, (29); Harney v. Wirtz, 152, N. W. 803, (N. D.)

The meaning of the language used by plaintiff and defendants is a question of law for the court. 13 C. J. 787 (5).

Kelly & Morris, for respondent.

A verdict based upon conflicting evidence cannot be set aside, as unsupported by the evidence. Montana Eastern R. R. Co. v. Lebeck, 32 N. D. 162, 55 N. W. 648; Northern Trust Co. v. Bruegger, 35 N. D. 150, 159 N. W. 859; Skogness v. Seger, 35 N. D. 366, 160 N. W. 508; Clark v. Ellingson, 35 N. D. 548, 161 N. W. 199; Senn v. Steffan, 37 N. D. 491, 164 N. W. 102; Blackbody v. Maupin, 38 S. D. 621, 162 N. W. 393; 4 C. J. 864.

When the evidence in a case is conflicting and a motion for a new trial has been denied the verdict of the jury is conclusive upon appeal. Peters v. Kirkrakedes, 27 S. D. 371, 131 N. W. 316.

The appellate court will not disturb a verdict which the trial court has declined to disturb after a review of the evidence on a motion for a new trial. Thompson v. Chicago, Milwaukee & St. Paul Railroad Co., 27 S. D. 567, 132 N. W. 158; Magnuson et al. v. Linwell, et al. 9 N. D. 154, 157, 82 N. W. 746.

Statement.

BRONSON, J. The complaint alleges that on March 22, 1920, plaintiff entered into a contract with said defendants whereby said defendants agreed to clerk and take charge of plaintiff's sale; that defendants agreed to take charge of all settlements made by purchasers at said sale and to pay to plaintiff the purchase price of such lots, goods, and chattels as might be sold at said sale in cash; that defendants agreed not to permit any property to be removed from plaintiff's farm until full settlement had been made by the purchasers thereof; that on March 26, 1920, plaintiff sold at public auction, pursuant to agreement with the defendants,

certain goods, which were bought by Robert Walks as the highest bidder, for \$654.65; that Robert Walks received possession of such property and removed the same from plaintiff's premises with the permission of the defendants; that defendants had not settled for or paid plaintiff for such property; and that there remains due thereon \$654.65. The answer of the defendant Posey admits that the plaintiff employed him personally to act as clerk at plaintiff's auction sale and that he agreed to pay him for his services \$10. The bank interposed a general denial and a counterclaim upon a note for \$100. The plaintiff, in reply, generally denied the counterclaim. The jury returned a verdict of \$583.65, with interest, against both defendants, less the amount of the counterclaim with respect to the bank. The defendants have appealed from a judgment entered thereupon, and from an order denying a motion for judgment non obstante, or, in the alternative, for a new trial.

The facts necessary to be stated are as follows:

The plaintiff resided upon a farm near Courtenay, where, on March 26, 1920, he held a public sale. The defendant Harry Posey is his nephew, and was the cashier of the defendant bank. Concerning the arrangement made with the defendants, the plaintiff testified that he saw Harry Posey in the bank; that he told him he would employ him to clerk the sale, if he would do it reasonably; that Harry Posey agreed to clerk the sale for \$10, and that the bank would take the paper at 95 cents on the dollar, all of it; that there would be no charge for the cash to be paid at the sale. This was four or six days prior to the sale. The plaintiff proceeded to get out auction bills and to post the same. These bills stated the terms of sale to be:

"All sums of \$15 and under, cash; over that amount, time given until October 1, 1920, on approved security. No goods to be removed until settled for. All goods and stock at owner's risk as soon as sold."

The plaintiff employed an auctioneer, and for his services paid him 1 per cent. of the total amount resulting from the sale. At this sale one Robert Walks bought various items of property, amounting to \$654.65. Harry Posey clerked the sale. Plaintiff paid him \$10 for his services. There is evidence in the record to the effect that, prior to the sale, Harry Posey advised Robert Walks that whatever he purchased at such sale must be settled with cash; that Walks advised him about a land deal in which he was then concerned, whereby he would secure some money in a few days, or possibly two weeks; that Harry Posey told him this was all right. However, Harry Posey maintains in his testimony that he

continuously advised Mr. Walks that he would have to pay cash, and also so notified the plaintiff. At the time of the sale Walks intended to move upon plaintiff's farm. Later, within a short time, he did move upon such farm. After the sale, no settlement was made by Walks with Harry Posey or the plaintiff. No settlement has ever been made, either in cash or upon approved security. Harry Posey's testimony is to the effect that he demanded settlement in cash, and advised plaintiff not to permit removal of property until settlement was made. Plaintiff's testimony is to the effect that he had nothing to do with the settlement. He received no advice from defendant Posey that settlement must be made in cash; that he expected all property sold at such sale to be paid either through cash received at the sale or by the defendant bank, whose business it was to see that approved security was given or to refuse permission to a person to bid if the condition were otherwise. After the sale Walks made an exchange of two horses, which he bought at the sale, for some other property of the plaintiff, pursuant to an agreement between them. The testimony is that this was satisfactory to the defendants. All of the property, excepting two horses or two colts, so bought by Walks, remained upon the premises, although it appears that Walks assumed to and did take charge of such property. It appears that some negotiations were thereafter had for purposes of making settlement with Walks but no settlement occurred. It appears, further, in the testimony, that the plaintiff, during the sale, was engaged in looking after the providing of a lunch, and with details concerning the presentation of the property for sale. It appears, also in the evidence, that at this sale the plaintiff had a by-bidder to bid on some horses, which he desired to keep and retain, up to a certain figure; that upon two sales the purchasers credited their respective accounts owing by the plaintiff; that one purchaser paid the plaintiff direct. This lawsuit has resulted through the failure of Walks to make settlement for the goods purchased at this auction sale.

Decision.

The complaint, if it alleges any cause of action, sets up a contract of employment involving principles of agency and violation of such contract of employment through failure to perform contract duties assumed. As such, it must be construed to allege an action to recover damages for violation of instructions and breach of duty. See 2 C. J. 886, 909. In this regard the gist of plaintiff's cause is the alleged agreement by the

defendants to take charge of all settlements, and not to permit any property to be removed from plaintiff's farm until full settlement therefor had been made.

Although it is alleged in the complaint, the evidence fails to disclose any specific agreement whereby defendants agreed not to permit any property to be removed from plaintiff's farm until full settlement therefor had been made. In accordance with plaintiff's testimony, he employed the defendant Posey to clerk his auction sale, with an understanding that the bank, of which Harry Posey was cashier, would take all of the paper at 95 cents on the dollar. Otherwise, he testified that Harry Posey was to pass upon the paper that should be accepted by the bank. It is true that he otherwise testified that it was the business of Harry Posey to see that no one bid at the sale, unless he would pay cash, or unless his paper would be acceptable to the defendants; that, if one were permitted to bid, the acceptance of such bid would constitute a sale. As the evidence discloses, however, such statement of the plaintiff was his mere conclusion upon the agreement that he had made with Harry Posey and concerning the duties imposed as clerk of the sale. Upon the record the defendant Harry Posey, whether representing himself alone or as the agent of the bank, as an employee of the plaintiff, as his agent, in clerking the sale. As such employee he was not an insurer. He was merely bound to exercise reasonable care, skill, and judgment. 21 R. C. L. 825; 18 R. C. L. 502, 503.

The sale was conducted by the plaintiff, not the defendants. The auctioneer was employed by the plaintiff. The terms of the sale were specified by the plaintiff. The evidence does not show that the defendants, or either of them, pursuant to the agreement made, or otherwise, guaranteed the payment of cash or the tender of approved security by any of those who might bid at the sale. The defendant Harry Posey acted as a mere clerk of the sale, with the additional duty and right to pass upon security that might be tendered by bidders who desired to buy. It is apparent that the plaintiff in certain cases dealt individually with bidders. He had a by-bidder present for the purpose of bidding at the sale. In one case he settled direct with the purchaser. Some debts owing by the plaintiff were offset against purchases made by the bidders. The evidence fails to disclose that Walks, after the sale, tendered any approved security. After the sale he proceeded to trade some other property for two horses bought by him at the sale. Consent to such proceedings, if given by the clerk of the sale, was consent as plaintiff's

agent, not as an independent contractor. There is a failure of proof to show any agreement not to permit delivery of the property to bidders, and to show any breach of duty, whether impliedly assumed or expressly contracted, by the defendant Harry Posey in making settlement concerning the Walks purchases.

The judgment is reversed, plaintiff's action dismissed, and judgment ordered to be entered in favor of the defendant bank for its counterclaim, with costs.

CHRISTIANSON and ROBINSON, JJ., concur.

GRACE, J., concurs in the result.

BIRDZELL, C. J., dissents.

ROBINSON, J. (concurring specially). This action has no legal basis on which to rest. The complaint does not state a cause of action. It avers that in March, 1920, the plaintiff employed defendants to clerk and take charge of an auction sale to be held on plaintiff's farm, some twelve miles from Courtenay, N. D. on March 26, 1920; that defendants agreed to take charge of all settlements made by purchasers, to pay plaintiff the price of goods sold for cash, and not to permit any property to be removed from the farm without full settlement; that at the sale plaintiff put up a lot of goods and chattels which were sold to the highest bidder for \$654.65; that the bidder was Robert Walks; that he received possession of said property and removed the same, with the permission of defendants, and did not settle or pay for it.

Now those facts do not constitute a cause of action. There is no showing that defendants, or anyone, converted or damaged the property or did anything to impair the plaintiffs title. There is no averment concerning the value of the property or any damage resulting from the removal. There is no averment that either defendant agreed to pay for the property or that either did any injury to the plaintiff. Turning from the complaint to the evidence, we have this showing: The plaintiff was about to have an auction sale at his farm near Courtenay, where the bank is located. He agreed with Harry Posey to clerk the sale and it was agreed that the bank should accept at 95 cents on the dollar such notes

as Harry Posey should approve. The plaintiff was present at the sale and was assisted by his son and a grandson. He hired his auctioneer, set up a lunch, and had general supervision of his property. It is true that at the sale Walks bid on a lot of property for which he did not give a note, pay cash, or make any settlement, but did not thereby obtain any title to the property. It is still the property of the plaintiff, unless by his own acts or laches his title has been lost. For several days after the auction sale the property remained on the plaintiff's farm and it was not removed without his acquiescence or consent. There was no deception. He knew well that Walks never settled for the property or paid anything on it. He knew that the bank had expressly refused to accept any note of Walks. If the plaintiff permitted Walks to take the property, it was his own affair. He had no right to expect and did not expect either defendant to remain on the place and to guard the property after the sale. There is no averment or claim that the property was sold to Walks on credit or for cash, or that by removing or taking possession of the property he acquired any title. There was no sale to him.

CHRIST REINKE and THE ELLENDALE NATIONAL BANK, a corporation, Appellants, v. NORTHWESTERN FIRE & MARINE INSURANCE COMPANY, a foreign corporation, and GEORGE HARMS, doing business as Harms Piano Company, interpleaded as party defendant, Respondents.

(189 N. W. 111.)

Interpleader — order of intervention permitting uninterested party to retire, held proper.

This is an appeal from an order of intervention which appears to be in all respects duly made. Under contracts with plaintiff Reinke, the bank and the intervenor claim the same money. The order of intervention in no manner determines the merits of the adverse claims. It simply permits the Insurance Company to pay the money into court and retire from a contest in which it has no interest.

Opinion filed June 16, 1922.

Appeal from an order of the District court of Dickey county;
McKenna, J.

Affirmed.

F. J. Graham, for appellants.

To maintain interpleader it is necessary that the plaintiff make demand upon the defendant for the same debt or property as the person not a party to the action. Section 7414 of the 1913 C. L. of North Dakota.

Debt is a legal liability to pay a specific sum of money, a sum of money reduced to a certainty and distinguished from a claim for uncertain damages. Interpleader cannot be maintained in an action not within the permission of the statute. Section 7414 of the 1913 C. L. of North Dakota; *North Pacific Lumber Co. v. Lang*, 28 Ore. 246, 52 Am. St. Reps. 780, 42 Pac. 799; *U. S. Victor*, 16 Abb. Pr. 153; *Am. Telegraph and Cable Co. v. Day*, 20 Jones & S. 128, 3 Kerr's Cyc. Civ. Proc. of Cal. part 1, § 386, notes 67, 85, 100 and 108, pp. 419-431.

Interpleader must show that he has no remedy at law. 1 Wait Pr. 169-179.

The complaint controls as to the nature of the action. C. L. 1913, § 7414, *Braithwaite v. Akin*, 3 N. D. 385.

W. S. Lauder, and *E. E. Cassels*, for respondent.

Originally interpleader was accomplished by an action in equity. R. C. L. Vol. 15 p. 221 et. seq.; *Conn. etc. Ins. Co. v. Tucker*, 23 R. I. 1, 49 Atl. 26, 91 A. S. R. 590-593 and note; *Stephenson et al. v. Burdette et al.* 56 W. Va. 109, 10 L. R. A. (N. S.) 748 and extensive note; *Pittsburgh etc. Co. v. Aukron*, 97 S. E. 593, 5 A. L. R. 1157 and note 1162; *Fouch v. Prudential Ins. Co. of Am.* 204 N. Y. 281, 28 A. & E. Ann. Cas. 1191 and note 1196; Cyc. Vol. 23, p. 35; *N. W. Mut. Life Ins. Co. v. Kidder*, 162 Ind. 382, A. E. & Ann. Cas. Vol 1, p. 509 and note at 513; *Michigan Trust Co. etc. v. McNamara*, 165 Mich. 200, 130 N. W. 653, 37 L. R. A. (N. S.) 986 and note; *Bayerischen et al. v. Knaus*, 75 N. J. Eq. 363, 138 A. S. R. 573.

It is well settled that where a party agrees to insure property for the benefit of another and in violation of such agreement he insures the property for the benefit of himself and the insurance company is notified of such agreement such other party has an equitable lien upon the in-

insurance money which can be enforced in a court of equity, and this is the case whether the agreement was embodied in a writing such as in insurance clause in a mortgage or whether it rests entirely in parol. *Dunne*l's Minn. Dig. 6275; *Ames v. Richardson*, 29 Minn. 330; *Fetters Equity*, 27; *Second Beach, Ins.* 584; *Pingree on Mortgages*, 582; *Jones on Mortgages*, Vol. 1, (3d ed.) § 402.

Tiffany on Real Estate, 1209; *Hanson v. Blake*, 135 Fed. 342; *Nordyke v. Grey*, 113 N. E. 683, (Ind.); 62 Kans. 163, 25 L. R. A. 305; See note to the case last cited as appearing in 25 L. R. A. 305; *Thorpe v. Creto*, 79 Vt. 390.

A parol agreement of present insurance is valid and may be specifically enforced. *Quinn v. U. F. & G. Co.* 142 Minn. 428; *Kovisto v. Bankers & Merchants Fire Ins. Co.* 181 N. W. 580, (Minn.); *Cromwell v. Brooklyn Fire Ins. Co.* 44 N. Y. 42; *Bernard v. U. L. Ins. Co.* 66 N. Y. St. Rep 521; *Teutonic Ins. Co. v. Ewing*, 90 Fed. 217.

It is true that the interpleader does not claim the whole of the insurance money but that is not material. *School Dist. v. Weston*, 31 Mich. 85; *Trenton Schools v. Heath*, 15 N. J. Eq. 22; *Wakeman v. Kingsland*, 46 N. J. Eq. 113; *Lanigan v. Bradley & Courier Co.* 50 N. J. Eq. 202; *Board v. Duparquet*, 50 N. J. Eq. 234; *Packard v. Stephens*, 59 N. J. Eq. 489.

It is immaterial that the claim of one claimant is actionable at law and the other one in equity. *Gibsen v. Goldwaite*, 7 Ala. 291; *Newhall v. Castens*, 70 Ill. 156; *Richards v. Salter*, 6 Johns Ch. 445; *Dixon v. National Life Ins. Co.* 168 Mass. 48; *Brierly v. Equitable Aid Union*, 170 Mass. 218.

ROBINSON, J. In July, 1921, the insurance company made to Reinke an insurance policy for \$1,000 on personal property. In August, 1921, the property was destroyed by fire, and in November, 1921, the loss was adjusted at \$882.47. After the loss the intervener notified the insurance company of a claim to the insurance money under a contract with Reinke; that is, under a mortgage by which Reinke had agreed to keep the property insured for the benefit of the intervener. In due time after the commencement of the action there was served a notice and affidavit showing the claim of the intervener. It was under this statute (C. L. § 7414):

"A defendant against whom an action is pending upon a contract
* * * may, at any time before answer upon affidavit that a person not

a party to the action and without collusion with him makes against him a demand for the same debt or property, upon due notice to such person and the adverse party, apply to the court for an order to substitute such person in his place and discharge him from liability to either party on his depositing in court the amount of the debt."

The insurance company made such an affidavit, and on due notice the court made an order that the company be discharged on depositing in the court the amount of the debt, \$882.47, and that the intervener be made a party to the action. Reinke and the bank appeal from the order. The error assigned is that the court erred in making the order because the affidavit of the insurance company is not sufficient, but there is no specification or showing of any insufficiency. In the brief of counsel for appellants we look in vain for any claim or showing that the affidavits do not comply with the statute. The brief argues the merits of the claim made by the intervener, contending that the action is on an adjustment of the loss and not on the insurance policy, and that, as the intervener was not a party to the adjustment, he cannot be made a party to the action. But the reasoning is too refined. The action is on the policy as well as on the adjustment, and, if the intervener had any legal claim to the money due on the policy, it was not competent for the appellants to adjust away the rights of the intervener. The showing is that the bank and the intervener claim the money due from the insurance company, and that the claim of each is based on a contract with Reinke. The order in question does not affect the substantial rights of either the plaintiff or the intervener. It leaves them entirely free to contest their rights to the insurance money, and at the same time it relieves the company from a contest in which it has no interest. Without any order of intervention the insurance company had a perfect right to give the intervener notice of the action and to tender him the defense of the same so as to bind him by the judgment, and that is the legal effect of the order of intervention.

The argument that the claim of the plaintiff bank is superior to that of the intervener is not relevant to this appeal. That is to be determined in subsequent proceedings. The order of intervention in no manner determines the merits of the adverse claims to the money. It simply permits the company to pay the money into court and retire from a contest in which it has no interest. Order affirmed.

BIRDZELL, C. J., and CHRISTIANSON, BRONSON, and GRACE, JJ., concur.

ANGELINE MALHEREK, Plaintiff, v. THE CITY OF FARGO, a
Municipal Corporation, Defendant.

(189 N. W. 245.)

Appeal and error — question not certified by district to Supreme Court, unless determination of cause depends on doubtful construction of law.

1. Chap. 2, Laws 1919, providing for the certification of questions of law to the Supreme Court is applicable, and intended to be invoked only where in a pending cause, at issue, it becomes apparent that the determination of the cause will depend principally or wholly upon the construction of the law applicable thereto, and such construction or interpretation is in doubt and vital, or of great moment in the cause.

Appeal and error — questions of law certified to Supreme Court must not involve examination of evidence and determination of sufficiency thereof; questions certified to Supreme Court must be distinctly stated.

Questions of law certified to the Supreme Court under chap. 2, Laws 1919, must not involve an examination of the transcript of the evidence and a determination whether the evidence is sufficient to establish either a cause of action or some ultimate fact required to be established by a party to the action. In other words, the question of law certified "must be clearly stated and not involve questions of fact, or those of mixed law and fact. It must be distinctly stated so that it can be determined by the Supreme Court, without regard to other issues of law or fact."

Opinion filed June 16, 1922.

Case certified from District court of Cass county, *Cole, J.* Action by Angeline Malherek against the City of Fargo.

Proceedings dismissed.

Taylor Crum, for plaintiff.

W. H. Shure, for defendant.

CHRISTIANSON, J. This case is before us upon a certified report of one of the district judges of the first judicial district in this state. Upon the oral argument, defendant's counsel moved that the proceeding be dismissed on the ground that the record here does not present a case within the statute, and the rules of this court relating to certification of

questions of law to the Supreme Court. After careful consideration, we have reached the conclusion that the motion should be granted.

This action was brought to recover for injuries which the plaintiff claims that she sustained on the evening of January 11, 1921, as a result of an accumulation of ice upon a sidewalk in said city. The case came on for trial in the district court of Cass county, before the court and a jury duly impaneled to try the same. Witnesses were sworn and testimony taken. A transcript of the testimony so taken covers some 30 pages of the transcript certified to this court. At this point of the trial the question arose as to whether the plaintiff had or had not established such knowledge on the part of any officer of the city as to charge the city with liability under chap. 70, Laws 1915. Plaintiff's counsel in effect stated that he had no other or additional testimony bearing on the question of knowledge on the part of any officer of the city than that which had already been introduced; the trial court ruled that the showing made was insufficient and thereupon dismissed the case and discharged the jury. Subsequently the plaintiff moved that the order of dismissal be vacated and that, in event of a denial of such motion, the question which arose upon the trial and occasioned the dismissal of the action be certified to the Supreme Court. The trial court granted the application to certify, and has transmitted to this court a certificate, the material portion of which read as follows:

"This cause is one brought by the plaintiff against the city of Fargo for damages for personal injury, and the defendant city interposed a defense that raised the issue of law now certified at the request of the plaintiff and on the court's own motion under chap. 70 of the Laws of 1915, which reads as follows: 'All municipalities in the state of North Dakota shall be absolutely exempt from all liability to any person for damages for injuries suffered or sustained by reason of accumulation of snow and ice upon sidewalks within such municipality, unless actual knowledge of the defective, unsafe or dangerous condition of such sidewalk or cross-walk shall have been possessed by the mayor, board of city commissioners, police officer or marshal of such municipality forty-eight hours previous to such damage or injury, and such actual knowledge shall in no case be presumed from the fact of the existence of such condition, but in all cases the same shall be proved as an independent fact. In no event shall any municipality in this state be liable in damages for any injury occasioned through the mere slippery condition of such sidewalk, or cross-walk due to the presence of frost or loose snow thereon.'

The transcript herewith certified to the court as a part of the record herein, consisting of 35 typewritten pages, contains all of the evidence in reference to the claim of notice to the defendant city under chap. 70 of the Laws of 1915, aforesaid. The cause was dismissed by the court after the plaintiff had stated that the testimony as in the transcript herein transcribed was all the testimony and is all the testimony that the plaintiff could and can produce as to notice to the city.

The plaintiff contended and contends that the testimony of Con Keefe and and Gaadson Loucks as to the notice to the defendant city is sufficient and was sufficient to take the question of such notice to the city to the jury, together with the other issues. The court, having ruled otherwise and dismissed the cause, and it being in doubt as to the correctness of its ruling upon the issue of notice and the correct interpretation of the law in that respect, being the vital and one controlling matter of law as to the right of the plaintiff to recover, such ruling of this court is now and hereby certified to the Supreme Court for its determination.

The trial court is and was of the opinion that the Legislative Assembly has full right and power to pass an act, if it should so determine to do, saying that no municipality would be liable in any event for injury to persons on account of defective conditions, either in the sidewalks themselves, or by reason of ice and snow thereon, and such being the judgment of the court as to the power of the Legislative Assembly, it further held and now holds that the language contained in chap. 70 of the Laws of 1915 should be given full force and effect, and, being so given full force and effect, that the evidence was insufficient and is insufficient to take the questions of actual knowledge, such as is demanded and required under chap. 70 of the Laws of 1915, to the jury.

The case was dismissed upon the ruling by the court that there was not and is not sufficient evidence to go to the jury upon the question of actual knowledge of the city through Policeman Keefe, within the provisions of the law of 1915 aforesaid, and the correctness or incorrectness of the ruling of the court is and will be determinative of the cause at issue."

The purpose and effect of the statute relating to certification of questions of law to this court has been considered by this court in former cases. See *Stutsman County v. Dakota Trust Co.*, 178 N. W. 725; *Guilford School District v. Dakota Trust Co.*, 178 N. W. 727. See, also, rule 17, District Court Rules of Practice. The statute was enacted by

the legislature in 1919. See chap. 2, Laws 1919. The title of the act reads thus: "An act to provide for the certification of questions of law to the Supreme Court in civil and criminal cases where the determination of such questions may determine the issues in a cause at issue." Section 1 of the act reads as follows:

"Where any cause is at issue, civil or criminal, in any district court or county court with increased jurisdiction, in this state and the issue of the same will depend principally or wholly on the construction of the law applicable thereto and such construction or interpretation is in doubt and vital, or of great moment in the cause, the judge of any such court may, on the application of the attorney or attorneys for plaintiff or defendant in a civil case, and upon the application of the attorney for the plaintiff and defendant in a criminal cause, halt all proceedings until such question or questions shall have been certified to the Supreme Court and it or they have been determined."

By its plain language the statute is applicable only where it is apparent that the determination of any pending cause—

"will depend principally or wholly upon the construction of the law applicable thereto and such construction or interpretation is in doubt and vital, or of great moment in the cause."

When that situation exists, the trial court—

"may, on the application of the attorney or attorneys for plaintiff or defendant in a civil case * * * halt all proceedings until such question or questions shall have been certified to the Supreme Court and it or they have been determined."

This action has been dismissed. The exigency which the statute presupposes as a condition precedent to its invocation does not exist. And, as appears from the certificate of the trial judge, the question certified here is really one as to the legal sufficiency of the evidence upon the proposition whether a police officer of the city had actual knowledge of the dangerous condition of the sidewalk.

In our opinion the record before us does not present a case within the statute. See *Stutsman County v. Dakota Trust Co.*, *supra*; *State v. Cornhauser*, 74 Wis. 42, 41 N. W. 959; *State v. Loomis*, 27 Minn. 521, 8 N. W. 758; *State v. Billings*, 96 Minn. 533, 104 N. W. 1150.

In *Stutsman County v. Dakota Trust Co.*, *supra*, we said:

"The statute involved is a procedural statute, in the exercise of the appellate jurisdiction alone of this court. It is a statute of review. It does not contemplate the making of mere advisory opinions to the trial

court nor the exercise of the original jurisdiction of this court. The purpose of this statute is to expedite the trial and determination of causes, when it becomes apparent during the course of a proceeding in a trial court that a question of law, doubtful and principally determinative of the issues and facts proved, or essential to be proved, is presented. In such event an opportunity is afforded, through this statute, to secure a review of the determinative questions of law, without invoking the more lengthy process of statutory appeal. A certified question of law, however, so presented to this court, must involve the exercise of its appellate, not its original, jurisdiction. * * * It is further necessary that the trial court determine, settle, adjudicate, and certify to the formulated question of law. This question of law must be clearly stated and not involve questions of fact or those of mixed law and fact, involving inferences of fact from particular facts stated in the certificate. It must be so distinctly stated that it can be answered and determined by this court without regard to other issues of law or of fact." 178 N. W. 727.

This language seems quite applicable here.

Proceeding dismissed.

BIRDZELL, C. J., and BRONSON and ROBINSON, JJ., concur.

GRACE, J., concurs in the result.

P. S. WASLIEN, OLE N. YDSTIE, WILLIAM MEYERS and MARTIN OLSON, as individuals and on behalf of all other person familiarly interested, Appellants, v. THE CITY OF HILLSBORO, a municipal corporation, the Board of City Commissioners of Hillsboro, N. Dak., Ole Damon, City Assessor and Norval Nyhus, City Auditor, Respondents.

(188 N. W. 738.)

Constitutional law — statute authorizing annexation of adjacent territory to cities held not objectionable as not uniform in operation; not special legis-

lation; not to deprive the people of the annexed territory of the right of local self government; statute authorizing annexation of territory to city; and not a delegation of legislative power.

In an action of injunction questioning the constitutionality of chap. 68, Laws 1915, which authorizes any city to annex certain adjacent territory by resolution of the city council, after hearing upon a protest being filed by property owners in the proposed extension, it is *held*:

(a) That the act is not subject to the constitutional objection that it is not uniform in its operation.

(b) That it is not special legislation.

(c) That it does not deprive the people concerned in the territory affected of any constitutional right of local self-government.

(d) That it does not delegate, contrary to constitutional provisions, a legislative power.

Opinion filed May 27, 1922. Rehearing denied June 16, 1922.

Injunction proceedings in District court, Traill county, *Cole, J.*, questioning the constitutionality of an annexation statute. Plaintiffs have appealed from the judgment dismissing the action.

Affirmed.

Barnett & Richardson, for appellants.

"This statute, if valid, grants to cities most extraordinary power, by permitting city councils to annex territory in direct opposition to the wishes and protests of all the people whose interests are to be affected, and if there is reason for the strict construction of any statute, it may certainly be found in a case of this kind." *Red River v. City*, 154 N. W. 725.

"An annexation of territory to a city, or disconnection of territory from it, is, pro tanto, a new organization of the municipality, and an act providing for annexation or disconnection is an act for changing the charter of cities, and is upon the same footing as an act for original incorporation." *People v. Ellis*, 97 N. E. 697, (Ill.) citing; *State v. Des Moines*, 65 N. W. 818; *City v. Dwyer*, 78 Pac. 417; 3 Am. & Eng. Cases 239; *People v. Oakland*, 28 Pac. 807.

"It is a well settled exception to the rule that the power to make local regulations, having the force of law in limited localities, may be delegated by the legislature to those localities. It is upon this distinction that

our whole system of local self government for cities, towns and villages depends. This delegated power, however, only extends to the management of their local concerns, under the charter and regulations that the legislature has provided." *Cleveland v. City*, 165 N. Y. S. 305; *Cooley's Const. Limitations*, 7th ed. 264; *State v. Sawyer Co.* 123 N. W. 246.

"In order to empower a city to reach out, as it were, with a chain and subject territory not included within its limits to its laws, there must be authority given therefor by some general act of the legislature or by legislation by the people of the whole state by means of the initiative. A legislation by which the land of plaintiff was attempted to be annexed to the city did not operate within the city only, and, as affecting the municipality, was not local within the meaning of the constitution. Such enactment as to the area annexed was unauthorized." Citing: *State v. Porte*, 124 Pac. 637; *State v. Gilbert*, 134 Pac. 1038; *Leach v. Porte*, 124 Pac. 642; *Landess v. City*, 129 Pac. 537; *Couch v. Marvin*, 136 Pac. 6, (Ore.).

"If the powers sought to be exercised, while in the form of a local character, in fact concern the people at large, or if they involve the performance of functions which are of a state character, they cannot be delegated to the municipality." *Cleveland v. City*, 165 N. Y. S. 305.

The annexation of territory to a city, or the extension of the boundaries thereof, in law, is the incorporation of the annexed territory; the former charter provisions touching the original territory, is repealed, or, at least, amended, by the substitution of the new boundaries; the unincorporated territory becomes thereby incorporated as a city, precisely to the same extent and with the same result as the original territory was incorporated by the original incorporation proceedings. *State v. Clark*, 21 N. D. 517-526; 131 N. W. 715; *Glaspell v. Jamestown*, 11 N. D. 86; 88 N. W. 1023; *Dillon Mun. Corp.* (5th ed.) 355; *Topeka v. Dwyer*, 80 Kan. 244; 78 Pac. 417; 3 Ann. Cas. 239; *Peo. v. Long Beach*, 155 Cal. 604; 108 Pac. 664; *Ex Parte Fritz*, 9 Iowa 30; *Town v. McGregor*, 19 Iowa 43; *State v. Des Moines*, 96 Ia. 521; 65 N. W. 218.

C. E. Leslie, for respondents.

There is every reason why the city tax payers and the bond holders should be protected by the application of the rule of estoppel. *Tuttle v. Tuttle*, (N. D.) 181 N. W. Rep. 188; *State v. City of Des Moines*, 65

N. W. Rep. 818; Kuhn v. City of Port Townsend, 41 Pac. Rep. 923; Strosser v. Ft. Wayne, 100 Ind. 443.

Private tax payers can not bring an action to have his property adjudged not to be a part of a city, (at least not till the proper authority has refused to act), but that the action must be brought and maintained by the state, through its proper officers. Kuhn v. Port Townsend, (Wash.) 41 Pac. 923, (also cited in ¶ 1); Voss v. School Dist. 18 Kansas 467; School Dist. v. State, 29 Kansas 57; Graham v. City of Greenville, 2 S. W. 742; Mullikin v. City of Bloomington, 72 Ind. 161; Railroad Co. v. Wilson, 6 Pac. 281; Clement v. Everest, 29 Mich. 19; Stockle v. Silsbee, (Mich.) 2 N. W. 900.

Statement.

BRONSON, J. This is an injunction proceeding involving the constitutionality of an annexation statute. In 1920 the defendant city, pursuant to chap. 68, Laws of 1915, annexed certain adjacent territory, within the terms of the statute. This was done against the protest of certain property owners in the territory annexed, and after a hearing before the defendant city commissioners. No appeal was taken to the Annexation Review Commission. The plaintiffs are residents of the territory annexed. The defendants are an incorporated city, operating under the commission form, and its city officers. The plaintiffs seek to set aside the annexation proceedings and to enjoin the assessment of city taxes. The trial court upheld the constitutionality of the statute. The plaintiffs have appealed from the judgment dismissing the action.

The plaintiffs contend: The change of the territorial limits of the city amounts to an amendment of its charter. The constitution inhibits the passage by the legislative assembly of local or special laws incorporating cities or amending their charters. Article 1, § 69, subd. 33, Const. The only powers which the legislature may grant to a city are those which are local and which apply only to their operation. The power to annex adjacent territory is not local in its nature. The constitution requires the legislature to provide by general law for the organization of cities. Section 130, Const. That all laws of a general nature shall have a uniform operation. Section 11, Const. chap. 68, Laws of 1915, is not a general law operative in præsenti. The annexation statute is a general law delegating the power of annexation. It delegates to cities the uncontrolled discretion touching the amendment of their charters without

the consent of those resident within the territory to be annexed. It is void as a general law because not operative in *præsenti*. If deemed operative in *præsenti* to take affect in *futuro*, it does not fix the contingencies or conditions upon which it shall so take effect in *futuro*. The legislature cannot incorporate a separate community: It therefore cannot delegate such power: Any attempt so to do is special legislation. It attempts to create a legislative power, indirectly, not possessed directly, by the legislative assembly. The statute further violates the right of local self-government. A law cannot be enacted by the legislature so as to be general and uniform in its operation unless an option feature is incorporated providing for the consent of the people affected in the territory to be annexed.

Decision.

Chap. 68, Laws of 1915, forms a part of a general law providing for the incorporation of cities. Chap. 62, Laws of 1905. See chaps. 44 and 45 of Political Code, C. L. 1913. Therein it is provided that any city so incorporated under the act may extend its corporate limits in a manner thereinafter provided. Section 3750, C. L. 1913; § 182, chap. 62, Laws of 1905.

Section 3751, C. L. 1913 (§ 183, chap. 62, Laws 1905) provides for annexation of territory upon petition to the mayor and city council by a majority of the property owners adjacent to the corporate limits, after publication of such petition and in the absence of any written protest by at least 25 property owners of the city.

Chap. 68, Laws of 1915 (§§ 3753 and 3754, C. L. 1913, as amended) provides that any city may extend its boundaries so as to increase the territory within the corporate limits, not to exceed one-fourth of its area, by resolution of the city council passed by two-thirds of the entire members elect, particularly describing the land proposed to be incorporated within the city's limits, setting forth the boundaries and describing the land, platted by blocks and lots, provided that at least two-thirds in area of the territory described in such resolution and proposed to be incorporated within such limits shall previously have been platted into blocks and lots.

It further provides for publication of such resolution and, in the absence of any written protest by a majority of the owners in the proposed extension, for the inclusion of the territory as a part of the city.

But, in the event of a written protest being filed, the city council shall hear the testimony offered for and against such annexation, and if, after hearing such testimony and after a personal inspection has been made of the territory proposed to be annexed, such city council is of the opinion that such territory ought to be annexed, and by resolution passed by a vote of two-thirds of the entire members elect thereof orders that such territory shall be so included within the corporate limits, the territory described shall be included within, and shall become a part of, the city, provided, however, that, if the greater portion of such territory consists of lands used exclusively for farming or pasturing purposes, it shall not be annexed. This chapter further provides for an appeal from the action of the city council to an Annexation Review Commission.

The city commissioners are successors to powers possessed by a mayor and city council. Section 3834, C. L. 1913. In this state, cities are incorporated through general law of the legislature. They are mere creatures of the statute. *State ex rel. Shaw v. Frazier*, 39 N. D. 430, 434, 167 N. W. 510. They are political subdivisions of the state, auxiliaries for purposes of local government exercising a part of the powers of the state. They may be created, or, after creation, their powers may be restricted or enlarged or altogether withdrawn at the will or discretion of the legislature. *State ex rel. Linde v. Taylor*, 33 N. D. 76, 111, 112, 156 N. W. 561, L. R. A. 1918B, 156, Ann. Cas. 1918A, 583; *Runge v. Glerum*, 37 N. D. 618, 629, 164 N. W. 284; *McDonald v. Hanson*, 37 N. D. 324, 341, 164 N. W. 8; *Cooley, Const. Limitations* (5th ed.) § 192, p. 230. This legislative power is primarily plenary; the constitution is not a grant of, but a restriction upon, that power. *Martin v. Tyler*, 4 N. D. 278, 60 N. W. 392, 25 L. R. A. 838; *O'Laughlin v. Carlson*, 30 N. D. 213, 221, 152 N. W. 675. In the creation of a city and the granting of certain sovereign powers through legislative enactment, it necessarily follows that legislative power must be delegated for local purposes of government. *Dillon, Mun. Cor.* (5th ed.) § 32; 28 Cyc. 276; *Cooley, Const. Limitations* (5th ed.) § 191, p. 228. Thus a city may be granted powers of government within its limits as well as powers of regulation without. 12 C. J. 910; *Chicago Packing Co. v. Chicago*, 88 Ill. 221, 30 Am. Rep. 545.

In *Picton v. Cass County*, 13 N. D. 242, 100 N. W. 711, 3 Ann. Cas. 345, this court has heretofore said, or stated with approval, that all legislative acts may be divided into two classes: First, those which imperatively command or prohibit the performance of acts; and, second, those

which only authorize or permit acts to be done. The former are mandatory; the latter, permissive. It is not essential that the legislative enactment should itself command to be done everything for which it provides. Half of the statutes on our books are in the alternative, depending on the discretion of some person in whom is confided the duty of determining when the proper occasion exists for executing them. To assert that a law is less than the law because it is made to depend on a future event or act is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relative to a state of affairs not yet developed. The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine from a fact or state of things upon which the law makes, or intends to make, its own action depend. If the determining power cannot be conferred by law, there can be no law that is not absolute, unconditional, and peremptory. The legislature may grant authority as well as give commands, and acts done under its authority are as valid as if done in obedience to its commands. See *Slack v. Railway*, 13 B. Mon. (Ky.) 1; *Moers v. Reading*, 21 Pa. 202; *Locke's Appeal*, 72 Pa. 491, 13 Am. Rep. 716. It is well settled that the legislature, in the exercise of its power, may not only originally fix the limits or boundaries of a city, but, subject to constitutional restriction, it may subsequently annex, or authorize the annexation of contiguous or other territory without the consent, or even against the remonstrance, of persons residing therein. *School Dist. v. King*, 20 N. D. 614, 619, 127 N. W. 515; *Glaspell v. Jamestown*, 11 N. D. 86, 90, 88 N. W. 1023; *State v. Clark*, 21 N. D. 517, 526, 131 N. W. 715; *Dillon, Mun. Corp.* (5th ed.) § 355; 28 Cyc. 184; 19 R. C. L. 732. Through constitutional restriction, the legislature in this state must prescribe by general law for the creation, enlargement, or abrogation of a city or its powers. Article 2, § 69, subd. 33; article 6, § 130, Const. Pursuant to general law permitting the incorporation of a city and the delegation of a legislative power thereto, a city may or may not be created and its territorial extent enlarged or diminished, dependent upon the will of the local inhabitants affected. Pursuant to such general law, a portion of the territory affected may be included within the limits of such proposed city against the unanimous protest of the residents thereof for the reason that they form a minority of the total residents affected. If such territory becomes incorporated, and thereby it may be said that a charter is created by the city resulting, it is only such charter as may likewise exist for any other city so incorporated under the general law.

This charter is not a contract. It may be changed or altered at the discretion of the legislature. Accordingly, the legislative will may express, in a general law concerning cities, the terms and conditions upon compliance with which only may city boundaries be enlarged or restricted. True, the function is legislative, yet legislative functions by the law are invoked to ascertain the legislative requirements and to secure compliance therewith. See 19 R. C. L. 733, 735.

But plaintiffs maintain that such general law must contain optional provisions which will permit an expression by those resident in the territory to be annexed to comply with the constitutional requirements that the law must be uniform in its operation, and shall not deprive such residents of their right of local self-government. However, the law involved does grant optional provisions to such persons: They may protest and have a hearing before the city council; they may appeal to the Annexation Review Commission for a review of any decision. So far as the effect of plaintiffs' contention would require that such residents be made a determining agency, this would simply serve to transfer from the city to private individuals, or to the result of their vote, such determining right without removing the constitutional objections urged by the plaintiffs.

This general law is not subject to the constitutional objection that it is not uniform in its operation; that it is special legislation. It uniformly applies to all citizens, subjects, and places within the state. It provides a uniform rule of ascertainment. Uniform operation does not mean universal operation nor universal execution. *Vermont Loan & Trust Co. v. Whithed*, 2 N. D. 82, 93, 49 N. W. 318; *Picton v. Cass County*, 13 N. D. 242, 100 N. W. 711, 3 Ann. Cas. 345; *McDonald v. Hanson*, 37 N. D. 324, 338, 164 N. W. 8; *Peterson v. Railway Co.*, 37 N. D. 440, 459, 164 N. W. 42; *State v. Cincinnati*, 52 Ohio St. 419, 40 N. E. 508, 27 L. R. A. 737. Neither the inhabitants of the territory affected nor the city possessed any local right or power of self-government concerning their boundaries which were not subject to the legislative will and control. *State ex rel. Linde v. Taylor*, 33 N. D. 76, 110, 156 N. W. 561, L. R. A. 1918B, 156, Ann. Cas. 1918A, 853; *Runge v. Glerum*, 37 N. D. 618, 629, 164 N. W. 284.

Pursuant to the effect of plaintiff's contentions, it would be competent for the legislature, by general law, to prescribe the annexation of the territory here involved, or of similar extent and character, all facts being known and ascertained, without any action or consent either on the part

of the residents in the territory affected or of the city itself. It could have created, by general law, such territory as a city or as a part of a city. Thus might it command; likewise otherwise might it authorize such territory to become a part of a city upon the fulfillment of certain conditions prescribed in the general law. The right accorded to the inhabitants of the territory affected to a hearing, to the city to annex pursuant to the general law, and to any party to an appeal, conferred a privilege pursuant to the law, not a power in derogation thereof. In complying with the permissive authority granted in the general law it was competent for the legislature to delegate to the city or its governing board the right to ascertain and determine the facts requisite. *Glaspell v. City of Jamestown*, 11 N. D. 86, 88 N. W. 1023; *Dillon, Mun. Corp.* (5th ed.) § 353; 28 Cyc. 187; *Kelly v. Meeks*, 87 Mo. 396, 401; *Emporia v. Smith*, 42 Kan. 433, 22 Pac. 616; *Oakman v. Board of Sup'rs of Wayne County*, 185 Mich. 359, 152 N. W. 89. We are of the opinion that the statute is not subject to the constitutional objections presented. The determination of such constitutional objections disposes of all questions involved in this appeal.

The judgment is affirmed, with costs.

BIRDZELL, C. J., ROBINSON and CHRISTIANSON, JJ., concur.

GRACE, J. (concurring specially). I am of the opinion that the statute under consideration is not subject to the constitutional objections presented.

GEO H. PAUL and C. R. EVANS, Appellants, v. FERDINAND LEUTZ, Respondent.

(188 N. W. 1022.)

Specific performance — contract must be certain, just, and reasonable; remedy must be mutual; facts held to warrant cancellation of contract.

This is a suit for the specific performance of a contract and for \$250,000 damages. Paul, the plaintiff, appeals from a judgment can-

celling the contract on the ground that it is uncertain, unconscionable, void for want of mutuality and nonperformance by the plaintiff. There is little ground for disputing either the law or the essential facts. To state the case is to decide it. *Held*, that the judgment is clearly right and it is affirmed.

Opinion filed May 27, 1922. Rehearing denied June 16, 1922.

Appeal from the District court of Mercer county, *Pugh, J.*

Affirmed.

Theodore Koffel, for appellants.

The granting of specific performance rests in the sound discretion of the court. The discretion, however, is not arbitrary or capricious, but judicial. *Nickerson v. Nickerson*, 127 U. S. 658; *Trigg v. Read*, 42 Am. Dec. 447, and note; 25 R. C. L. p. 214.

This discretion is controlled by the established doctrines and settled principles of equity. *Willard v. Taylor*, 3 Wallace, 557; *Marks v. Gates*, 14 L. R. A. (N. S.) 317; *Turn Verein Eiche v. Paul Kaionka*, 43 L. R. A. (N. S.) 44; *Marshall v. Keach*, 10 Ann. Cases 164.

The fact that the contract in the long run might turn out a losing investment affords no reason for refusing to specifically enforce it. *Schmidtz v. Louisville Railroad Co.* 38 L. R. A. 809.

And the allegations that the defendant made a bad trade does not exempt him from specific performance. *Rodman v. Robinson*, 65 L. R. A. 682, 25 R. C. L. p. 224.

A court of equity will adjust the rights of the parties so as to give each what he would have received under the contract if there had been no default. *Pillsbury v. J. B. Streeter Jr. Co.* 107 N. W. 40.

In actions for specific performance it is proper to render alternative judgments giving damages in case of failure to convey. *Mitchell v. Land Co.* 19 N. D. 736, 124 N. W. 946; *Orfield v. Harney*, 157 N. W. 124, 26 Am. & Eng. Enc. of L. 86, 36 Cyc. 753; *Pillsbury v. Streeter*, 15 N. D. 182, 107 N. W. 40; *Beddow v. Flage*, 22 N. D. 54, 132 N. W. 637; *King v. Ruckman*, 24 N. J. Eq. 556; *Lombard v. Chicago Sinai Congregation*, 75 Ill. 271, 20 Enc. of Pl. and Pr. note ff; *Knudson v. Robinson*, 118 N. W. 1051.

Zuger & Tillotson, for respondent.

A contract for the sale or transfer of stock in a corporation never created cannot be enforced; an agreement to buy or sell stock in a corporation to be organized in future in unenforceable in equity. 26 Enc. of Law, 123.

For the breach of such contract, where valid, an action of law is the remedy, if there is any. L. R. A. 1918E, See on p. 845.

"Courts refuse to compel the building of railroads, the erection of buildings or the cultivation, cutting and delivery of crops, etc. Avery v. Ryan et al. (Wis.) 43 N. W. 317; Pomeroy on Specific Performance. § 312, and note; 2 Morovitz on Private Corporations, § 1136 and note; 36 Cyc. 576.

"A designation of the land as a certain quantity out of a larger described tract, as of so many acres out of a specified tract, is insufficient, where the boundaries of the part are not stated or the part has not been carved out." 36 Cyc. 592; Rochester v. Yeslers Estate (Wash.) 32 Pac. 1057; Knight et al. v. Alexander et al. (Ore.) 71 Pac. 657; Nippolt v. Kammon (Minn.) 40 N. W. 266; Weigert v. Frank (Mich.) 22 N. W. 303; Pierson v. Ballard (Minn.) 20 N. W. 193; Auer v. Matthews (Wis.) 108 N. W. 45; Blankenship v. Spencer (W. Va.) 7 S. E. 433.

"The rule is well settled that where a contract, for any reason, is incapable of being enforced as against one party it cannot be enforced as against the other." Easton v. Lockhart, 10 N. D. 181, 86 N. W. 697; Knudtson v. Robinson, 18 N. D. 13, 118 N. W. 1051.

"When no cause of action is established, because no ability to perform the contract has been shown, proof that the defendants were in default in the performance of any act precedent to the delivery of the deeds and payment of the consideration therefor is immaterial." Royal v. Dennison (Cal.) 38 Pac. 39; 53 Ill. 526; 41 Minn. 448, 43 N. W. 376; 38 Minn. 338, 37 N. W. 791; 23 S. D. 367, 211 N. W. 868; 112 Minn. 388, 128 N. W. 459, 21 Ann. Cases, 837.

A good and merchantable title means fee simple. 127 Ia. 218, 102 N. W. 1126; 120 Minn. 399, 139 N. W. 714; 93 Wis. 294, 66 N. W. 253; 67 S. W. 739; 103 N. W. 158; 39 Cyc. 1516, (Note No. 48).

ROBINSON, J. This is a suit for the specific performance of a contract and for \$250,000 damages. Paul, the plaintiff, appeals from a judgment canceling the contract on the ground that it is uncertain, unconscionable, and void for want of mutuality and nonperformance by the plaintiff. There is little ground for disputing either the law or the essential facts. To state the case is to decide it.

(1) The parties agreed to create a corporation, with capital stock representing 20,000 acres at \$30 an acre, the stock to be allotted thus: To Leutz, \$300,000; to Paul, \$70,000; to Evans, \$70,000; to treasury bonus, \$160,000. The land is described thus: 20,000 acres in township 1 and 2 south, and 1 north, of range 6 west, being the south 20,000 acres of a 50,000-acre tract near Telogia, Liberty county, Fla.

(2) Paul, the plaintiff, agrees to obtain a contract for deeds to such land and to pay thereon \$200,000 leaving a balance due and unpaid, \$160,000; also, to deliver such contracts, with abstracts of title.

(3) The contracts offered by Paul are Exhibits 8, 9, 10, and 11. Each is dated either October 25, 28, or 30, 1920, signed by the grantors and by Dakota Homes Company, by P. Z. Mowry, President, George N. Paul, Secretary. Each contract reserves merchantable timber, pine, hardwood, cypress, and juniper, and turpentine privileges for a term of years. Each contract recites a payment of nearly 3 per cent. on the price—in all, \$10,000. The 3 per cent. may have been a commission. There is no evidence of any cash payment. The grantees assume and agree to pay 97 per cent. of the purchase price.

(4) For his interest as a purchaser of the land—a half interest, as measured by his stock in the nonexisting corporation—Leutz does transfer to Paul $9\frac{1}{4}$ sections of land in Mercer county at \$25 an acre, subject to a mortgage for \$20,000, 375 head of cattle, 50 head of horses, with ranch equipment, hay, feed, and grain, at regular market prices; and, if necessary to care for his share of the balance of the indebtedness, Leutz agrees to put up as collateral \$12,500 first mortgage bonds of the Hebron brick plant, \$35,000 in shares on the plant, with his homestead in Hebron, valued at \$40,000.

(5) From the abstracts it is wholly impossible for a judge, sitting in his chambers, to determine that the titles are good or bad. That would require investigation and inquiry of perhaps six months, and evidence dehors the abstracts.

(6) There is no convincing evidence that the Florida land is worth half the sum due and unpaid on its price, as shown by the contracts, Exhibits 8, 9, 10, and 11. There is strong evidence that the land is not worth over \$2 an acre.

The Civil Code gives the law of the case thus:

Section 7193: Neither party to an obligation can be compelled to perform it unless the other party has performed or may be compelled to perform it.

Section 7197: The law does not enforce an obligation to render personal service (such as to create a corporation). It does not enforce an agreement the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable, nor an agreement which is not as to the purchaser just and reasonable, nor if the seller cannot give to the buyer a title free from reasonable doubt.

To summarize: The contract in question does not describe the land with certainty. It expressly bargains for the payment of \$200,000, and not merely 3 per cent. of the purchase price. The contract is not for titles, with reservations for a term of years, as shown by Exhibits, 8, 9, 10 and 11. The contract is for land fairly worth \$18 an acre, and not merely a small part of that sum. Every point of law and fact is against the plaintiff. The case merits no discussion.

The judgment is clearly right, and it is affirmed.

BIRDZELL, C. J., and BRONSON, J., concur in result.

GRACE, J. (concurring specially). The findings of fact of the trial court are amply sustained by the evidence. Its conclusions of law are correct; its judgment entered is a proper one, and should be affirmed.

I concur in its affirmance.

CHRISTIANSON, J. (specially concurring). I agree with my associates that the plaintiffs in this case have not established a contract of such nature as will be specifically enforced in equity. See *Avery v. Ryan*, 74 Wis. 591, 43 N. W. 317; 25 R. C. L. p. 303 et seq. § 7197, C. L. 1913.

ANDREW KREIN, Respondent, v. W. W. ROW, Appellant.

(189 N. W. 105.)

Judgment — affidavits of merits not impeached on motion to vacate default; affidavit excusing default on motion to vacate default held sufficient.

In May, 1921, the plaintiff obtained a default judgment for over \$1,500. This is an appeal from an order denying a motion to vacate the default. The order of this court is that the default be vacated and that defendant may serve his proposed answer, and that the lien of the judg-

ment herein remain and may be enforced to the extent of any judgment recovered on a trial of the action.

Opinion filed June 17, 1922.

Appeal from an order of the District court of Cavalier county; *Kneeshaw, J.*

Order reversed and modified.

Grimson & Snowfield, for appellant.

"It was held in an abuse of discretion to set aside default suffered by defendant because an attorney had erroneously advised him that service upon him was void." *Crebler v. Eidelbush*, 24 Wis. 162.

"Where on claimining paramount title to mortgage land neglected to answer a bill of foreclosure because advised by counsel that the mortgagor's answer presented a complete defense, it was held proper to set aside his default and let him answer." *Wickle v. Lake*, 21 Wis. 410, 94 Am. Dec. 552.

In New York, Pennsylvania and Rhode Island the courts are unanimous in holding "That a judgment may be set aside when taken as a consequence of the negligence or inattention of the attorney." See 23 Cyc. 941.

"Courts almost universally favor a trial on the merits and when there has been a reasonable excuse shows by default there should be no objection for such trial for those who are reasonably diligent." *Barto v. Sioux City Elec. Co.* 93 N. W. 268.

Price & Pierce, for respondent.

"The moving party must show: 1, that he has a good defense upon the merits, and 2: A reasonable excuse for the mistake, inadvertence, surprise or neglect which occasioned the default, and 3: reasonable diligence in presenting the application to vacate after knowledge of the judgment." *Bank v. O'Laughlin*, 164 N. W. 135, 37 N. D. 532.

"Under the express terms of the statute, § 7483, C. L. 1913 an application to vacate a default judgment on the ground of mistake, surprise or excusable neglect is addressed to the sound judicial discretion of the trial court on the particular facts of the case. And consequently its determination will not be disturbed on appeal unless it is plain that its dis-

cretion has been abused." *Wakeland v. Hanson*, 36 N. D. 129, 161 N. W. 1011.

In the case of *Murphy v. Minot Foundry Co.* 24 N. D. 185, 139 N. W. 518, it is held: "On the question of whether the defense may be interposed or not its interposition is a matter in the discretion of the trial court instead of a matter of strict legal right. *Hunt v. Swanson*, 15 N. D. 512, 108 N. W. 41.

ROBINSON, J. This is an appeal from an order denying a motion to vacate the default herein. The motion is based on a regular affidavit of merits and on a proposed verified answer and an affidavit excusing the default. The action is on a promissory note made by defendant to the plaintiff on October 14, 1920, for \$1,485 and interest. On March 29, 1921, the summons and complaint were served on defendant. On May 17, 1921, judgment by default was entered. In September, 1921, defendant moved to vacate the default. The proposed answer shows that prior to October 14, 1920, at Langdon, N. D., the plaintiff and defendant had been in partnership in the garage business; then they agreed to dissolve the partnership; the plaintiff did transfer to defendant his interest in the partnership property, and in writing agreed with said Row that "he shall not, for a period of five years, become interested in the ownership of any garage in the city of Langdon, without the written consent of W. W. Row"; that, contrary to the agreement, in the month of April, 1921, the plaintiff did open a garage in Langdon, and since then has continued to operate the same to defendant's damage, \$2,500; that the note in question was given in consideration of said agreement, and that the good will of the garage business was the real consideration for the promissory note; that before the entry of judgment Row consulted with Price & Pierce, stating the facts aforesaid, and was told by them that he would have to pay the note because he had made default in payment, according to the terms of the contract; that he relied on their advice, and because of it failed to answer or to consult with any other attorney until September 15, 1921.

Now, while defendant does make a complete affidavit of merits and a proposed verified answer showing a meritorious defense, it is true that he is contradicted by other affidavits, both in regard to the excuse for his default and the merits of defense. But the rule is that on a motion to vacate a default the affidavit of merits may not be impeached, and the court should not try out the merits of the defense. *Bank v. Brandon*, 19 N. D. 489, 126 N. W. 102, 27 L. R. A. (N. S.) 858; *Westbrook v. Rice*,

28 N. D. 325, 148 N. W. 827; *Sargent v. Kindred*, 5 N. D. 8, 19, 20 63 N. W. 151.

The excuse or reason for the default appears quite probable, though by no means conclusive. However, an error in granting a trial while retaining the lien of the judgment cannot injure the plaintiff in excess of the cost of the trial, while an error in denying a trial may injure defendant more than \$1,000. Hence the order is that the default be vacated and a trial granted, with leave to serve the proposed answer, and that the lien of the judgment herein remain, and that it may be enforced to the extent of any judgment that may be recovered on a trial of the action.

Order reversed and modified, without costs.

BIRDZELL, C. J., and GRACE, J., concur.

BRONSON, J. (dissenting). The plaintiff has appealed from an order of the court refusing to vacate a default judgment. Taking the statement of facts claimed by the plaintiff to be true, they are as follows: The parties were partners. Upon the dissolution of the partnership the defendant agreed to pay \$2,500 for the good will of the plaintiff in the business, upon the express stipulation contained in a written agreement that the plaintiff would not go into business again in the city of Langdon for at least five years. The defendant paid \$1,000 upon the original amount. The plaintiff brought action upon a note for the balance. Default judgment for \$1,515.40 and costs were entered May 17, 1921. On June 16, 1921, execution was issued. The sheriff made return thereupon August 16, 1921, showing partial satisfaction in the sum of \$502. On August 20, 1921, another execution was issued. On September 21, 1921, a levy was made upon some tractors, a gang plow, and two automobiles. On this date the defendant presented to the trial court his motion papers to vacate the judgment. The trial court issued an order to show cause, staying further proceedings upon the execution. The proposed answer alleges, as a defense, the partnership and its dissolution; the purchase by the defendant of the good will of the business for \$2,500; the agreement by the plaintiff that he would not become interested in the ownership of any garage in Langdon for at least five years without the written consent of the defendant; that the note formed a part of the consideration for the good will; that the plaintiff, in violation of his agreement, in the month of April established a garage and repair shop in Langdon, and

since that time has operated such garage and repair shop and is now doing so; that therefore the consideration for the note has entirely failed. The same facts are also alleged as a counterclaim, and damages therefor demanded in the sum of \$2500.

The defendant seeks to vacate the judgment, pursuant to § 7483, C. L. 1913, which provides that the court may, in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect. The defense and counterclaim asserted in the proposed answer is subject-matter for an independent action. All of the rights of the defendant can be secured and determined in an independent action. The defendant complains that he will be prejudiced by being compelled to resort to an independent action, for the reason that the plaintiff is insolvent. The defendant, however, has an equitable remedy to stay the enforcement of plaintiff's judgment upon proper showing in the prosecution of his independent cause of action. The defense asserted is in the nature of a counterclaim, which can as well be maintained in an independent action, and, unless prejudice would result, the judgment should not be vacated for such reasons. *Cresswell v. White*, 3 Ind. App. 306, 29 N. E. 612; *Wills v. Browning*, 96 Ind. 149, L. R. A. 1916F, 858. This court has frequently held, and the statute so provides, that the trial court has a discretion in the vacation of default judgments. For the reasons stated, I am not prepared to hold that the trial court abused its discretion in refusing to vacate the judgment. *Bowman v. Wood*, 41 Ill. 203; *Palmer v. Harris*, 98 Ill. 507. The order should be affirmed.

CHRISTIANSON, J. (dissenting). Under the express terms of the statute (Comp. Laws 1913, § 7483), an application to vacate a default judgment on the ground of mistake, surprise, or excusable neglect is addressed to the sound judicial discretion of the trial court on the particular facts of the case. Consequently its determination will not be disturbed on appeal unless it is plain that its discretion has been abused. 23 Cyc. 895. On such application the prime question is whether the moving party has presented a sufficient excuse for his negligence. *Wakeland v. Hanson*, 36 N. D. 129, 132, 133, 161 N. W. 1011. In this case, as stated in the majority opinion, the showing presented by the defendant in support of the contention that the judgment was taken against him through in-

advertence or excusable neglect was controverted. The trial judge decided the question in favor of the plaintiff. Defendant has the burden of showing that the trial court's decision is clearly wrong. Upon the record presented here I am of the opinion that the defendant has not sustained this burden. In other words, I do not believe that this court can say that the trial court abused its discretion in refusing to vacate the judgment.

DAVID J. RIPLEY, Appellant, v. J. A. McCUTCHEON, Respondent.

(189 N. W. 104.)

Contracts — in enforcement of simple contract necessary to allege consideration.

1. In the enforcement of a simple contract, it is necessary to allege consideration.

Pleading — complaint alleging enforceable contract not subject to demurrer because alleging erroneous measure of damages.

2. A complaint, otherwise alleging a valid enforceable contract, is not subject to demurrer merely because it alleges an erroneous measure of damages.

Appeal and error — order overruling demurrer to one of several counterclaims appealable.

3. An order overruling a demurrer to one of several counterclaims is an appealable order.

Opinion filed June 26, 1922.

Appeal from an order overruling a demurrer to a counterclaim, in District court, McLean county, *Nuessle, J.*

R. L. Fraser, J. A. Hyland for appellant.

Under the decisions of our court it is too plain for argument that the damages claimed in such counterclaim are speculative, uncertain, indefinite, and fictitious, and no ground for cause of action. It is almost too clear for argument that the depreciation in the price of flax was not chargeable to the plaintiff. *Paulson v. Sorenson*, 33 N. D. 488, 157 N.

W. 473; *Hayes v. Cooley*, 13 N. D. 204, 100 N. W. 250; *Lynn v. Sevey*, 29 N. W. 420 L. R. A. 1916E 788, 151 N. W. 31.

Therefore the counterclaim did not plead a cause of action for damages. *Lynn v. Sevey*, *supra*; *Hayes v. Cooley*, *supra*.

J. E. Nelson, E. T. Burke, for respondent.

A litigant should not be permitted to appeal frequently in the same lawsuit. For this reason most of the states carry the simple provision that the order must affect a substantial right and be final. If a litigant can proceed with his lawsuit and save the point raised by his demurrer until a final appeal upon the merits, he should be required to do so. *Kramer v. Heins et al.* 158 N. W. 1061; *Stimson v. Stimson*, 152 N. W. 132; *Ellis v. George et al.* 175 N. W. 623; *Boulger v. Northern Pac. Ry.* 171 N. W. 632; *Stimson v. Belle Fl. Stimson*, 30 N. D. 78; *Marquart v. Schaffner*, 30 N. D. 342; *Holebuck v. Schaffner*, 30 N. D. 344.

BRONSON, J. The plaintiff brought action upon a promissory note. The defendant, in its answer, set up three counterclaims. The plaintiff demurred to the third counterclaim upon the ground that it did not state a cause of action. In substance, this counterclaim alleged that the plaintiff agreed with the defendant to haul all of the defendant's grain to market immediately after the same was threshed, in the fall of 1920; that the plaintiff failed, refused, and neglected to deliver such grain as agreed, but delayed hauling the same until late in the fall, when market prices of such grain had materially decreased, thereby damaging the defendant in the sum of \$1,000. The trial court overruled the demurrer. The plaintiff has appealed. The plaintiff asserts that the damages claimed are speculative, and afford no cause of action; that the counterclaim alleges no consideration. The defendant maintains that the order overruling this demurrer is not an appealable order. The counterclaim has not been artistically drawn; only its substance has been stated. It wholly fails to plead any consideration. As consideration is essential to the enforcement of a simple contract, it is subject to demurrer. 6 R. C. L. 649; 13 C. J. 722.

The claim for damages, even though it be conceded to be erroneous, is not a ground for demurrer. The allegation of a valid, enforceable contract, and the breach thereof would constitute a cause of action, at least for nominal damages, upon a demurrer which admitted such facts.

Hudson v. Archer, 4 S. D. 128, 137, 55 N. W. 1099; Guild v. More, 32 N. D. 432, 451, 155 N. W. 44. The order herein involved is made appealable by statute. Sections 7841, 7452, C. L. 1913. However, we do not commend the appeal taken herein. All of the purposes of judicial expedition could have been better accomplished by a motion to make more definite. Perhaps through inadvertence consideration was not pleaded, and a failure to so plead overlooked by the trial court. The order of the trial court is reversed without costs.

BIRDZELL, C. J. and CHRISTIANSON, ROBINSON, and GRACE, JJ., concur.

GEORGE MORTON, Respondent, v. ALBERT WOOLERY, FRED W. BRENDEMUHL, FARMERS BANK OF DUNN COUNTY, a corporation, Appellant.

(189 N. W. 232.)

Banks and banking—bank bound by conditions imposed by depositor in making deposit.

1. Where a person makes a deposit in a bank for the specific purpose of meeting certain checks to be thereafter issued, the bank on accepting the deposit becomes bound by the conditions imposed, and if the money so deposited is misapplied it can be recovered as a trust deposit.

Appeal and error—submission of case on theory on which it was tried not error; submission of question which should have been determined by court to the jury held harmless in view of jury's finding; refusal to require witness to testify what he meant by certain statement held not error.

2. Certain assignments of error predicated upon instructions given to the jury and rulings made in the admission and exclusion of evidence examined, and for reasons stated in the opinion held to be nonprejudicial.

Opinion filed June 27, 1922.

From a judgment of the District court of Dunn county, *Berry J.*, the defendant, Farmers Bank of Dunn County, appeals.

Affirmed.

W. A. Carns, and Alf. O. Nelson, for appellant.

T. F. Murtha, for respondent.

CHRISTIANSON, J. Plaintiff brought this action to recover upon a check drawn on the defendant bank by the defendant Woolery and payable to the plaintiff or his order. The evidence shows that the plaintiff is a farmer who lives about 15 miles from Dunn Center, where the defendant bank is located. The defendant Woolery is a cattle buyer, and in the fall of 1920 and prior thereto he had been buying cattle in the vicinity of Dunn Center. He carried on his banking business with the defendant bank, wherein he had two accounts, one of which was carried on the books in his own name, and the other as "A. Woolery, cattle account." It was his custom to make a notation on each check given for cattle to the effect that it was given for cattle, and the checks so marked would be charged to the account carried as "A. Woolery, cattle account." It appears that in September, 1920, this account was overdrawn as a result of some losses in the cattle business. About the middle of October, 1920, Woolery purchased 17 head of cattle from the plaintiff, agreeing to pay therefor the sum of \$620. He arranged with the plaintiff to have the cattle delivered at Dunn Center on October 21, 1920, where Woolery agreed to pay for the same. The plaintiff, Morton, drove the cattle to Dunn Center on the day agreed upon and delivered the cattle to Woolery and received from him a check for \$620 dated on that day, namely, October 21, 1920, payable to plaintiff and drawn on the defendant bank. In the lower left-hand corner of the check appeared the words "17 cattle." Plaintiff deposited this check with the bank where he carried his account at Manning, in this state, and in due time it was presented to the defendant bank, but payment was refused for want of funds. According to the testimony of the assistant cashier of the defendant bank, the defendant Woolery came to the bank prior to October 21, 1920, and asked the assistant cashier if the bank would honor his checks to be issued in payment of a carload of cattle that were to be delivered to him in Dunn Center that day for shipment, provided that he (Woolery) would draw and deposit a sight draft for \$1,600 on the Prouty Commission Company, to whom the cattle were to be consigned. At the time Woolery told the assistant cashier that the checks he would issue in payment of cattle

which he would purchase for such shipment would aggregate some \$1,600, and might exceed that sum, but would not exceed \$1,700. The assistant cashier thereupon ascertained the status of Woolery's account and found that he had a balance in the cattle account of about \$145. The assistant cashier agreed to the proposition made by Woolery. The \$1,600 sight draft was drawn by Woolery and handed to the assistant cashier for deposit, he prepared a deposit slip crediting the \$1,600 to the "cattle account," and it was carried by the bank as a cash item until the close of business on October 23, 1920, when it was deposited and credited on the books of the bank to "A. Woolery, cattle account." It appears that on that day the bank paid two checks drawn upon such account in payment of cattle included in the shipment, namely, one to Minneau for \$1,030, and one to Joslyn for \$40. It appears further that there were a number of checks that had been drawn by Woolery during September, 1921, against the cattle account, and which had previously been presented to the bank, and payment of which had been refused for want of funds. Some of these checks were again presented on or about October 23 or 24, 1921, and the bank paid out practically all the balance of the funds on hand in the cattle account upon such checks; and when the check drawn in favor of the plaintiff Morton was presented some time between October 28th and November 1st there were not sufficient funds in such "cattle account" and payment thereof was refused. Thereafter this action was brought against the bank by the plaintiff, claiming that the bank had no right to pay the old dishonored checks; that the funds in the cattle account on October 21, 1921, and subsequent thereto realized from the \$1,600 sight draft, and the \$145 on deposit at the time Woolery made the arrangement with the assistant cashier of the bank, was, under such arrangement, held for the special purpose of paying checks issued for cattle contained in the particular shipment against which the sight draft was drawn. The case was tried to a jury, which returned a verdict in favor of the plaintiff. Upon the return of the verdict defendant moved for judgment notwithstanding the verdict. The motion was denied. Thereafter judgment was entered pursuant to the verdict, and defendant has appealed from the judgment.

The principal contention advanced by the defendant on this appeal is that the evidence is insufficient to sustain the verdict, and that the court should have directed a verdict in its favor, or ordered judgment notwithstanding the verdict. The motion for a directed verdict was in substance that the plaintiff had failed to show that the \$1,600 deposited by

Woolery in the defendant bank was a trust fund, and had failed to prove that there was any agreement that such funds should be retained as a trust fund for the payment of any particular check or checks.

In support of this contention it is asserted by the defendant bank that the deposit of the \$1,600 was a general one, and that the bank was entirely within its rights, and properly performed its duties, when it paid checks as presented, even though such checks were old ones which had been drawn and presented for payment, and payment of which had been refused by the bank long prior to October 21, 1921.

In our opinion the contention cannot be sustained. We believe there is abundant evidence tending to sustain a finding that the \$1,600 draft was deposited for a special purpose, namely, the payment of checks to be thereafter drawn by Woolery in favor of the various parties from whom he would purchase cattle for that particular shipment. The bank knew that Woolery would purchase cattle for such shipment, and draw checks upon the "cattle account" in payment of cattle so purchased. It was informed that the amount of checks to be drawn would be not less than \$1,600, might run something over that, but would not exceed \$1,700. The bank knew that the old checks were not drawn in payment of any cattle included in the shipment designated by Woolery at the time he deposited the \$1,600 draft. It knew that those checks had been issued long prior thereto, and had been issued for other purposes. And, when the bank honored such old checks, it must have known that it was not likely that all checks drawn by Woolery in payment of the cattle included in the carload against which the sight draft was drawn had been presented.

Where money is deposited for a special purpose, as for instance in this case where it was deposited for the stated purpose of meeting certain checks to be thereafter drawn against such deposit, the deposit does not become a general one, but the bank, upon accepting the deposit, becomes bound by the conditions imposed, and, if it fails to apply the money at all, or misapplies it, it can be recovered as a trust deposit. *Hitt Fireworks Co. v. Scandinavian-American Bank*, 114 Wash. 167, 195 Pac. 13, 196 Pac. 629; *Dolph v. Cross*, 153 Iowa, 289, 133 N. W. 669; *First Nat. Bank v. Barger et al.* (Ky.) 115 S. W. 726; *Smith v. Sanborn State Bank*, 147 Iowa, 640, 126 N. W. 779, 30 L. R. A. (N. S.) 517, 140 Am. St. Rep. 336. See, also, *Russell v. Bank of Nampa*, 31 Idaho, 59, 169 Pac. 180; *Bank v. Miller* (N. D.) 179 N. W. 997; 7 C. J. 632.

In its instructions to the jury the trial court said:

"The plaintiff claims that he sold 17 head of cattle to Woolery and

received a check of \$620 for the cattle. He also claims that the bank, defendant Farmers' Bank of Dunn county, had made a trust agreement with Mr. Woolery whereby there was a fund that was specifically set aside to pay the checks for the cattle for this particular shipment, and that they, contrary to the terms of trust, used this money and did not pay his \$620 check."

It is contended that this instruction was prejudicial for the reason that it did not state the contentions of the plaintiff as stated in the complaint. It is true the allegations of the complaint were somewhat restricted, and seem to have been predicated upon the theory that there was an agreement on the part of the defendant that it would pay all checks drawn by Woolery in purchasing cattle to be included in the particular shipment against which the sight draft was drawn, and that consequently the bank under its agreement was obligated to pay the check in question regardless of the amount of funds on deposit in the "A. Woolery, cattle account." The court in its instructions in effect eliminated the theory that the bank was obligated to pay the check as a result of the agreement to pay all checks drawn in payment of such cattle, and submitted the case on the theory that the bank was liable only in the event there was an understanding that the moneys deposited in the cattle account should be utilized for the special purpose of paying checks thereafter issued by Woolery in payment of cattle to be included in that particular shipment. It will be noted, however, that these instructions were in accord with the theory of defendant's motion for a directed verdict. No contention was advanced at any time during the trial that there was any variance between the allegations of the complaint and the proof; and, as already indicated, at the close of plaintiff's case, and again at the close of the introduction of all the evidence, defendant's counsel moved for a directed verdict on the specific grounds that the plaintiff had failed to prove that the \$1,600 draft was deposited as a trust fund, or that there was any agreement between Woolery and the bank that it should be so treated. So we are of the opinion that, as the case stood at the time the instructions were given, the court was correct in submitting the case to the jury on the theory on which it was submitted. The trial court gave instructions covering the question of the creation of a trust fund. The instructions embodied the statutory rules on the subject, and an examination of the instructions leads us to the conclusion that they were fair to the defendant.

It is further contended that the question of whether a trust was or was not created was one of equitable cognizance, and consequently should

have been determined by the court, and not submitted to the jury. If this be true, then the action of the court in submitting the same to the jury was manifestly not prejudicial to the defendant. It received a finding of both the court and the jury on that proposition. And, as we have already stated, we are all agreed that there is abundant evidence tending to establish that the \$1,600 draft was deposited for a designated special purpose.

When the assistant cashier was being examined by defendant's counsel on redirect examination, he was asked what he meant by a certain statement which he said he had made to Woolery at the time Woolery deposited the \$1,600 draft. Plaintiff's counsel objected to the question on the ground that the words used were plain, and not susceptible of interpretation. The objection was sustained and error is assigned upon this ruling. In our opinion the ruling was correct. The language used was not technical in any sense. And manifestly the agreement between Woolery and the bank did not depend upon what particular meaning the assistant cashier intended to attribute to his words. The secret intention of a party to an agreement is not material. The law looks to what the parties say as expressing their real intention. Language must be interpreted in the sense in which the promisor knew or had reason to know that the promisee understood it. 9 Cyc. 578. It will be noted the purpose of the question was not to ascertain what the agreement between the parties was but merely what particular meaning the assistant cashier intended to convey by the words he used. Furthermore, the assistant cashier was fully examined with respect to the entire conversation, and when his testimony is considered as a whole there does not seem to be the slightest reason to believe that the words which he used were intended to convey any meaning different from what the plain words imported. What has been said disposes of all the errors assigned and argued, and it follows from what has been said that the judgment appealed from must be affirmed.

Affirmed.

BIRDZELL, C. J., and ROBINSON, BRONSON, and GRACE, JJ., concur.

N. F. SAYRE, Appellant, v. VILLAGE OF ALSEN; Board of County Commissioners; John W. Scott, County Auditor; Fred A. Thompson, County Treasurer; S. J. A. Boyd, County Superintendent of Schools, et al., Respondents.

(189 N. W. 240.)

Appeal and error — appeal from judgment dismissing action to enjoin collection of taxes for school district and have organization declared void dismissed after taxes have been collected.

1. Where a taxpayer has sought to enjoin the assessment, levy and collection of taxes for a Special School District, and the determination that the organization of such Special School District was illegal and void, and where the plaintiff has appealed from a judgment dismissing the action without securing a stay of the temporary injunctive order issued, whereby, pursuant to statutory law, the assessment and levy of such school taxes have been made, and the collection of the same perhaps effected, it is *held*, that the restraint of the assessment, levy, and collection of such taxes has become moot and that the determination of the legality of the organization of the Special School District can not be made, and, if made, may be ineffectual.

Opinion filed April 26, 1922. Rehearing denied June 27, 1922.

Proceeding for injunction in District Court, Cavalier county, *Kneeshaw*, J. Plaintiff has appealed from judgment dismissing the action and has demanded trial de novo.

Appeal dismissed.

Flynn, Traynor & Traynor, for appellant.

That suit of this nature can be brought in his own name by such taxpayer is settled in this state. *Wood v. Bangs*, (N. D.) 1 Dak. 179, 46 N. W. 586; Particularly at p. 588 near bottom 1st column to top p. 589; *Engstad v. Dinnie*, 8 N. D. 176 N. W. 292; *Storey v. Murphy*, 9 N. D. 115, 81 N. W. 23; *Fox v. Walley*, 13 N. D. 610, 102 N. W. 161; *McKinnon v. Robinson*, 24 N. D. 367.

Grimson & Snowfield, for respondents.

Before the plaintiff can be invested with the capacity to sue he must present the matter to the attorney general and request his action therein,

and only in the case of a refusal by the official will a private suitor be heard in a court of equity for an injunction. *State ex rel. Dakota Hail Ass'n. v. Carey*, 2 N. D. 36, 49 N. W. 164; *Carter v. State*, 8 S. D. 153; 65 N. W. 422; *Anderson v. DeUxrieste*, 96 Cal. 404, 31 Pac. 266.

So in the tax commission case, *State ex rel. Birdzell v. Jorgenson*, 25 N. D. 539, the petition brought by the members of the tax commission for a writ of mandamus in the Supreme Court was endorsed and approved by the attorney general.

As showing the requirement that a private citizen bringing a suit against a state board, as in this case, must show that his burden or taxation will thereby be increased, see the case of *Sherman v. Bellows et al.* (Ore.) 34 Pac. 549.

"Two questions are this way presented: first, has the plaintiff any legal capacity to sue, and second, does the complaint state facts sufficient to constitute a cause of suit. While there is an irreconcilable conflict in the decisions upon the right of a tax payer in his own name to restrain by an injunction a municipal corporation and its officers from illegally creating debts or disposing of the corporate property or funds, we think the decided weight of authority supports the doctrine that he may invoke the aid of a court of equity to obtain such relief, whenever it is made to appear that such illegal act of the corporation would increase his burden of taxation. The court here cites: *Hodgeman v. Railway Co.* 20 Minn. 36-48 (Gillfillan); *Killard v. Comstock*, 58 Wis. 565, 17 N. W. 401; *Railway Co. v. Dunn*, 51 Ala. 134; *Springfield v. Edwards*, 84 Ill. 627; *McCord v. Pike* (Ill.) 12 N. E. 259; Am. St. Rep. 85 and exhaustive notes.

Statement.

BRONSON, J. The plaintiff, as a taxpayer, seeks to enjoin the assessment, levy, and collection of school taxes and to adjudge, as illegal, the proceedings had in the organization of a special school district. The record discloses the following facts: The plaintiff owns three quarter sections of land in Banner township. He is a resident, citizen, and taxpayer in such township and in Banner school district, a common school district situated within Banner township. In July, 1920, the village of Aisen was organized as a village. It comprises 30 sections of land—six in Henderson township; nine in Gordon township; nine in Storlie township; and six in Banner township. Four of these sections in Banner

townships (sections 3, 10, 11 and 12) composed a portion of Banner school district. On April 22, 1921, a petition was presented to the trustees of Alsen village requesting that the village be organized into a special school district according to § 1243, Comp. Laws 1913. Thereafter, in May, 1921, proceedings were had whereby the territory comprising Alsen village was organized into a special school district of Alsen village. This served to take from Banner common school district the four sections of land above stated. On July 19, 1921, the plaintiff presented to the trial court his complaint. It alleges the facts above stated; that the proceedings for the organization of the territory of Alsen village into a special school district were illegal and void for the reason that Banner school district was deprived of four sections of land without notice and the proceedings were not had pursuant to provisions of §§ 1230—1239, C. L. 1913; that on July 16, 1921, a notice of tax levy for the benefit of Alsen special school district was filed in the county auditor's office which will be apportioned and assessed upon these four sections of land, a part of the Banner common school district; that, unless defendants be restrained, the plaintiff and other persons will suffer irreparable damage. The complaint prays that the proceedings which purport to organize the village of Alsen into a special school district be declared null and void, and the election or appointments of the officers thereof illegal; that the county auditor be restrained from assessing or levying any taxes upon the four sections of land for purposes of such special school district; that the county auditor and county treasurer be restrained from collecting any taxes for such purposes of the special school district; that defendants be restrained from any further proceedings attempting to organize the village of Alsen into a special school district; that the county superintendent and the special school district be restrained from equalizing or attempting to divide the property of the Banner school district. The defendants are the village of Alsen, the special school district of Alsen and their respective officers, the board of county commissioners, the county auditor, the county treasurer, and the county superintendent.

Upon this complaint, the trial court issued a temporary injunctional order restraining the defendants as demanded. A general demurrer was interposed which asserted lack of legal capacity to sue, lack of grounds for issuing a restraining order, impropriety of restraining public officers, and the failure to state a cause of action. Separate answers were interposed alleging, generally, the legal organization of the special

school district. On September 7, 1921, the action was tried. The trial court sustained the demurrer, so far as the same affected the county commissioners and the village of Alsen, upon the grounds that they were not necessary parties. In the evidence it appears that the plaintiff had been a director of the Banner school district for some four years. He owned no land in the district attached to the special school district. In Banner school district there are two schools, one in section 18, and the other in section 13 adjoining a section attached to the special school district. Plaintiff testified that, if these four sections were taken away, it would not be able to continue the school in section 13, by reason of prohibitive taxes; that the Banner school district had no debts excepting the outstanding warrants for the expenses of last year. It further appeared in the evidence that the school tax for Banner school district for the year 1920 was approximately \$1,010; that, in addition, the Great Northern Railway Sompany paid \$838 to the Banner school district as school tax covering sections 3 and 11, which are included in the sections attached to the special school district. It further appeared that all of the residents in the four sections involved preferred to belong to the Alsen special school district. The plaintiff introduced in evidence a copy of the proceedings organizing the Alsen special school district that had been filed with the county auditor. The clerk of Alsen village testified that such copy was not a copy of all the proceedings; that there was a petition circulated to call an election to determine the question of organizing such special school district, and a notice of election, neither of which was contained in the copy. There was some evidence also that Alsen village was organized with the idea of later affording an opportunity to organize the territory into a special school district; that this village only contained some 30 or 40 inhabitants; that the purpose was to get better school facilities and better roads. On September 24, 1921, the trial court made its order for dismissal of the action. Pursuant thereto, on October 3, 1921, judgment was entered dismissing the action and vacating the injunctional order. A stay being granted the court finally on Oct. 26, 1921, dismissed the injunctional order. On December 19, 1921, the plaintiff appealed from judgment. In a memorandum decision the trial court found the plaintiff had failed to show all the proceedings had in the organization of the special school district; that the plaintiff was merely a taxpayer of Banner school dstrict and had no special interest in the case excepting as a taxpayer; that the court was unable to adjudge that the special school district was organized pursuant to § 1243, C. L. 1913; that accordingly the

action should be dismissed.

Plaintiff has demanded trial de novo. He contends that the village of Alsen was organized for the special purpose of permitting such organization to be used in the creation of the special school district; that the record clearly discloses that the Alsen special school district was organized pursuant to § 1243, C. L. 1913; that such section is inapplicable and would serve to permit the detaching of territory from a common school district without notice and without its consent; that §§ 1230—1239, C. L. 1913, provide for notice and for an election where it so attempted to detach territory from a common school district, and are the sections applicable.

Decision.

Upon this record plaintiff's right to maintain this action depends upon his residence and status as a taxpayer in Banner school district. The gravamen of his injury alleged is the detriment to be suffered as a taxpayer. The remedy sought is restraint in the assessment, levy, and collection of school taxes through a determination of illegality of procedure in organizing a special school district. Irrespective of the propriety of his status as a plaintiff or that of some of the defendants as necessary or proper defendants in this proceeding, it is manifest, for some evident reasons, that this court, at this time, and upon this record, is not in a position to restrain the assessment, levy, or collection of the school taxes involved, or to determine the illegality of the organization of Alsen special school district. This court cannot award to the plaintiff now the relief sought. The plaintiff does not challenge the validity of the proceedings which organized Alsen as a village. After the judgment was entered herein dismissing the action, the temporary injunctive order issued by the trial court was dismissed. Plaintiff did not secure a stay thereof. He did not appeal until nearly two months after such injunctive order was dismissed. Manifestly from October, 1921, until the present time the special school district has acted and continued to act as a de facto corporation. Presumably statutory provisions with respect to the assessment and levy of taxes have been fulfilled. Accordingly the taxes concerning which complaint has been made have been levied and assessed against the individual tracts of land concerned in this proceeding. Perhaps such taxes have been paid. The time within which such payment might have been made without penalty has elapsed. The

persons in such territory involved do not complain concerning the assessment, levy, or payment of such taxes. The determination of the question whether the special school district was organized pursuant to the provisions of § 1243, C. L. 1913, or §§ 1230—1239, C. L. 1913, or the question whether such special school district could be legally organized under the provisions of said § 1243 is necessary, primarily, for the purpose of ascertaining plaintiff's right to restrain the assessment, levy, and collection of the school tax involved. *Holter v. Wagoner*, 32 S. D. 137, 139, 142 N. W. 175. If it be contended or conceded that these questions might still properly remain for the determination of this court without the award of the specific relief demanded, nevertheless it is apparent, upon this record, that this court, at this time, cannot with propriety so determine. The trial court has found, and there is some evidence to show, that the plaintiff failed to prove all of the proceedings had in the organization of the special school district. Further at this time the legality of this special school district, as such, depends, not only upon the proceedings had at the time this suit was instituted, but upon any proceedings that might have occurred subsequently and up to the present time. The determination of these questions, anterior and subsequent, could not serve, at this time, as a basis for relief to the plaintiff by enjoining the assessment, levy, or collection of the school tax, if already made. The determination of the legality of the proceedings, as shown, under § 1243, might be moot and wholly ineffectual by reason of other proceedings had either before or since the institution of this action. See *Chicago, Mil. Ry. Co. v. Sioux Falls*, 28 S. D. 471, 134 N. W. 49; *Thompson v. Vold*, 38 N. D. 569, 165 N. W. 1076; *In re Kaeppler*, 7 N. D. 307, 75 N. W. 253; *State v. One Buick Automobile* (N. D.) 185 N. W. 305, 307; *Torgrinson v. School District*, 14 N. D. 10, 103 N. W. 414; *Barber Asphalt Paving Co. v. Hamilton*, 80 Wash. 51, 141 Pac. 199; *Carr v. City of Montesano*, 76 Wash. 380, 136 Pac. 363; 3 C. J. 358, 360; 4 C. J. 584.

The appeal is dismissed.

ROBINSON, J., concurs.

CHRISTIANSON, J. (concurring). Plaintiff's cause of action is predicated upon the proposition that the proceedings had for the organization

of Alsen special school district were void. In a memorandum decision the trial court said:

"The plaintiff has alleged that the proceedings taken by the Alsen special school district for its organization were illegal and void, and therefore the court holds as a matter of law that the burden of proof was upon the plaintiff to show the court all the proceedings that were taken by the Alsen special school district in the organization of said special school district. They have only seen fit to introduce the papers found with the county auditor. The evidence in the case shows that there were other proceedings and other elections, and plaintiff did not see fit to introduce or produce them."

The court therefore concluded that the plaintiff had failed to sustain the burden of proving that the proceedings for the organization of Alsen special school district were void. The record sustains the statement made in the memorandum opinion. And, of course, it follows that the trial court was right in dismissing the action.

GRACE, C. J., and BIRDZELL, J., concur.

STATE OF NORTH DAKOTA, EX REL., C. J. Kopriva, County Auditor of Burke County, North Dakota, Respondent, v. LAWRENCE LARSON and the FIRST NATIONAL BANK OF BOWBELLS, N. D., a corporation, Appellants.

(189 N. W. 626.)

Mandamus — national bank, acting as legal depositary, occupies quasi official position.

1. A national bank acting as a legal depositary, and depositary of county funds, occupies a position quasi official in its character.

Mandamus — appropriate remedy against former county treasurer and legal depositary to compel payment of public funds.

2. Mandamus is an appropriate remedy against a former county treasurer and a bank, acting as a legal depositary, to compel the payment of public funds placed upon time deposit.

Mandamus — county auditor is proper relator in proceedings to compel former treasurer and bank to pay public money deposited.

3. The county auditor, by reason of the connection of his duties, is a proper person to appear as relator in such proceedings.

Depositaries — statute section held not to repeal powers of county commissioners to designate legal depositaries.

4. Section 7 of chap. 147, Laws 1919 (Bank of North Dakota Act) and article 11 of chap. 42 of the Political Code (§§ 3315—3329 C. L. 1913) are construed, and it is *held*, that the powers of county commissioners to designate legal depositaries and to direct the placing of county funds upon time deposit were not repealed by said § 7.

Counties — commissioners must act as a board at proper meetings.

5. County commissioners must act as a board and through action taken at proper meetings.

Depositaries — commissioners may not direct time deposit of county funds for more than year.

6. Section 3319 Comp. Laws 1913 construed, and it is *held*, that county commissioners have no authority to direct a time deposit of county funds for a longer period than one year.

Depositaries — deposit of county funds by county treasurer without commissioners' assent held unauthorized, and commissioners held without authority to place funds for period of longer than one year.

7. Where a former county treasurer, shortly before the expiration of his term of office, deposited approximately \$166,000.00 of county funds upon time deposit in various banks of the county, without the formal consent or direction of the county commissioners, and, where thereafter the county commissioners, by formal resolution, set apart \$50,000.00 of such moneys upon time deposit in a sinking fund, which amount, pursuant to certificates of deposit, did not become due for more than one year thereafter, it is *held*, that the disposition of such public moneys by the county treasurer was unauthorized and that the county commissioners had no authority to place public funds upon time deposit for a longer period than one year.

Opinion filed June 5, 1922. Rehearing denied June 27, 1922.

Mandamus proceeding in District court, Burke county, *Lowe J.*, against a former county treasurer and a national bank. Defendants have appealed from the writ of mandamus awarded.

Affirmed, subject to the right of the defendant bank to make full pay-

ment and to the right of the county commissioners to exercise their powers.

Palda & Aaker, for appellants.

The duties which mandamus will enforce must be such as results from an office, trust, or station. This is clear from the wording of our statute. 8457 C. L. 1913; 26 Cyc. 163; *State ex rel. v. Piper*, 50 Neb. 25, 39, 40, 69 N. W. 378; *Lafin v. State*, 49 Neb. 614, 68 N. W. 1022.

These acts which may be compelled by mandamus are ministerial acts as distinguished from acts which are quasi-judicial or discretionary. *State v. Stutsman*, 24 N. D. 68, 139 N. W. 83, 89 Ann. Cas. 1914D, 776.

Where a party has a legal right to the enjoyment of which the discharge of a ministerial duty on the part of a public officer is necessary, and he has no other adequate remedy, in case the officer refuses to discharge his duty, mandamus is the proper proceeding. *High Extra. Leg. Rem.* § 34, et seq.; *State v. Whitesides*, 30 S. C. 579, 9 S. E. 661, 3 L. R. A. 777.

"A writ of mandamus runs only against the officer who is to do the particular official act commanded and should be addressed to him in his official capacity." "An action for mandamus is to be regarded as a proceeding against an officer, and not against the individual." *Placard v. State*, 148 Ind. 305, 47 N. E. 623, (B.) No clear right shown.

Mandamus will not issue to enforce a right which is in substantial dispute. 26 Cyc. 153, Citing, *Williams v. Smith*, 6 Cal. 91; *Davis v. Hewett*, 69 Kan. 651, 77 Pac. 704.

The undoubted rule of law is that where the act to be performed is beyond the power of the defendant, the writ will not issue. 26 Cyc. 167.

The peremptory writ will not ordinarily be awarded commanding an officer to do what is not within his power to do; and although he may have placed it out of his power to perform his duty, and may be liable in damages therefor, still, where he cannot perform the act, and this is clear to the court, the peremptory writ will not ordinarily be issued against him. *Duval Co. Comm. v. City*, 30 Fla. 196, 18 Ia. 339, 29 L. R. A. 416.

Mandamus will not lie to compel the tax collector of one county to pay over to the collector of another county taxes belonging to the latter county which he has unlawfully collected, as mandamus cannot serve the purpose of an action for money had and received. *Kings Co. v. Johnson*, 104 Cal. 198, 37 Pac. 870; *Territory v. Crum*, 13 Okla. 9, 73 Pac. 297.

The writ of mandamus can issue in all cases where there is not a plain, speedy or adequate remedy in the ordinary course of law. If there is such remedy in the ordinary course of law, it is very clear this writ cannot be invoked. *Territory ex rel. Co. Com. v. Cavanaugh*, 3 Dak. 325, 19 N. W. 413; *State ex rel. v. District Court*, 13 N. D. 211, 100 N. W. 248. *Taubman v. Aurora Court*, 14 S. D. 206, 84 N. W. 784; *Stover v. Keith*, Neb., 67 N. W. 313; Also in Note to 13 Pac. 846; Cited in Note to 98 Am. St. Rep. 865.

"The statutes of the state assimilated the mandamus proceeding to a civil action but have not made it a civil action, as is done in the case of quo warrants." *State ex rel. v. Carey*, 2 N. D. 36, 49 N. W. 164.

E. R. Sinkler, for respondent.

The money was a trust fund in the hands of the bank, that the relationship of principal and agent existed with respect to such money, that the money notwithstanding the certificates of deposit was at all times on checking account and subject to demand, that regardless of the subterfuge of the certificates of deposit the money was on demand deposit.

Mandamus will lie to compel the principal, that is, the treasurer and his agents to turn over what rightfully belongs to the office, and this money was a part of the office. *State v. Hill*, 66 N. W. 550 and cases cited.

"The county commissioners have only such powers as are granted them by statute." *Fox v. Walley*, 31 N. D. 610; *Kas. v. State*, 88 N. W. 776, (Neb.)

Statement.

BRONSON, J. This is one of several proceedings brought against a former county treasurer and a national bank. Through mandamus, the relator seeks to compel the payment of county funds by the defendant Larson, a former treasurer of Burke county, and, by the defendant bank, a depository of county funds upon time deposit.

The relator, as county auditor, has instituted this proceeding upon instructions received from the state auditor, pursuant to § 3359, C. L. 1913, which, in such case, imposes upon the auditor the duty to institute suit, where a county treasurer has failed to pay over all money with which he may stand charged. The record is long; the exhibits voluminous. No attempt will be made herein to state money figures with exactitude as if

upon an accounting. Such facts only are stated which are deemed sufficient for understanding the legal questions raised, involved, and deemed determinative in this proceeding. These facts are as follows: The defendant Larson was the county treasurer of Burke county for two terms ending on May 7, 1921, when J. R. Jensen, his successor, assumed the office. The county funds of Burke county consisted of moneys that it possessed for itself, or that it had collected for, and owed the state, or townships, school districts, cities, and villages in the county. In April, 1921, county funds were deposited either upon open account or upon time deposit in various banks of the county, including the defendant bank. Shortly before the expiration of the defendant's term of office, a meeting of the bankers in the county was held, together with the defendant Larson and the county commissioners, or some of them. The banks, theretofore designated as legal depositories, agreed to pay 6 per cent. per annum upon county funds placed with them upon time deposit. The bankers, brought with them blank certificates of deposit. The defendant Larson, with the verbal consent of the county commissioners, or some of them, as it appears, agreed to place county funds upon time certificates of deposit in such banks. Accordingly, on April 28, 1921, or thereabouts, the defendant Larson placed upon time deposits about \$166,000 of county funds. For such funds certificates of deposit were issued, bearing 6 per cent. interest per annum, and falling due, respectively, in intermittent periods from July 1, 1921, until December 1, 1922. The defendant bank issued certificates of deposit as follows: No. 2616, dated April 28, 1921, due August 1, 1921, for \$2,000. No. 2617, dated April 28, 1921, due Oct. 1, 1921, for \$2,000. No. 2618, dated April 28, 1921, due Dec. 1, 1922, for \$5,000. No. 2619, dated April 28, 1921, due Dec. 1, 1922, for \$5,000. No. 2620, dated April 28, 1921, due Dec. 1, 1922, for \$5,000. No. 2621, dated April 28, 1921, due Oct. 29, 1921, for \$2,000.

In his testimony, the defendant Larson stated that the reasons for so doing were that there was no immediate use for such county funds, and that the county would thereby secure a higher rate of interest. The defendant, upon the surrender of his office, delivered the certificates of deposit to his successor, who refused to receive them, and demanded the money therefor. Demand was also made upon the county commissioners that suit be commenced against the former county treasurer.

On July 8, 1921, the county commissioners adopted the following resolution:

"The following named banks of Burke county, North Dakota, are

designated as depositories to receive deposits to create a sinking fund to retire the seed and feed bond of \$125,000.00 due April 1, 1926, to which certificates of deposits have been issued as follows, as there is now over fifty thousand dollars (\$50,000.00) in the said seed and feed grain fund:

Name of Bank.	Date.	Due.	Amount.	Int.
First National Bank, Bowbells	4-28-21	12-1-22	\$6,000.00	6%
Burke County State Bank, Bowbells	4-28-21	12-1-22	\$5,000.00	6%
Farmers' State Bank, Columbus	4-28-21	12-1-22	\$5,000.00	6%
Farmers' State Bank, Battleview	4-28-21	12-1-22	\$2,000.00	6%
First State Bank, Coteau	4-23-21	12-1-22	\$3,000.00	6%
Citizens' State Bank, Flaxton	4-28-21	12-1-22	\$3,000.00	6%
First Bank of Flaxton	4-28-21	12-1-22	\$2,000.00	6%
First State Bank, Lignite	4-28-21	12-1-22	\$3,000.00	6%
Portal State Bank, Portal	4-28-21	12-1-22	\$4,000.00	6%
First International Bank, Portal	4-28-21	12-1-22	\$2,000.00	6%
State Bank, Powers Lake	4-28-21	12-1-22	\$6,000.00	6%
First State Bank, Powers Lake	4-28-21	12-1-22	\$6,000.00	6%
First State Bank, Northgate	4-28-21	12-1-22	\$3,000.00	6%

It appears that there was then something over \$50,000 in the seed and feed fund, the same being the unexpended proceeds of a seed and feed county loan negotiated by the county in March, 1921. The county auditor, accordingly, on July 21, 1921, instituted proceedings against the former county treasurer and the banks. The petition for the writ alleges many of the facts above stated, that the petitioner has no adequate remedy at law, and that the county will be unable to pay obligations to the state and other political subdivisions and to carry out its various governmental functions without registering warrants, unless a writ issue. The defendant interposed a demurrer, a motion to quash and an answer wherein is alleged the legality of the time deposits made. Trial was had commencing July 25, 1921. The testimony taken was made applicable to all of the cases instituted. The trial court overruled the demurrer and motion to quash. The present county treasurer testified that, on May 7, 1921, there were over \$32,000 in registered warrants; that since that time \$76,000 in registered warrants, had been issued; that on April 20, 1921, there were due the political subdivisions of the county about \$109,000. The defendant Larson testified that, on April 15, 1921, there were due the state about \$26,000 for hail insurance moneys; that when he left office there were, exclusive of the certificates of deposits, about \$145,000, con-

sisting of \$66,000, seed and feed moneys, and, the balance, other moneys. The present county treasurer testified that, on June 1, 1921, there were due the state from Burke county about \$65,000; that then there were warrants outstanding amounting to over \$109,000.00, of which \$92,000 had been registered; that his cash on hand then was about \$4,000 including \$3,000 in unpaid certificates of deposit, and not including the seed and feed fund, then amounting to about \$51,000; that the certificates of deposit, then outstanding, amounted to \$144,000. It appeared also from the evidence that the present county treasurer had made deposits with the Bank of North Dakota; that many of the certificates of deposit after they became due were not paid, for the reason that garnishment actions were instituted by school districts, or townships, against the county naming the banks as garnishees.

The trial court found that the placing of the county funds upon time deposit in defendant bank was unlawful and without authority; that such action operated to deprive the county of necessary funds to conduct its ordinary business and the business of its various political subdivisions; that if such moneys should be permitted to be withheld on time deposit, the county would be unable to pay the state, and the various political subdivisions of the county, and it would be necessary for the county to register warrants and to suffer substantial and material loss of interest necessary to be paid on such warrants. A writ of mandamus was authorized and issued, directing the defendants to pay to the present county treasurer the sum of \$22,000, moneys so placed on time deposit. This judgment was entered August 29, 1921. The defendants, on December 31, 1921, appealed from the judgment and orders of the trial court, and furnished a supersedeas undertaking upon appeal.

Contentions

The defendants contend that the record does not justify the issuance of a writ of mandamus; that the relator, in any event, has no cause of action at law and no right to a writ of mandamus; that § 3359, C. L. 1913, pursuant to which the relator commenced this proceeding, does not authorize nor contemplate a mandamus proceeding; that neither of the defendants are public officers; that there is no legal duty shown resulting from an office, trust, or station such as permit the maintenance of mandamus; that the right of the defendant Larson to make the time deposits with the defendant bank as a legal depository and to tender the

certificates of deposit issued create upon the issuance substantial dispute so as to prohibit the maintenance of mandamus; that there is shown an adequate remedy at law. Furthermore, that the laws providing for legal depositaries of county funds were not entirely repealed by the Bank of North Dakota Act; that the county commissioners had authority to designate public depositaries in January, 1921, and that the deposits made by the defendant Larson, pursuant to chap. 56, Laws of 1921, upon time deposits, were legal and proper. Such contentions are made upon numerous specifications of error concerning the rulings, findings, and orders of the trial court.

Decision.

Mandamus—Section 8457, C. L. 1913, provides that the writ may be issued to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust, or station. This same statutory provision has been in effect since territorial times. Section 695, Terr. Code Civil Proc. 1877. The statutes of many states have a similar provision. 26 Cyc. 163. It is, of course, a prerogative writ denominated in our statute a special proceeding. See *State ex rel. Johnson v. Ely*, 23 N. D. 619, 137 N. W. 834; 26 Cyc. 143. The prerequisites ordinarily necessary for the issuance of the writ are: First, the clear right of the relator to compel the performance of a particular duty; and, second, that the law affords no other plain, speedy, and adequate remedy. *Strauss v. Costello*, 29 N. D. 215, 150 N. W. 874. As a county official the county auditor is the proper person to institute mandamus to compel the performance of official duties with which he is concerned. 26 Cyc. 298. By law he is required to keep an accurate account current with the treasurer of his county. Section 3367, C. L. 1913. The duty to pay or account for county funds was a public duty, which concerned the county auditor as well as the county treasurer in the performance of their duties. Accordingly it was proper for the county auditor to appear as the relator in this proceeding, even if, perchance, § 3359, C. L. 1913, should be construed to refer to an action at law or to an action against a county treasurer as an existing official.

It is fairly well settled that mandamus will lie against a former official to compel the surrender of the insignia of the office, including funds belonging thereto. 26 Cyc. 258; 18 R. C. L. p. 261; *State ex rel. Langer v. McDonald*, 41 N. D. 389, 391, 170 N. W. 873; *Frisbie v. Fogg*,

78 Ind. 269; *Kas v. State*, 63 Neb. 581, 88 N. W. 776; *Butler v. Callahan*, 4 N. D. 481, 488, 61 N. W. 1025; note 31, L. R. A. 342. Mandamus may also lie to enforce the performance of a duty by one who, although not a public official, occupies a relation quasi official in its character. 26 Cyc. 387. See *Haines v. People*, 19 Ill. App. 354; *State v. Cadwallader*, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319. Thus, in *Belcher v. First National Bank*, 81 W. Va. 316, 94 S. E. 380, mandamus was held to be an appropriate remedy to compel certain banks, county depositories, under the Depository Act, to credit the sheriff with certain interest and to pay his lawful orders drawn thereupon. So in *Nye v. Rose*, 17 R. I. 733, 24 Atl. 777, mandamus was appropriate against a person appointed as commissioner of a certain sinking fund, established without legislative authority, although he was not a public official nor an official de facto, to compel him to pay over the fund to the persons authorized to receive the same. In the case at bar, the defendants contend, and have asserted in their answer, that the defendant bank was a legal depository; they base their claim and right to withhold the time deposits upon the ground that such defendant bank is a legal *depository*, as well as a *depository*. For reasons hereinafter stated, concerning the interpretation of the law applicable, the defendant bank was a legal *depository* pursuant to §§ 3315—3329, C. L. 1913, as well as a *depository* for county funds. It held, accordingly, with relation to the county, a position quasi official in its character. 18 C. J. 579. The case of *Territory v. Cavanaugh*, 3 Dak. 325, 19 N. W. 413, cited in support of defendant's contention, may be readily distinguished. It involved a proceeding of mandamus to compel the payment of \$400 claimed by a county official as his rightful commission. It is well settled that mandamus cannot be used either to try the title to office or to property. In this case there is no dispute that the funds involved are public funds. The question involved concerns the disposition of such funds upon deposit. Manifestly, in determining the administration of governmental funds properly, speedily, and adequately, mandamus upon this record, is an appropriate proceeding. We so determine.

Legal Depositories.

Were the time deposits, made by the former county treasurer, authorized and legal? Was the resolution of the county commissioners concerning such time deposits in all respects legal and effective? The an-

swer to these two questions depends upon the construction and interpretation of constitutional and statutory provisions concerning county funds and depositaries.

Pursuant to constitutional, as well as statutory, provisions, the duty to supervise and control fiscal affairs of the county is imposed upon the county commissioners. Section 172, Const.; § 3276, C. L. 1913; *Boettcher v. McDowall*, 43 N. D. 178, 174 N. W. 759, 761.

Pursuant to article 11 of chap. 42 of the Political Code (§§ 3315—3329, C. L. 1913) the county commissioners, concerning depositaries of county funds, were empowered to designate either national or state banks as county depositaries in which all of the funds of such counties should be deposited, and, further, concerning sinking funds and other county funds in excess of \$1,000 for which there was no immediate use, to direct time deposits thereof for a period of one year in a county depositary as created by law or in such state or national bank as the county commissioners might designate.

The act creating the Bank of North Dakota (chap. 147, Laws 1919) became a law February 25, 1919. Section 7 thereof provides as follows:

"All state, county, township, municipal and school district funds, and all funds of all penal, educational and industrial institutions and all other public funds shall be, by the person having control of such funds, deposited in the Bank of North Dakota within three months from the passage and approval of this act, subject to disbursement for public purposes on checks drawn by the proper officials in the manner now or hereafter to be provided by law; provided, however, that on a proper showing made by any official having control of public funds, the Industrial Commission may permit a postponement * * * not to exceed six months. And provided, further, that if any such funds are now loaned by authority of law under a contract terminating at a future time, then the deposit of such funds in the Bank of North Dakota shall not be required until two months after time of expiration of such contract."

Section 25 thereof provides as follows:

All acts and parts of acts inconsistent with this act are hereby repealed."

Did the Bank of North Dakota Act wholly or partially repeal the provisions of said article 11 (§§ 3315—3329, C. L. 1913)? This act required the deposit of all county funds in the Bank of North Dakota. Manifestly, pursuant to its terms, legal depositaries that had been designated, or that might be designated, within a period of three months

after the passage of the act by the county commissioners, continued proper and legal depositories of county funds. Further, legal depositories established by the county commissioners or that might be established by such county commissioners within a period of six months after the passage of the act might remain proper depositories of county funds through permission of the Industrial Commission. Furthermore, such legal depositories designated by the county commissioners might remain depositories for funds, loaned under authority of law under contract terminating at a future time, for a period of time extending two months after the expiration of such contract. From the terms of the Bank Act, it appears that the powers of the county commissioners to designate legal depositories, pursuant to the provisions of article 11, were not repealed nor taken away upon the passage and approval of the act. Further, the act does not contemplate the repeal of the powers of the county commissioners to supervise and control the fiscal affairs of the county. The Bank Act served to designate by law a legal depository of county funds in which all county funds must be deposited, pursuant to and dependent upon its terms. The act did not pretend to deprive the county commissioners of the power to contract with the Bank of North Dakota concerning time deposits. The act did serve, by its express terms, to suspend the right of any legal depository designated by the county commissioners other than the Bank of North Dakota to receive or retain any county funds excepting such as the Bank Act expressly permitted. The word "repeal" may be used in a limited sense. Sutherland Stat. Const. § 137. It is a mere retortition now to state that repeals, by implication, are not favored. The provisions in the Bank Act repealing all acts and parts of acts inconsistent therewith assumes the existence of statutory laws repugnant to such Bank Act. It assumes to repeal to the extent of any repugnancy, but no farther. Sutherland, Stat. Const. § 147. The use of such phraseology is an express limitation upon the extent to which it was intended that former acts should cease to be in operation. Such phraseology does not serve to create, by implication, legislative intent for a more extensive repeal or suspension. *Gaston v. Merriam*, 33 Minn. 271, 22 N. W. 614; *Co-op. Savings & Loan Ass'n v. Fawick*, 11 S. D. 589, 79 N. W. 847; 36 Cyc. 1097; 25 R. C. L. p. 912. The repugnancy of existing statutes to the Bank Act is removed by suspending the power of a legal depository to act as a depository contrary to the terms of the Bank Act. No repugnancy exists in permitting former statutes to survive concerning the designation of legal de-

positaries; the Bank Act, by its terms, expressly contemplated the continuance of legal depositories dependent upon the inhibitions prescribed to act as depositories. Upon such principles of construction, the provisions of the Bank Act concerning the deposits of county funds may be made harmonious with the constitutional powers of county commissioners and the statutory authority provided thereunder and then existing at the time of the adoption of the Bank Act.

Pursuant to the initiated law, adopted by the electors at the general election on November 2, 1920, § 7 of the Bank Act (chap. 147, Laws 1919) was amended and re-enacted (Laws 1921, p. 255) so as to read as follows:

"All State funds, and funds of all state, penal, educational and industrial institutions shall be, by the persons having control of such funds, deposited in the Bank of North Dakota."

Accordingly, when such initiated act became a law, no mandatory requirement remained that county funds be deposited in the Bank of North Dakota. The Bank of North Dakota, however, continued to be a proper bank, wherein deposits of county funds might be made. Section 9, chap. 147, Laws 1919.

Chap. 56, Laws 1921, became a law March 8, 1921: It provides, among other things, that all state and national banks complying with the provisions of the act, and the Bank of North Dakota, are declared to be legal depositories of public funds of counties, etc.; that before any deposit shall be made in any depository, such depository shall furnish a bond subject to approval as to its amount and sufficiency by the governing board of the corporation (for a county meaning the county commissioners). In this opinion the word "depository" has been used to denote a person with whom, and the word "depository," to denote a place in which, public moneys may be deposited for safe-keeping. 18 C. J. 562. It may be noted that the legislative acts have also used these words advisedly. This act (chap. 56, Laws 1921) by law, makes all banks legal depositories. Such banks may qualify as depositories by further complying with the terms of the act. Such act, at least impliedly, recognizes duties and powers of the county commissioners and of the county treasurer, as prescribed in said article 11. This act does not prescribe concerning the deposit of sinking funds, or other funds, of a county, upon time deposit, although the act otherwise requires reports to be made by the depository showing time deposits and demand deposits and rates of interest paid therefor. The act does not prescribe concerning the duty

of the county treasurer in distributing county funds in the depositories who have qualified as depositories. The provisions of said article 11 do prescribe concerning the duties of the county commissioners and the county treasurer in regard to such matters.

These statutory provisions hereinbefore mentioned accordingly were applicable when the former county treasurer deposited upon time deposit the sum of approximately \$166,000. There is evidence in the record that such time deposits were made with the consent or advice of the whole or part of the county commissioners. This consent and advice, however, does not appear from the record to have been through any formal action or at any meeting of the county commissioners. The powers conferred upon the county commissioners to designate legal depositories, or to direct time deposits, is a power requiring formal action by the county commissioners. They act as a board, and through action taken at proper meetings. Section 3290, C. L. 1913; 15 C. J. 460. See *State ex rel. Lemke v. Ry.* (N. D.) 179 N. W. 378; *State ex rel. Lemke v. Power Co.* (N. D.) 182 N. W. 539; *Schwanbeck v. People*, 15 Colo. 64, 24 Pac. 575; *Schumm v. Seymour*, 24 N. J. Eq. 143. Accordingly, the treasurer may not successfully assert the deposit of county funds upon time with the consent and advice of the county commissioners, unless he is able to establish in the record that the county commissioners, as a body, so gave its consent and advice. The record does not so establish. Consequently, the action of the former county treasurer in depositing such county funds upon time was unauthorized and improper.

The formal resolution of the county commissioners, dated July 8, 1921, placed \$50,000 out of the certificates of deposits issued, pursuant to the arrangement made with the former county treasurer in a sinking fund for the seed and feed bonds. All of these certificates are dated April 28, 1921, and become due December 1, 1922. The relator maintains that the county commissioners had no authority to place unexpended proceeds of the seed and feed bonds in the sinking fund therefor. It is unnecessary to either consider or decide this question. As hereinbefore discussed, the county commissioners did have power and authority to place money upon time deposit pursuant to the provisions of § 3319, C. L. 1913; either moneys of a sinking fund or other county funds for which there was no immediate use. The county commissioners, as hereinbefore stated, also have supervision and control over the fiscal affairs of the county, subject to the limitations imposed by statute. Section 3319, C. L. 1913, imposes the limitation of one year as a period of time

for which county funds may be placed upon time deposit. The power granted concerning sinking funds in the seed and feed act does not pretend to extend this limit of time. Chap. 13, Spec. Sess. L. 1918; chap. 177, Laws 1919; chap. 54, Spec. Sess. 1919. This specific provision contained in § 3319, C. L. 1913, provides that—

The county commissioners "shall direct a time deposit of such funds for a period of one year, as they may deem expedient, either in one or more of the county depositories as created by law, or such state or national banks as said board of county commissioners may designate."

This specific provision, before its amendment by legislative act in 1903, provided as follows:

"The board of county commissioners are authorized and empowered to direct a time deposit of such funds for a period of one year, or six months, as they may deem expedient, either in one or more of the county depositories as created by law, or such state or national bank as said board of county commissioners may designate." Chap. 75, § 1, Laws 1903.

It will be noted that under the former law a deposit upon time could be made for a period of one year or six months; that the words "as they may deem expedient," present both before and after the amendment was made, refer to the succeeding phrase, and do not serve to enlarge a discretion which the legislature intended to limit. Considerations of public policy also apply in holding, upon construction, a definite limit of time to apply. 5 C. J. 542. It is readily observable that the interest rate upon a time deposit due in one year (and which is capable of being renewed) is greater than time deposit for a longer period, although the interest rate prescribed be the same for both. It follows that on July 8, 1921, the moneys placed on time deposit in the various banks by the former county treasurer were really in law deposits payable on demand; that on July 8, 1921, the county commissioners had no authority to place such deposits upon time deposit for a period of more than one year. At this time it is manifest that all moneys so placed upon time deposit by the former county treasurer have become due and payable, excepting the certificates of deposit due December 1, 1922. It is to be presumed that the banks have paid such certificates that have become due. The questions upon such certificates, therefore, have become moot, excepting those due December 1, 1922. Full consideration, however, has been given in this opinion to the proper construction and interpretation of the present depository laws applicable to county funds, by reason of their importance in the administration of public funds in this state, and as affecting the

questions involved in this action. The defendant bank, upon this record, should pay interest at 6 per cent. per annum upon the certificates of deposit issued by it, pursuant to the arrangement made with the former county treasurer and the county commissioners, up to and until the time of payment thereof. 18 C. J. 594. It is ordered, accordingly, that the writ of mandamus issued by the trial court be affirmed subject to the right of the defendant bank to make full payment to the present county treasurer, or to the right of the county commissioners to direct the deposits of county funds concerned and involved herein, all within a period of 15 days from the time the remittitur is filed in this proceeding. Neither party will recover costs on this appeal.

ROBINSON, J., concurs.

GRACE, J. (specially concurring). In my opinion the principal question presented is whether the trial court properly issued the writ of mandamus. I am of the opinion that the writ was properly issued.

CHRISTIANSON, J. (dissenting). I dissent. In my opinion mandamus does not lie under the facts in this case. In this state "the writ of mandamus may be issued by the Supreme Court and district courts to any inferior tribunal, corporation, board or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station." (Section 8457, C. L. 1913.) The writ of mandamus cannot be employed to supersede legal remedies, but is intended to furnish a remedy where no adequate legal remedy is provided. *Strauss v. Costello*, 29 N. D. 215, 150 N. W. 874; § 8458, C. L. 1913. In this case the defendant Lawrence Larson, while county treasurer of Burke county, made certain time deposits of funds in his hands as such county treasurer. Among others he made such deposits with the defendant bank, and received therefor time certificates of deposit. It is undisputed that, at the time his successor in office qualified, said Larson turned over to him everything then in his possession as county treasurer, including such certificates of deposit. In this case it is sought to have the said Lawrence Larson and the bank which received such deposits and issued such time certificates compelled by writ of mandamus to pay over at once the moneys so deposited. In the petition herein the petitioner prays that—

"An alternative writ of mandamus issue out of and under the seal of this court, directed to the said Lawrence Larson and to his agent, First

National Bank of Bowbells, commanding them forthwith to turn over and deliver to the said J. R. Jensen, the duly elected, qualified, and acting treasurer of Burke county, N. D., the sums of money and funds rightfully belonging to the said J. R. Jensen, as treasurer of Burke county, N. D., which are so wrongfully and unlawfully withheld and retained by the said Lawrence Larson and the said First National Bank of Bowbells."

The alternative writ issued upon the petition states:

"I do command and enjoin you, Lawrence Larson, and First National Bank of Bowbells, that immediately upon the receipt of this writ, to turn over and deliver to the said J. R. Jensen the duly elected, qualified, and acting county treasurer of Burke county, N. D., the sum of \$19,000, being the funds and money rightfully belonging to the said J. R. Jensen, as treasurer of Burke county, N. D., or in default thereof to show cause," etc.

It is not contended that the said Lawrence Larson did not at the expiration of his term of office turn over all the records and property held by him as county treasurer to his successor in office. On the contrary, it is undisputed that the said Larson did turn over to his successor in office everything in his possession as county treasurer, including the certificates of deposit which he had received from the different banks. It is also undisputed that the present county treasurer has collected a large number of such certificates of deposit when and as they became due. Larson has had no possession of or control over any of the funds which he formerly held as county treasurer or over the certificates of deposit at any time since his term of office expired. Hence this is not a case where a county treasurer at the expiration of his term refuses to turn over to his successor in office either property or moneys in his possession or under his control, and mandamus is invoked for the purpose of compelling him to surrender the same to his successor, and authorities dealing with that situation are not applicable here. The real object of this proceeding is to compel a county treasurer, whose term of office has expired, to make restitution of certain moneys, which he, while in office, placed on time deposit, and to compel the bank in which such time deposit was made to pay over the funds so deposited in disregard of the terms of the certificates of deposit. In other words, it sought by mandamus to undo that which has been done. Mandamus is a writ to compel action, and not to undo that which has been done. 19 Am. & Eng. Ency. L. p. 743; 13 Ency. Pl. & Prac. 497; Merrill on Mandamus, §§ 42,

43; *Gow v. Bingham et al.*, 57 Misc. Rep. 66, 107 N. Y. Supp. 1011; *State v. Jacobs*, 103 App. Div. 86, 92 N. Y. Supp. 590; *State v. Bowman*, 66 S. C. 140, 44 S. E. 569; *State v. Ross*, 39 Wash. 399, 81 Pac. 865; *State v. Willett*, 117 Tenn. 334, 97 S. W. 299.

In *Gow v. Bingham et al.*, *supra*, the court said:

"In the absence of special statutory authority, a writ of mandamus only lies to compel one to do what ought to be done in the discharge of a public duty, and not to undo what is improperly done, even though it may have been done under the color of performance of public duty." 57 Misc. Rep. 75, 107 N. Y. Supp. 1018.

Nor will mandamus issue against an officer, after the expiration of his term of office, unless the power and the duty to act still continue. 19 Am. & Eng. Ency. L. 763; 18R. C. L. pp. 120, 121.

BIRDZELL, C. J., concurs.

MABEL KAWABATA, Respondent, v. ROY KAWABATA, Appellant.

(189 N. W. 237.)

Marriage — requirements of complaint to annul marriage for fraud stated.

Where it is sought to have a marriage annulled under subdivision 4, § 4368, Comp. Laws 1913, on the ground that the consent thereto was obtained by fraud, the complaint must set forth the facts showing such fraud as is contemplated by the statute; also the time and place where the marriage was celebrated and the date of the discovery of the alleged fraud.

Opinion filed June 30, 1922.

Appeal from the District court of Ward county, *Lowe, J.*

The defendant appeals from an order overruling a demurrer to the complaint.

Reversed.

Dudley L. Nash, for appellant.

E. T. Burke and *John E. Burke*, for respondent.

"Although the jurisdiction of the courts to annul marriage may in certain cases exist independently of statute and in virtue of their general equity powers, these powers may in this particular be either enlarged or restricted by statutes, which must then be looked to as the measure of their authority. 29 Cyc. 900 and cases cited.

"Imposition in the nature of a fraud may also be ground for annulling the marriage, especially where it was exerted by playing upon the party's superstitions or religious delusions." *Orchardson v. Cofeild*, 171 Ill. 14 N. E. 197; 63 Am. St. Rep. 211, 40 L. R. A. 256.

PER CURIAM. This is an action for the annulment of a marriage on the ground that the consent to such marriage was obtained by fraud. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and defendant appeals.

The ground on which annulment is sought is that the plaintiff's consent to the marriage was obtained by virtue of a false representation made by the defendant that he was a citizen of the United States. It is contended by the defendant that the alleged misrepresentation as to citizenship does not constitute fraud within the purview of the above quoted statute, and that hence the complaint fails to state a cause of action for the annulment of a marriage. It is asserted that fraud, as contemplated by this statute, must relate to something which goes to the essentials of marriage relation itself, and that misrepresentations as to other matters, however important such as to birth or condition of life, do not affect the validity of a marriage. In support of this many authorities are cited, among which are 2 Kent, Com. 77; Schouler on Domestic Relations § 23; Nelson on Divorce and Separation, § 616; 1 Bishop on Marriage and Divorce, § 167; *Chipman v. Johnston*, 237 Mass. 502, 130 N. E. 65, 14 A. L. R. 119; *Lyon v. Lyon*, 230 Ill. 371, 82 N. E. 850, 13 L. R. A. (N. S.) 996; 12 Ann. Cas. 25; *Trask v. Trask*, 114 Me. 60, 95 Atl. 352; note 14 A. L. R. p. 121 et seq.

A majority of the court, namely, Mr. Chief Justice Birdzell and Associate Justices Christianson and Robinson, are inclined to the view that the rule invoked by the defendant is applicable, and that the alleged false representation set forth in the complaint does not constitute such fraud as is contemplated by the statute relating to the annulment of marriage; but the court does not find it necessary to base its decision in this case on the ground stated, for the members of the court are all agreed that there are other reasons why the complaint fails to state a cause of action. Under the statute a marriage may be annulled by an action in the district court, for the reason, among others:

"When the consent of either party was obtained by fraud, unless such party afterward, with full knowledge of the facts constituting the fraud freely cohabited with the other as husband or wife." Subdivision 4, § 4368, C. L. 1913.

But action for annulment of marriage on this ground must be brought within four years after the discovery of the facts constituting the fraud. Subdivision 4, § 4369, C. L. 1913. It is a general rule (subject to certain exceptions) that the validity of a marriage is to be determined by the law of the place where it was contracted or celebrated. 26 Cyc. 832; 18 R. C. L. p. 388; 19 Am. & Eng. Ency. L. p. 121 *et seq.*; *Garcia v. Garcia*, 25 S. D. 645, 127 N. W. 586, 32 L. R. A. (N. S.) 424, Ann. Cas. 1912C, 621. This rule is embodied in the statutory law of this state. Section 4366, C. L. 1913.

The laws of this state relative to marriage and divorce recognize that (1) certain marriages are void; (2) others voidable; and (3) that all marriages which do not fall within these two classes are valid. The different statutory provisions relating to void and voidable marriages were considered, and to some extent quoted, in *Woodward v. Blake*, 38 N. D. 38, 164 N. W. 156, L. R. A. 1918A, 88, Ann. Cas. 1918E, 552. A marriage which is void or voidable may be annulled by an action for annulment as prescribed by the statute. A valid marriage can be dissolved only (1) by the death of the parties; or (2) by a judgment of a court of competent jurisdiction decreeing a divorce of the parties. Section 4379, C. L. 1913. A divorce may be decreed only for one of the causes prescribed by the legislature. 9 R. C. L. p. 269. An action for annulment is predicated upon some ground existing at the time the marriage was entered into, and the decree therein in effect declares that a valid marriage never existed. An action for a divorce is predicated upon grounds arising after the marriage, and the decree therein, in effect, declares the

marriage valid and dissolves it. 19 Am. & Eng. Ency. L. p. 1218; 9 R. C. L. p. 267.

In view of these fundamental propositions it seems manifest that a petition for the annulment of a marriage must allege the place where the marriage was contracted or celebrated; and that is the rule laid down by the authorities. The Encyclopedia of Pleading and Practice (13 Ency. Pl. & Pr. p. 875) says:

"In every petition for annulment the plaintiff must allege the marriage sought to be annulled, by stating the time and *place* where the marriage was celebrated."

The complaint in this case does not show where the marriage was contracted or celebrated. So far as we know, the marriage may have been celebrated in any one of the states of the Union, or it may have been celebrated in some foreign country.

This action was commenced in February, 1921. The complaint shows that the plaintiff and defendant were married on April 27, 1916. The complaint does not show when the facts constituting the alleged fraud were discovered. There is merely a statement that "the time in which an action for the annulment of this marriage has not expired." Actions for the annulment of marriage are not governed by the statute of limitations embodied in the Code of Civil Procedure. The period of limitations prescribed for such actions are embodied in the statute giving the right of action. Hence we believe that the limitations so prescribed affect the right or cause of action itself, and not merely the remedy, and that, if the right granted by the statute is not asserted within the limited period, it ceases to exist. *Mayer v. Walsh*, 111 U. S. 31, 4 Sup. Ct. 260, 28 L. ed. 340. Hence, when the complaint shows that the marriage sought to be annulled on the ground of fraud was contracted more than four years before the action for annulment is brought, it should further appear from the averments therein when the fraud was discovered, and the date of discovery must be within four years before the commencement of the action. The Encyclopedia of Pleading and Practice (13 Ency. Pl. & Pr. p. 876) says:

"The facts constituting the fraud, reliance upon the misrepresentations of the defendant, *the date of discovery of the fraud*, and the subsequent conduct of the parties should be alleged as in actions for equitable relief from contracts procured by fraud."

It follows, from what has been said, that the trial court should have sustained the demurrer, and the order appealed from is reversed.

BIRDZELL, C. J., and CHRISTIANSON, BRONSON, and ROBINSON, JJ.,
concur.

GRACE, J. (specially concurring). Plaintiff brought this action to annul her marriage to the defendant. She claims a legal right to have the marriage annulled on account of certain fraudulent representations of the defendant made to her in procuring her consent to the marriage:

"The plaintiff alleges that her consent to said marriage was obtained by fraud, and that, after obtaining full knowledge of the facts constituting the fraud, she has not lived nor cohabited with the defendant as his wife; that the fraud alleged above consisted in part in that the defendant, prior to the marriage, told the plaintiff that he was a citizen of the United States; that he well knew that he was not a citizen of the United States, and that he could not become a citizen of the United States; that defendant made such statements, well knowing that the same was false, and with the intent to deceive the plaintiff; that the plaintiff relied on such statement, believed it, and gave her consent under the impression that she did not lose her citizenship by said marriage; that, had she known the said statement to be untrue, she never would have entered into said marriage contract with the said defendant. Plaintiff alleges that she is informed and believes that on account of her said marriage she has alienated her citizenship from her native country, and that she does not willingly do so; that she did not do so."

It is further alleged that the time in which an action for annulment might be brought has not expired, that prior to her marriage her name was Mabel Jones, and that she desires to have that name restored to her. The prayer for relief is that the marriage be annulled, and she be granted a decree of nullity, and costs, disbursements, and attorney's fees, and that the property acquired by the plaintiff and defendant by their joint labor be divided between them. To the complaint a demurrer was entered on the ground that the same does not state sufficient facts to constitute a cause of action. The trial court made an order overruling the demurrer with leave to answer, and further ordered that defendant pay to the plaintiff within 10 days \$150 as attorney's fees and \$50 as costs in the action.

Our statute (§ 4368, C. L.) permits the annulment of marriage for certain causes. It provides that:

"A marriage may be annulled by an action in the district court to obtain a decree of nullity for any of the following causes existing at the

time of the marriage."

The cause for annulment provided by subdivision 4 of that section is as follows:

"When the consent of either party was obtained by fraud, unless such party afterwards, with full knowledge of the facts constituting the fraud, freely cohabited with the other as husband or wife."

As above stated, the demurrer was on the ground that the complaint does not state sufficient facts to constitute a cause of action. The complaint, indeed, is not a model of pleading. It would seem that it was drafted without careful investigation of the facts which should have been fully and with certainty pleaded. The case was presented to this court, and an oral argument had. The contention of the defendant is to the effect that there is a failure to plead sufficient facts in the complaint to constitute fraud. The fraudulent representations, if any, center about the following alleged fact, set forth in the complaint:

"That the defendant, prior to the marriage, told the plaintiff that he was a citizen of the United States, that he well knew that he was not a citizen of the United States, and that *he could not become a citizen of the United States.*"

This language needs careful consideration, to ascertain the meaning intended to be conveyed by it. It will be noticed that plaintiff alleges that her consent to the marriage was obtained by fraud, which consisted of the above statement and fraudulent representation; that the defendant knew the statement was false, and that he made it with the intent to deceive the plaintiff, who relied upon it and gave her consent under the impression that she did not lose her citizenship by said marriage. Assuming the allegations of the complaint to be true, the question arises: Was the fraudulent representation of the defendant to the plaintiff that he was a citizen, when in truth he was not, such a material representations as to constitute fraud, when used in obtaining her consent to the marriage? This may be answered by determining how the marriage affected her status as a citizen; that is, whether she would wholly lose her citizenship by the marriage, if she had freely consented to it. It would seem that a fraudulent representation which would operate to deprive her of her citizenship against her consent, and except for which she would not have consented to the contract of marriage, constituted an obtaining of her consent by fraud, under subdivision 4 of § 4368. The act of Congress of March 2, 1907 (chap. 2534, § 3, 34 Stat. 1228 (U. S. Comp. St. § 3960), reads:

"That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, * * * or, if residing in the United States at the termination of marital relation, by continuing to reside therein."

This section was construed and upheld in the case of *MacKenzie v. Hare*, 239 U. S. 299, 36 Sup. Ct. 106, 60 L. ed. 297, Ann. Cas. 1916E, 645, affirming the decision of the Supreme Court of California in the same case, which is reported in 165 Cal. 776, 134 Pac. 713, L. R. A. 1916D, 127, Ann. Cas. 1915B, 261. See, also 239 U. S. 299, 30 Sup. Ct. 106, 60 L. ed. 297, Ann. Cas. 1916E, 645; L. R. A. 1916D, 127; Ann. Cas. 1915B, 261, and note. To be a citizen of the United States, either by birth or naturalization, is a priceless privilege. It possesses a moral value to the possessor, which is largely indeterminable. The average citizen of the United States, whether native-born or naturalized, considers it one of his highest privileges. It gives him the feeling that his country places no impediment in the way of his advancement, though he may have been born a child of poverty. He thinks of his right of equality before the law; his freedom of action under just legal restraint; his opportunity to freely write and speak the thoughts of his mind, being responsible only for an abuse of those privileges. He thinks of the fact that there is largely no limitation upon the official position or other place of prominence or of trust that he may acquire, except such as are prescribed by his own limitations of intellectuality or other personal qualities. He would give up all else rather than lose such a privilege. We have known of those whose career was one of long and continued criminality, and who had committed the deepest and blackest of crimes, denoting great moral turpitude. We have seen them in the penitentiary while paying the penalty of their transgressions, required of them by the majesty of the law. We have listened to their plea for clemency on their application for pardon, where they would claim they had expiated their offense by sufficient suffering occasioned by restraint of their freedom; but we have ever noticed that a plea of mercy uniformly was accompanied with one for restoration of citizenship.

It would seem that, if such unfortunates feel that they cannot, after their liberation, face the world unless again in the possession of their citizenship; that if they regard themselves without it as unable to survive in the waves of scorn which they encounter as they again take up the

voyage on life's ocean, if they consider themselves without it as a pilotless bark on an angry sea—can it be said that it is not fraud to take such a privilege from one who, so far as the record shows, is a reasonably good citizen? We think not. Mr. Justice McKenna, speaking for the Supreme Court of the United States in *MacKenzie v. Hare*, said:

“We concur with counsel that citizenship is of tangible worth, and we sympathize with plaintiff in her desire to retain it and in her earnest assertion of it.”

We are of the opinion that the complaint liberally construed constitutes a cause of action.

The order of the court requiring defendant to pay attorney's fees in the amount stated in the order was a matter within its discretion. However, under the decision of *Bailey v. Bailey*, 22 N. D. 554, 134 N. W. 747, the attorney's fees should be payable to the plaintiff, and not the attorney.

The complaint in the case does not show where the marriage was contracted or consummated. We are of the opinion that it should have shown this. It should also have shown the date of the marriage. In addition to containing these requirements, the complaint should have clearly and concisely stated the facts constituting the fraud.

JOHN HELLEMONS, Respondent, v. JOHN KNUDSVIG, Appellant.

(189 N. W. 234.)

Compromise and settlement — evidence held sufficient to support rescission of leasehold settlement on ground of duress.

In an action to recover damages for breach of an agreement to lease real property for a certain period of time and for deprivation of plaintiff's interest in certain personal property through alleged wrongful acts of the defendant, where the defendant claimed that the plaintiff had voluntarily surrendered his rights under the lease and had given a bill of sale for the personal property for an agreed consideration, it is *held*:

The evidence is sufficient to support the verdict in so far as it is based upon a rescission of the settlement on the ground of duress.

Opinion filed June 30, 1922.

Appeal from the District court of Dunn county, *Berry J.*

Affirmed.

Thos. G. Johnson, Crawford & Burnett, for appellant.

"The proof necessary to destroy the recitals in a written instrument must be clear, satisfactory and specific, and of such a character as to leave in the mind of the court no hesitation or substantial doubt." *Jasper v. Hazen*, 4 N. D. 1, 23 L. R. S. 58; *McQuinn v. Lee*, 10 N. D. 160.

T. F. Murtha, T. H. H. Thorsen, for respondent.

If there was fraud in securing the settlement—the bill of sale and surrender of the lease—then the plaintiff had a right to rescind the same demand back his property and sue for a conversion and ejectment. 9 C. J. 1159; 2 Black on Rescission, § 700 to § 706; 20 Cyc. 86-87; § 5833 N. D. Comp. Laws 1913; *Clark v. N. P.* 36 N. D. 502.

The plaintiff prevailed in the court below before a jury. A motion for judgment notwithstanding the verdict or for a new trial was made and argued and by the trial court denied. There was no demurrer to the complaint or reply. No objections are made to the instructions of the court to the jury. No substantial objection is made to the reception or rejection of the testimony. On this appeal for the purpose of testing the sufficiency of the evidence the same will be construed most strongly in favor of the plaintiff, and all evidence in favor of the plaintiff must be taken as true. *Atkin v. Johnson*, 28 N. D. 205; *Ry. v. Lebeck*, 32 N. D. 162; *State v. Cary*, 31 N. D. 67; *Blackorby v. Tinther*, 34 N. D. 248; *Oakland v. Nelson*, 28 N. D. 456.

The defendant's misrepresentations as to the law in regard to his rights to foreclose the chattel mortgage at once, and as to his right to prevent the plaintiff from selling any of the grain under the contract, were sufficient to constitute fraud. Section 5855 N. D. C. L. 1913; *Silander v. Gronna*, 15 N. D. 552; 1 Black on Rescission § 151; 9 C. J. p. 1169 § 22; 26 C. J. 1207-8-9; *Holt v. Gordon*, 176 S. W. 902; *Schaeffer v. Blanc*, 87 S. W. 745.

BIRDZELL, C. J. The action is one to recover damages occasioned by the plaintiff being deprived of the continued possession of certain real

property and of his interest in certain personal property through alleged wrongful acts of the defendant. This is an appeal from a judgment in favor of the plaintiff for \$1,000 and costs, and from an order of the district court denying a motion for judgment non obstante or in the alternative for a new trial. The facts necessary to be stated are as follows:

In September, 1919, the plaintiff and defendant entered into a contract for farming on shares, lands belonging to the defendant, possession to be given to the plaintiff September 22, 1919, and to terminate November 1, 1921. The defendant sold and turned over to the plaintiff certain personal property to an agreed price of \$3,000, to secure which the plaintiff gave his notes for that amount, drawing 10 per cent. interest, secured by a chattel mortgage on the property purchased, \$300 of the principal sum falling due each year, beginning November 1, 1920. In addition to the property purchased, the defendant turned over to the plaintiff some cattle and hogs covered by a separate agreement, which provided for the plaintiff's supplying the labor and feed necessary to properly care for the stock and their increase, in return for which he was to have half the proceeds of the cattle and four-fifths of the hogs. The plaintiff entered into possession of the land in the fall of 1919 and farmed it the following year. The crop, consisting principally of wheat and oats, amounted to about 4,000 bushels, of which each party was to receive one-half. The plaintiff had likewise put up a considerable amount of hay upon the hay land. He had various accounts outstanding, which he would be unable to pay without the proceeds of the crop. The plaintiff's indebtedness, including the installment and interest due the defendant, amounted to at least \$1,800 at the time the threshing was done.

It seems that the plaintiff desired to discontinue the contract and that the defendant wished to regain possession of the land and the other property, so negotiations were had looking toward this end. The plaintiff consulted an attorney who looked into the proposition with a view to ascertaining what he should be paid to relinquish his rights under the contract. After some investigation and negotiations, a bill of sale was drawn up, dated October 2, 1920, under which plaintiff turned back the property purchased and covered by the mortgage for a recited consideration of \$100, but for an actual consideration of \$50 in money, one hog, valued at about \$30, and an agreement upon the part of the defendant to pay the plaintiff's outstanding accounts, surrender the chattel notes, and release the mortgage. Soon thereafter the plaintiff vacated the premises

and later consulted counsel with a view to bringing this action.

Plaintiff served a notice of rescission upon the defendant, rescinding "all agreements, conveyances, and bills of sale made by and between John Hellemmons and John Knudsvig on or about the 2d day of October, 1920, * * * on the ground of fraud, duress and mistake," and demanding that the defendant return and restore the property taken. The notice was accompanied by a tender of \$50 previously paid to the plaintiff.

The principal contention is that the evidence is insufficient to warrant a finding by the jury that the settlement contract was induced by duress and fraud. Reliance is had upon the rule that the proof necessary to destroy the recitals of a written instrument must be clear and satisfactory and such as to leave in the mind of the court no hesitation or substantial doubt. *Jasper v. Hazen*, 4 N. D. 1, 58 N. W. 454, 23 L. R. A. 58; *McGuin v. Lee*, 10 N. D. 160, 86 N. W. 714; *Anderson v. Anderson*, 17 N. D. 275, 115 N. W. 836. The soundness of this rule was conceded by the trial judge, who instructed the jury as follows:

"You are instructed that, before the plaintiff can recover, the burden is on him to prove that the bill of sale was procured by fraud, duress, menace, or undue influence. The burden is on the plaintiff to show that the bill of sale executed by him was not his free and voluntary act. The presumption is that the bill of sale is valid and binding, and this presumption will not be overcome by a mere preponderance of the evidence. On the contrary, fraud, duress, menace, or undue influence must be shown by evidence of the clearest and most satisfactory character before the bill of sale will be set aside. The proof necessary to destroy the recitals in a written instrument must be clear, satisfactory, and specific, and of such a character as to leave in the mind of the jury no hesitation or substantial doubt."

The jury being properly instructed as to the degree of proof required, the question presented here is whether or not, in the light of the rule, there is sufficient evidence to justify the verdict. The issue of fraud, duress, or undue influence cannot be tried here *de novo* as in an equity case. There is substantial evidence to the effect that the defendant induced the plaintiff to relinquish his rights under threat of foreclosure, involving a deficiency judgment and continued embarrassment incident thereto; that the plaintiff was an immigrant, not familiar with our language or our laws; and that there were threats of expensive litigation and of arrest if he did not vacate the premises.

While it does appear that the plaintiff consulted his attorney before completing the transaction, the record does not negative the continued operation of the duress that might have induced the defendant's assent to the contract, if the jury should find it to have existed as claimed. It is unnecessary to state all of the evidence tending to establish duress. Suffice it to say that, in our judgment, it is sufficient to support the verdict.

The appellant also contends that there were certain errors in excluding evidence, to the effect that the defendant lost money on the transaction. We can see no prejudicial error in excluding the evidence referred to, for the record on the whole discloses that ample latitude was given to show what the defendant realized as a result of the deal.

The appellant argues further to the effect that the record shows that the plaintiff sustained no loss by reason of the transaction. This argument is supported by evidence, most of which is disputed, tending to show that less grain was raised than plaintiff contends for, that more of plaintiff's indebtedness was paid by the defendant than he gets credit for, and that amounts should be added on account of loss on cattle and other personal property for which plaintiff has made no allowance. A careful examination of the evidence leads us to the conclusion that there is ample evidence from which the jury could find that plaintiff had sustained damages in the amount of the verdict. We cannot, therefore, with propriety disturb the verdict on this ground.

We can see no merit in the contention that the notice of rescission is not sufficient. It was not incumbent on the plaintiff to return property of which he was entitled to possession under the reinstated contract. Some, if not all, of the benefits that he did not offer to return were conferred after the notice of rescission was served, and it amply appears that the defendant, under the instructions of the trial court, had full credit for such benefits.

The judgment appealed from is affirmed.

CHRISTIANSON, ROBINSON, and BRONSON, JJ., concur.

GRACE, J. (concurring specially). As it appears to me, the conclusions reached by the jury did justice between the parties. The evidence is sufficient to support the verdict.

STATE OF NORTH DAKOTA on the relation of the North Dakota Workmen's Compensation Bureau, Joseph A. Kitchen, Chairman, S. A. Olsness, S. S. McDonald, Philip Elliot, and L. J. Wehe, Commissioners, Supply Department of the State Board of Administration and Hiram Landers, Appellants, v. JOHN STEEN, Treasurer of the State of North Dakota and as custodian of the North Dakota Workmen's Compensation Fund, Respondent.

(189 N. W. 247.)

States — bills for supplies and expenses of traveling auditor incurred by Workmen's Compensation Bureau must be audited by state auditing board.

Bills for supplies and for expenses of a traveling auditor incurred by the Workmen's Compensation Bureau must be audited by the State Auditing Board pursuant to the provisions of ¶ "D," chap. 145, Laws 1921 and the general law applicable.

Opinion filed June 30, 1922.

Action in District court, Burleigh county, *Nuessle, J.*, for a peremptory writ of mandamus. The complainant has appealed from an order sustaining a demurrer to the petition.

Affirmed.

C. A. Marr, for appellants.

Sveinbjorn Johnson, Attorney General, for respondent.

BRONSON, J. The Workmen's Compensation Bureau seeks to compel the State Treasurer to pay a voucher for supplies and a voucher for expenses of its traveling auditor. These vouchers were audited by the Bureau. The State Treasurer refused payment for the reason that they had not previously been audited by the State Auditing Board. The Bureau has appealed from the order of the trial court sustaining a demurrer to its petition.

The sole question presented is whether bills for supplies and for expenses of a traveling auditor incurred by the Compensation Bureau must be audited by the State Auditing Board.

In the case of *State ex rel. Stearns v. Olson*, 43 N. D. 619, 175 N. W. 714, this court held that an allowed claim for injuries received by an employee did not require auditing by the State Auditor or the State Auditing Board before payment by the State Treasurer.

In this case it is not contended that such decision of this court was erroneous or that such allowed claims of injured employees should be audited by the State Auditing Board. It is, however, maintained that claims for salaries and all other expenses, under the law, of the Bureau, must and should be audited by the State Auditing Board.

Chap. 145, Laws 1921, ¶ D, provides:

"The salaries and compensation of the members of the Bureau, of the secretary and all actuaries, accountants, inspectors, examiners, experts, clerks, physicians, stenographers and other assistants, and all other expenses of the Bureau herein authorized, including rent for offices of the Bureau, and the premium to be paid by the State Treasurer for the bond to be furnished by him, shall be audited and paid out of the workmen's compensation fund and the appropriation herein made in the manner prescribed for similar expenditures in other departments or branches of the state service, provided, however, the same shall not exceed in any year the sum of fifty-five thousand dollars (\$55,000.00)."

This same provision is contained in the original law, chap. 162, Laws 1919, excepting the words "including rent for offices of the Bureau" and excepting that the sum of \$55,000 theretofore was \$50,000. When the decision was rendered in *State v. Olson*, supra, the then existing law made it the duty of the State Auditing Board to audit all claims, accounts, bills, or demands against the state except such as were not then specifically excepted by law. Chap. 227, Laws 1915. Thereafter, in December, 1919, a special session of the legislature amended such law by inserting therein "except those of state-owned utilities, enterprises, and business projects."

Chap. 151, Laws 1919, provides that the Industrial Commission is empowered to manage, etc., all utilities, industries, enterprises, and business projects undertaken, etc., by the state except those carried on in penal, charitable, or educational institutions.

Pursuant to the specific provisions of ¶ D, is an audit required by the State Auditing Board? In terms, stripped of verbiage, the act provides that all expenses of the Bureau shall be audited and paid out of the fund in the manner prescribed for similar expenditures in other departments

or branches of the state service. If ¶ D had not been enacted, it might be conceded that the Compensation Bureau would have authority to audit its own disbursements out of the special fund over which the Bureau has control. The apparent purpose of ¶ D is to provide a check on official disbursements. In the re-enactment of the law in 1921, the legislature, if it had desired to specifically restrict the provisions of ¶ D to the powers and duties of the Bureau, could have readily so done. In the special session of 1919 it was specifically legislated that the powers of the State Auditing Board should not apply to state-owned utilities, enterprises, and business projects. It used, in so restricting the powers of the State Auditing Board, the same words of exception concerning such powers which in a previous statute were used concerning the Industrial Commission. The provisions contained in ¶ D seem to be peculiarly applied to the Compensation Bureau. Such specific provisions evidently have not been applied to the Industrial Commission (chap. 151, Laws 1919), state mill and elevator (chap. 152, Laws 1919) home building (chap. 150, Laws 1919), or the experimental creamery fund (chap. 149, Laws 1919). The original purposes of the statute were not changed by its re-enactment through ¶ D of chap. 145. It was competent for the legislature to impose upon the State Auditing Board, as well as upon the State Auditor, duties of auditing claims, although the same might not be conceded or determined to be claims against the state, but merely upon the special fund. The language used in this act is subject to the fair construction that it imposes duties upon state agencies required by the general law to audit claims. Such construction fulfills the fundamental purposes underlying an audit. Such construction does no violence to any legislative intent expressed in the law or in the cognate law. Such construction, following the language used, employs the usual and well-established agencies required in the presentation, allowance, and payment of claims. Accordingly it is our opinion that ¶ D of chap. 145, Laws of 1921, specifically provides for an audit in a manner prescribed for similar expenditures for other departments or branches of the state service, namely, an audit as now required by the general laws of this state.

The order of the trial court is affirmed, without costs.

BIRDZELL, C. J., and CHRISTIANSON and ROBINSON, JJ., concur.

GRACE, J. (dissenting). The duties of the State Auditing Board, as

I believe, are to audit claims which are or may be chargeable against the state and which are paid out of moneys in the state treasury. The expense incurred by the Compensation Bureau are paid out of a particular fund, the compensation fund, of which the State Treasurer is the custodian. The fund is accumulated by a premium to be paid by employers of the kinds and classes described in the Workmen's Compensation Act.

The question here presented is whether the bills of the ordinary expense of conducting the Bureau must be audited by the State Auditing Board, or whether they should be audited by the Bureau, which is composed of three members appointed by the Governor for definite periods of time and the Commissioner of Agriculture, and the Commissioner of Insurance.

Chap. 145, Laws of 1921, § D, provides:

"The salaries and compensation of the members of the Bureau, of the secretary and all actuaries, accountants, inspectors, examiners, experts, clerks, physicians, stenographers and other assistants, and all other expenses of the Bureau herein authorized including rent for offices of the Bureau, and the premium to be paid by the State Treasurer for the bond to be furnished by him, shall be audited and paid out of the workmen's compensation fund and the appropriation herein made in the manner prescribed for similar expenditure in other departments or branches of the state service, provided, however, the same shall not exceed in any one year the sum of fifty-five thousand dollars (\$55,000.00)."

It is my opinion that it was the intent of the legislature that such expenses should be audited and authentication required by the Bureau in the same way that charges against the state are audited and authentication required by the State Auditing Board in auditing the expenditures of the various departments or branches of the state's service.

M. B. FINSETH, Respondent, v. BISMARCK MOTOR COMPANY,
a corporation, Appellant.

(189 N. W. 106.)

Appeal and error — resolution of board of directors directing managers to make certain charges against plaintiff held inadmissible to prove plaintiff's debt to corporation; permitting paper with figures made by judge to go to jury room held harmless, in view of showing that jury was not influenced thereby.

Defendant appeals from a judgment on a verdict for \$646.26. It claims that the verdict is for an excess of \$277.49. The appeal is on two grounds: (1) Error of law in sustaining objections to the offer of resolutions directing the managers of the corporation to make certain charges against the plaintiff. (2) Error in permitting inadvertently a paper with some figures on it to go to the jury room. *Held*, that the record shows no prejudicial error.

Opinion filed June 30, 1922.

Appeal from an order and judgment of the District Court of Burleigh county; *Nuessle, J.*

Affirmed.

O'Hare & Cox, for appellant.

The exclusion of proper evidence is a ground for a new trial. 29 Cyc. 783; *Wheelter v. Bolton*, 66 Cal. 83, 4 Pac. 981; *Whitley v. Hudson*, 114 Ga. 668, 40 S. E. 838; *Iroquois Furnace Co. v. Wilkinson Mfg. Co.*, 181 Ill. 582, 54 N. E. 987; *Shirk v. Cartright*, 29 Ind. 406; *Tunnell v. Larson*, 37 Minn. 258, 34 N. W. 29; *Morelands v. McDermott*, 10 Mo. 605; *Cable v. Payne*, 8 Fed. 788; *Keys v. Baldwin*, 33 Tex. 666.

The fact that a paper which should not properly be with the jury during their deliberations has been sent to the jury room through inadvertence or accident, and not through the design of the prevailing party, will not as a rule be ground for a new trial if it does not appear that the paper was of a character to prejudice the unsuccessful party." *Bertsch v. State*, 13 Ind. 434, 74 Am. Ded. 263; *State v. Wilson*, 40 La. 751, 5 So. 52, 1 L. R. A. 795; *Leonard v. Schall*, 125 Minn. 291, 146, N. W.

1104, Ann. Cas. 1915C, 922 and note; *People v. Dolan*, 186 N. Y. 4, 78 N. E. 569, 116 A. S. R. 521, 9 Ann. Cas. 453; *Wright v. Clark*, 50 Vt. 130, 28 Am. Rep. 496.

It is ground for a new trial that the jury in arriving at their verdict considered depositions not in evidence or documents or papers not in evidence of a character that might have influenced their verdict. *Walker v. Hunter*, 17 Ga. 364; *McLeod v. Humeston, etc.* R. Co. 71 Ia. 138, 32 N. W. 246; *Benson v. Lambie*, 125 Mass. 367, (Bill of exceptions of former trial); *Flanders v. Davis*, 19 N. H. 139; *State v. Hartmann*, 46 Wis. 248; 50 N. W. 193; *Hutchinson v. Decatur*, 12 Fed. Cas. No. 6956, 3 Cranch, C. C. 291.

Taking statutes to the jury room has been considered sufficient ground for a new trial. *Merrill v. Nary*, 10 Allen (Mass.) 416; *Griffin v. Bartlett*, 58 N. H. 141.

If papers improperly considered by a jury were material or apt to prejudice the unsuccessful party a new trial should be granted, although the successful party was not at fault. *Dillen v. Sistrunk*, 7 Ga. 283; *Hoffron v. Gallupe*, 55 Me. 563; *Benson v. Fish*, 6 Me. 141; *Munde v. Nambie*, *supra*; *Hicks v. Drury*, 5 Pickering (Mass.) 296; *Whitney v. Whitman*, 5 Mass. 405; *Page v. Wheeler*, 5 N. H. 91; *Kruidenier v. Shields*, 77 Ia. 504, 42 N. W. 432.

Among the late decisions on this point are: *Lampher v. McLean*, 162 N. Y. St. 432; *Guntzer v. Healy*, 163 N. Y. St. 513; *Force v. Scholl*, 16 Pa. Dist. 1001 (Medical books); *Lidy v. R. Co.* 33 Pa. Co. 402; *Fort Worth v. Young* (Tex.) 185 S. W. 983; *Lumber Co. v. Huston*, 81 Wash. 678, 143 Pac. 146; (Taking statutes into the jury room) *McKibbon v. R. Co.* 251 Fed. 577 (Newspaper articles giving account of former trials of case.)

F. H. Register and Zuger & Tillotson, for respondent.

Upon such a situation as here presented, the courts held that the verdict will not be disturbed. 12 Ency. Pl. & Pr. p. 597; 12 Enc. Pl. & Pr. p. 603.

The presence of improper papers or books in the jury room will not vitiate a verdict if it appears that they did not influence the same. 20 R. C. L. p. 259, § 42; *Wilkins v. Maddrey*, 67 Ga. 766; *Schmertz & Co. v. Johnson*, 72 Ga. 472; *Winslow v. Campbell*, 46 Vt. 746; *Wilds v. Bogan*, 57 Ind. 452; *Leonard v. Schall*, (Minn.) 146 N. W. 1104.

ROBINSON, J. This is an appeal from an order denying a new trial and from a judgment on a verdict for \$646.26 and interest. Appellant claims that the verdict is for an excess of \$277.49, and that it should be for only \$369.86. The motion for a new trial is based on two grounds: (1) Error of law in sustaining objections to the offer of several resolutions by the directors of defendant, directing the president or manager of defendant to make certain charges on the books of the company against the plaintiff; (2) for error in permitting the jury to have a paper (Exhibit X) with certain figures marked on it by the judge.

Now from the record it well appears that the paper had no influence on the jury, and that they did not read or notice the figures made on it by the judge. The alleged error did in no manner prejudice the defendant.

In regard to the first error it is entirely clear that it was not competent for the defendant to manufacture or make evidence against the plaintiff by a resolution of its directors. There is no claim or specification that the evidence is not sufficient to sustain the verdict. As the record shows, the defendant is a stock corporation, represented by 250 shares of stock at \$100 a share. The plaintiff paid \$11,000 for 110 shares. He and Chris Bertsch did the same. They organized the corporation. The plaintiff became the president and manager. In time the small stockholders combined with Mr. Bertsch, and he became the president and manager. In January, 1920, the directors declared a dividend of 10 per cent., payable on February 1, 1920. The plaintiff became entitled to \$1,100, less a sum due the company, \$452.65. The motor company refused payment, and by answer set up a counterclaim against the plaintiff, demanding judgment for \$246.40. Now if defendant had offered to pay what it justly owed and had served a true and honest answer, the chances are that it would have saved both parties the expense of this action. The record shows no occasion for a lawsuit. And as the two errors assigned do not challenge the sufficiency of the evidence and point out wherein it is not sufficient to sustain the verdict, there is no occasion for reviewing the evidence.

Affirmed.

BIRDZELL, C. J., concurs.

BRONSON, J. (concurring specially). I agree that it was not reversible error to reject the resolutions of the defendant's directors. I also

agree that the showing made is insufficient to vitiate the verdict by reasons of the presence of certain figures inadvertently presented on a paper to the jury, during its deliberations. It is not otherwise claimed that the evidence is insufficient to justify the verdict. I am of the opinion that the order and judgment should be affirmed.

GRACE, BRONSON and CHRISTIANSON, JJ., concur.

THE HILLSBORO NATIONAL BANK, a banking corporation, organized under the laws of the United States, Appellant, v. JOSEPH ACKERMAN, JOHN DAVIS, and JOHN HOGLUND, as the Township Board of Supervisors of Buxton Township, in Traill County, North Dakota, Respondents.

(189 N. W. 657.)

Judgment — former judgment against predecessor in title held *res adjudicata* in matter involving highway.

1. The appellant's contention, with reference to the application of the principle of *res judicata*, for reasons stated in the opinion are sustained.

Highways — evidence held to disclose establishment of highway by right of prescription.

2. It is *held* that the evidence discloses that a certain road, to which reference is made in the opinion as "The old road," has become an established highway by right of prescription.

Highways — all section lines held to have become public highways from time of congressional grant.

3. All section lines, under the grant of congress of 1866, § 2477, Revised Statutes U. S. (U. S. Comp. Laws, § 4119) having been accepted by chap. 33, Laws of Dakota Territory 1871, became public highways from the time of the congressional grant.

Opinion filed June 14, 1922. Rehearing denied July 7, 1922.

Appeal from the judgment for costs and the dismissal of a temporary restraining order, *Cole, J.*

Judgment reversed.

Theo. Kaldor, for appellant.

"The rule is unquestioned, that a judgment of a court of competent jurisdiction, upon the merits of a controversy, is conclusive between the parties, and those in privity with them, upon every question of fact in issue, and determined in the action." Am. & Ency. of Law, Vol. 24, p. 765, (2nd ed.); *Jacobson v. Miller*, 41 Mich. 90, 1 N. W. 1013.

"This estoppel extends not only to every material fact within the issue, which were expressly litigated and determined, but also to those matters which, although not expressly determined, are comprehended and involved in the thing expressly stated and decided. Hence, it is not necessary to the conclusiveness of a former judgment that issues should have been taken upon the precise point concluded in the second action. Any conclusion which the court or jury must evidently have arrived at, in order to reach the judgment or verdict rendered, will be fully concluded." Am. & Eng. Ency. of Law, Vol. 24 p. 766, (2nd ed.); *Fla. Cent. R. Co. v. Schutte*, 103 U. S. 118; *Conklin v. Wehrman*, 43 Fed. Rep. 12; *Reed v. Cross*, 116 Cal. 473; *Mowry v. Wareham, et al.*, 101 Ia. 28, 69 N. W. 1128; *School Dist. No. 28 v. Stocker*, 42 N. J. L. 115.

"Where a judgment is necessarily based on certain premises, such premises are equally conclusive in a subsequent action, between the same parties, as the judgment itself." *Shelly v. Creighton*, 91 N. W. 369; *Blake v. Ohio River R. Co.* 47 W. Va. 520.

I A. Acker, for respondent.

GRACE, J. This is an action by plaintiff against the defendants as the board of supervisors of Buxton township, to restrain them from trespassing on its premises, S. E. $\frac{1}{4}$ of section 21 and S. W. $\frac{1}{4}$ of section 22, township 148, range 51, in Buxton township, Traill county, and from commencing to plow and grade a new road on plaintiff's land about 80 feet, more or less, north of a certain other highway on the south side of plaintiff's land, and to compel defendants to replace certain pasture fence along the road which it is alleged they removed; to fill certain ditches made by them on plaintiff's land to level out the grade and to put plaintiff's premises in the same condition as it was before the alleged trespass. A trial de novo in this court has been demanded.

It is the claim of plaintiff that there has been a public road immediately south of the premises above described which has been traveled and worked and used continuously since 1889. It is further his claim that on the 11th day of July, 1904, in the district court of Traill county, in a case in which Ambrose Sauer, the then owner of the premises, was plaintiff, and Buxton township, defendant a trial was had between them and a judgment entered by the court definitely fixing and establishing the then traveled road on the south side of the premises as a public highway on the section line south of the premises. The defendants do not deny the entry of the judgment, but claim that the judgment entered did not definitely fix the highway on the section line. Defendants further deny that this had been a public highway, traveled and worked as such, and used for travel continuously since 1889. The minutes of the board of supervisors of Buxton township show that a motion was made and seconded by members of that board on June 29, 1886, that all section lines in the township be and are hereby declared open, and that the motion carried. It must be presumed at or about that time, the board entered an order to that effect.

In the fall of 1920, defendants graded a new road, as they claim, on the section line south of plaintiff's premises; that for the purpose of definitely establishing the true and correct location of the section line, the county engineer of Traill county, Ernest Johnson, was employed; that he determined the true location of the section line according to the original survey and prepared a plat thereof; that defendants proceeded to grade the public highway along the section line; that plaintiff was notified by the defendant that a highway would be established along the section line, and to remove any obstructions in the form of fences, which plaintiff did not do; that defendants removed the same and proceeded to grade a public highway on the section line, all of which was known to the plaintiff, and which he did not bring any proceedings to restrain. Defendants deny that the section line so graded is the property of plaintiff, and state that the highway is constructed and built upon the section line according to the original government survey. Defendants further claim that plaintiff had knowledge of these facts and, not having brought any action to restrain the building of a highway, is guilty of laches; that at the time of the commencement of the action, the court issued a temporary restraining order which was served upon the defendants.

Upon the trial, judgment was entered dismissing the action, and de-

defendants were allowed judgment for costs. Plaintiff (the appellant here) has arranged in his brief the discussion of the facts and the assignments of error under four subdivisions. We will adopt that order in our analysis of the question presented. The appellant claims that the judgment of the trial court should be reversed for the reasons:

(1) That the issue in the present action is *res judicata*, in that it was wholly and finally decided in an action in the district court of Traill county, which judgment is made a part of the complaint.

(2) That the old road was laid out and traveled for more than 30 years, and is located upon the section line in question.

(3) That if the old road is not located on the section line, it was originally laid out by the township board of said Buxton township where now located, and has for more than 30 years been traveled, graded, and considered by everybody as the section line road, and that until the commencement of this action the respondents treated it as the section line road and acquiesced in the location of the same as such, and now are estopped from questioning it.

(4) That plaintiff and appellant, as soon as he learned that defendants and respondents attempted to change said road, took immediate steps to prevent the same by asking the court for a restraining order. Plaintiff became the owner of the premises in 1915.

We think it not necessary to state further the claims or facts of the case. Sufficient has been stated to give an understanding of the issues presented.

As to the plea of *res judicata*, we are of the opinion that it is available to the plaintiff. It seems that in 1904, the then owner of this land brought an action against the township board of Buxton township, claiming in effect that without authority it had graded and maintained a highway upon the land, and deprived him of the use of six acres thereof; he further claimed that the value of the use thereof and his damages amounted to \$288. He demanded judgment for that amount, and that defendants repair the damages done to the land through the grading, that the land be placed in the same condition it was before a highway or grade was made, and that they be restrained from continuing the use thereof.

The defendants in that case, the township board, pleaded that the highway in question was on the section line on the south of the land. Its answer in that respect is as follows:

"That the highway in question is located on the section line in ac-

cordance with the United States government survey of said lands and the establishing mounds thereof, and was and is practicable for highway purposes. That the said highway is a public road and has been used for such for more than 22 years prior to the commencement of this action, and is so established as such highway by operation of law. That all work and labor in grading upon such public road was for the purpose of constructing and maintaining the same in the usual course of repairing and maintaining the public roads, and not otherwise, and does not exceed in width 33 feet along said section line on the south side of said described tract of land."

The parties of that action also entered into the following stipulation:

"The defendants are to take judgment against the plaintiff, establishing the road as now located, and graded permanently for the use of a highway, without further dispute or controversy between either of the parties hereto, the defendants agreeing to pay their own costs in the case, and the plaintiff to pay the costs that he incurred in maintaining his action. The action in all other respects being fully settled and disposed of, the judgment to remain in the same force and effect as if under verdict of the jury finding for defendant."

In accordance with the stipulation, the court entered the following judgment, which, so far as material here, reads:

"It is hereby considered, ordered, and adjudged that the government mound and section corner on the south section line between section 21 and section 22, in township 148, north, range 51 west of the Fifth principal meridian, in West Buxton township in the county of Traill and state of North Dakota, be and the same is hereby established in the center of the graded road for public travel at the said corner of said sections, and as located when the said public road was located and graded by the board of supervisors of said Buxton township in the year A. D. 1888, and the graded public road along the south side of the southwest quarter of said section No. 22, and the south side of the southwest quarter of said section No. 21, in said township and range as now located and graded, be and the same is hereby permanently established as a public road and highway for public uses and travel, and to be used as such, as if laid out and established by due process and legal proceedings, and all damages had been paid in full therefor. That all matters in dispute between the parties to the said action be and are hereby settled and adjusted under the agreement of the parties, and stipulation therefor, and that the judg-

ment herein be entered without the taxation of costs to either parties in said cause."

The principal issue presented in that case was whether the road then in controversy was located on the section lines south of plaintiff's land. The effect of the stipulation that defendant take judgment establishing the road as then located was to concede the truth of the allegation of the answer, alleging that the road was on the section line; he permitted a judgment to be entered to that effect. The present plaintiff succeeded directly to the interest in the land of the plaintiff in the prior suit. If he were endeavoring to do so, we do not think he would be in a position to question the location of the section lines as conceded by his predecessor. We think he would be bound by that determination where, under the stipulation, judgment was entered locating it where the road in question in that suit was situated. We think that the township board, as the successors of the township board at the time of the former litigation, are in no position at this time to question the location of the section lines as determined in the former litigation. In effect the present litigation is between the same parties as the prior, and refers to the same subject-matter. It is, we are fully convinced, *res judicata*. It is not shown that the judgment was procured or entered by fraud.

In conclusion, it may be observed that there can be no doubt that section lines are public roads. Section 1920, C. L. They may be opened upon compliance with that section and other relative laws by those having jurisdiction to do so, and who are specified in § 1921, C. L., and this without any survey being had, except where necessary by variations caused by natural obstacles.

Congress in 1866, by § 2477, Revised Statutes U. S. (U. S. Comp. St. § 4919), granted the right of way for the construction of highways over public lands not reserved for a public use, and this grant was accepted by the state of North Dakota (chap. 33 of the Laws of 1871). It has been determined that such grant when accepted by this state became a grant in *præsenti*; that all section lines in the territory of Dakota, so far as practicable, became by operation of law public highways; that the highways thus established on section lines have never since been vacated or the right of the public in them in any way surrendered. These and relative questions have been so frequently and ably discussed in prior decisions of this court that it is wholly unnecessary here to enter into any further discussion of them. See *Township v. Skaug*, 6 N. D. 382, 71

N. W. 544; *Faxon v. Civil Township of Lallei*, 36 N. D. 634, 163 N. W. 531, and other decisions of this court cited in those cases; *Huffman v. Board of Supervisors* (N. D.) 182 N. W. 459. The case of *Faxon v. Civil Township of Lallei* was appealed to the Supreme Court of the United States, and the judgment of this court affirmed. 250 U. S. 634, 39 Sup. Ct. 491, 63 L. ed. 1182.

Plaintiff's contention that the old road is an established highway by right of prescription is also sustained by the proof. The statutory right of establishing a highway by description does not now exist; it did exist prior to the passage of chap. 112 of the Laws of 1897. That act repealed former statutes on that subject. None since have been enacted. If a highway may be now established by prescription, it is by reason of the common law. *Burleigh County v. Rhud*, 23 N. D. 366, 136 N. W. 1082. Assuming that the right under the common law now exists, has plaintiff shown the old road to have been established for 20 years or more since the enactment of chap. 112? We think he has. It is more than 20 years since 1897 until this action was commenced, and the evidence shows continuous user by the public during all that time and more, so it may be conceded that, measured by the rule of common law, the old road is a legally established highway by right of prescription.

We find it unnecessary to discuss any further assignments of error, since it is clear that the judgment appealed from must be reversed; it is reversed. The case is remanded to the trial court for further proceedings not inconsistent with this opinion. The appellant is entitled to its costs and disbursements on appeal.

BIRDZELL, C. J., and ROBINSON, and BRONSON, JJ., concur.

CHRISTIANSON, J. (concurring). I agree with the conclusion reached in the opinion prepared by Mr. Justice Grace upon the questions of res judicata. The principal question in this case is: Where is the public highway heretofore established upon the section line running along the south side of the southeast quarter of section 21 and the southwest quarter of section 22, township 148, range 51, in Traill county, in this state, located? The public highway upon said section line was established by the acceptance of the congressional grant by the territorial legislature. *Huffman v. Board of Supervisors* (N. D.) 182 N. W. 459. The ques-

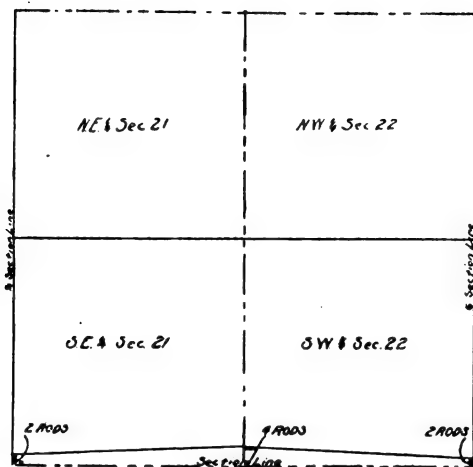
tion as to where the highway so established upon such section line is located was actually and directly in issue in a former suit and was there judicially passed upon and determined by a court of competent jurisdiction. The judgment entered in such former suit is conclusive so far as concerns the parties to that action and persons in privity with them. 23 Cyc. 1215.

I express no opinion as to whether a highway was or was not established by prescription.

On Petition for Rehearing

PER CURIAM. In a petition for rehearing filed by the defendants, it is claimed that this court gave undue effect to the judgment rendered in the former action. It is claimed that that case only involved the highway on the south side of the southwest quarter of section 22 and did not involve the highway on the south side of the southeast quarter of section 21. It is also contended that the judgment in that case merely established the graded portion of the highway there in question as a highway, and that other portions which were not graded were unaffected by the judgment in the case. We are unable to give any such limited effect to that judgment. The complaint in that action stated that the plaintiff was the owner of the southeast quarter of section 21 and the southwest quarter of section 22 in township 148 north of range 51 west in Buxton township in Traill county; and that for some 15 years prior to the commencement of the action the defendant township had "unlawfully and without the consent of the plaintiff, and against his will, graded and maintained a highway upon plaintiff's land above described; the said highway being located on said premises as follows, to wit, commencing at a point two rods north from the point where the quarter line intersects the section line at the southwest corner to the southeast quarter of said section 21, thence in a straight line to a point four rods north of the point where the section lines at the southwest corner of the southwest quarter of said section 22 intersect each other, thence in a straight line to a point two rods north of the point where the quarter line and section line by the southeast corner of the southwest quarter of said section 22 intersect each other."

The following plat shows the tract of land described:



The complaint further alleges:

"That on account of the defendant so grading and maintaining such highway, the plaintiff has been deprived of the use of the land upon which the said highway runs, to wit, six acres. That the use of said six acres and the damage thereto caused by the grading and maintaining such highway by the defendant is of a reasonable value of \$288."

The answer in the case averred that the two tracts of land in question were surveyed by the United States government in 1873, and that—

"The highway in question is located on the section lines in accordance with the United States government survey of said lands and the established mounds thereof."

Also:

"That the said highway is a public road, and has been used for more than 22 years prior to the commencement of this action, and is so established as such highway by operation of law. That all work and labor in grading upon such public road was for the purpose of constructing and maintaining the same in the usual course of repairing and maintaining the public roads, and not otherwise, and does not exceed in width 33 feet along said section line, on the south side of the said described tracts of land."

These were the issues as framed by the pleadings. The judgment

entered in this case specifically adjudged that—

“The government mound and section corner on the south section line between section 21 and section 22, in township 148 north, range 51 west of the Fifth principal meridian, in West Buxton township, in the county of Traill and state of North Dakota, be and the same is hereby established in the center of the graded road for public travel at the said corner of said sections, and located when the said public road was located and graded by the board of supervisors of said Buxton township in the year A. D. 1888, and that the graded public road along the south side of the southwest quarter, of said section No. 22, and the south side of the southeast quarter of said section No. 21, in said township and range, as now located and graded, be and the same is hereby permanently established as a public road and highway for public uses and travel and to be used as such, as if laid out and established by due process and legal proceedings.”

According to the contention of the defendants, the judgment should be deemed to relate only to that portion of the highway on the south side of the two quarters which was actually graded at the time the judgment was entered. And evidence was adduced tending to show that the only part of the road which was graded at the time was where it crossed a slough or depression. If the judgment is given the effect contended for, it was an idle ceremony to enter it. It will be noted that the complaint alleged that a highway had been “graded and maintained” for the whole distance along the southside of the two quarters, and the judgment purports to establish and definitely locate the public highway on the south side of the southeast quarter of section 21, as well as on the south side of the southwest quarter of section 22. To hold that the judgment did not include the highway on the south side of the southeast quarter of section 21 would be to ignore the recitals in the judgment itself.

Rehearing is denied.

BIRDZELL, C. J. and BRONSON, CHRISTIANSON, GRACE and ROBINSON, JJ., concur.

HARRISON SCHOOL DISTRICT NO. 2, a school corporation et al.,
Appellants, v. CITY OF MINOT, NORTH DAKOTA, a municipal
corporation, et al., Respondents.

(189 N. W. 338)

School and school districts — special districts can be organized only from platted city, town or village and territory contiguous thereto.

1. Under the laws of this state a special school district can be organized only from a platted or incorporated city, town or village, or from such city, town or village and territory contiguous thereto.

Schools and school districts — when incorporated city is organized into a special district all territory within city must be included within the district.

2. Where an incorporated city is organized into a special school district all the territory within the city must be included with the special school district.

Schools and school districts — where special district is composed of incorporated city alone, annexations of contiguous territory ipso facto enlarges district to include such territory.

3. Where a special school district is composed of an incorporated city alone, and the city limits are extended by the annexation of contiguous territory to the city the special school district is ipso facto enlarged so as to include the territory annexed to the city.

Opinion filed July 7, 1922

From a judgment of the District court of Ward county, *Leighton, J.*, plaintiffs appeal.

Affirmed.

Dudley L. Nash, for appellants.

In any event, the city of Minot and the school board within its original territorial limits is estopped to deny the legal existence of Minot Special School District No. 1 as a special school corporation with defined territorial limits.

The city must exercise the powers delegated to it strictly according to the statutory method prescribed. All doubts are resolved against the city. *Stern v. Fargo*, 18 N. D. 296, 26 L. R. A. (N. S.) 665, 122 N. W. 403.

An injunction will issue to preserve the status pending rearrangement

of territorial boundaries of subordinate political subdivisions. State ex rel. Miller v. Miller, 21 N. D. 324; State ex rel. Dorgan v. Fisk, 15 N. D. 219; See also High on Injunctions, § 1254; McQuillan on Municipal Corporations, Vol. 1 § 288; See particularly Red River Valley Brick Co. v. Grand Forks, 27 N. D. 8; 2 Spelling Extraordinary Relief, § 1802; High Extraordinary legal remedies, § 618.

Grants to cities, school corporations and to political subdivisions to annex territory in opposition to wishes and protests of people whose interests are to be affected are extraordinary.

Statutes of this nature are strictly construed. Red River Valley Brick Co. v. Grand Forks, *supra*.

Palda & Aaker, for respondent.

It is well settled that the power to organize, establish or lay off new school districts, or to divide, change the boundaries or otherwise alter existing districts is vested primarily in the legislature which may act without the assent of the inhabitants of the affected territory. 35 Cyc. 833.

And that power may be delegated to subordinate agencies or officers. 35 Cyc. 834.

‘Not only may the legislature originally fix the limits of the corporation, but it may unless specially restrained in the Constitution, subsequently annex or authorize the annexation of contiguous or other territory, and this, without the consent and even against the remonstrance, of the majority of the persons residing in the corporation or on the annexed territory. And it is no constitutional objection to the exercise of this power of compulsory annexation that the property thus brought within the corporate limits will be subject to taxation to discharge a pre-existing municipal indebtedness, since this is a matter which, in the absence of a special constitutional restriction, belongs wholly to the legislature to determine. The power to enlarge the boundaries of a municipality by the annexation of contiguous territory is an incident to the legislative power to create and abolish municipalities at pleasure; and it is no objection to the exercise of this power, in the absence of constitutional restriction that the territory annexed to a municipality already has a complete municipal organization as a city, borough, town or village, or other corporate form recognized by the constitution and laws of the state.’ Dillon Municipal

Corporations, 355, (185) and copious notes; School Dist. v. Zediker, 47 Pac. 482, (Okla.)

When territory is duly annexed to a municipality pursuant to law, it immediately on such annexation becomes a part of the municipality *and in the absence of statutory provision to the contrary*, comes under the power, control and jurisdiction of the municipality for all purposes, *including school purposes*. 28 Cyc. 215; McGurn v. Board of Education of Chicago, 133 Ill. 122, 24 N. E. 529 (1890).

"The power of a state legislature over the boundaries of the political subdivisions of the state is absolute. It may divide, change or abolish them at pleasure. The exercise of this power does not in any way violate the rights of individual residents of the affected territory, either as citizens or as taxpayers. 19 R. C. L. 38; Laramie County v. Albany Co., 92 U. S. 307, 23 L. ed. 552; Pass School Dist. v. Hollywood School Dist., 156 Cal. 416, 105 Pac. 122; 26 L. R. A. (U. S. 485); Pittsburg's Petitions (Pa.) 66 Atl. 348, 120 Am. St. Rep. 845.

There is no contract between the citizens and taxpayers of a municipal corporation and the corporation itself that the citizens and taxpayers shall be taxed only for the uses of that corporation and shall not be taxed for uses of any like corporation with which it may be consolidated. 19 R. C. L. 38.

CHRISTIANSON, J. This action was brought to restrain the board of education of the city of Minot from levying any taxes and from exercising any jurisdiction over certain territory described in the complaint. The ultimate question presented is whether the territory in dispute is a part of Minot special school district and under the jurisdiction of the board of education of the city of Minot, or whether such territory is a part of the plaintiff school district and under the jurisdiction of its officers. The trial court ruled that the property in dispute is within Minot special school district and under the jurisdiction of the board of education of said city and dismissed the action, and plaintiffs have appealed from the judgment.

The material facts are not in dispute.

Prior to the year 1909, a large portion of the northwest section of what was commonly known as the city of Minot had a separate legal existence and was commonly designated as "North Minot." North Mi-

not was in fact embraced within, and a portion of, an organized township known as Harrison township. After proceedings duly had, North Minot was annexed to the city of Minot in 1909. The legality of such annexation proceeding was contested, and the validity thereof was sustained by this court. See *State ex rel. Johnson v. Clark*, 21 N. D. 517, 131 N. W. 715. At the time North Minot was so annexed, and for a long period of years prior thereto, the city of Minot had been denominated and conducted as a special school district, although it appears that no record exists showing the organization of such school district. It is admitted, however, that at all times since on and prior to the date of the organization of the plaintiff school district, the so-called Minot special school district No. 1 has been functioning with officers duly elected by such school district in charge; and such officers have carried on the work imposed by law upon the board of education in a special school district. The validity of the organization of the school district had never been questioned, and the district and its officers had functioned as such for more than 30 years before North Minot was annexed to the city of Minot. The plaintiff school district, namely, Harrison school district No. 2, was organized by an order of the board of county commissioners of Ward county entered on the 18th day of May, 1889. Prior to the annexation proceedings of 1909, the organized township known as Harrison township contained all of congressional township No. 155 north of range No. 83 west in Ward county, with the exception of sections 13 and 14, which were included within the corporate boundaries of the city of Minot. At the time the plaintiff school district was organized in 1889, the same territory was included therein as the organized township of Harrison; that is, Harrison school district was organized so as to contain all of township 155, range 83, except such portion thereof as was within the corporate limits of the city of Minot.

The first question presented on this appeal is: Did the extension of the limits of the city of Minot also extend the limits of Minot special school district No. 1, and make the territory so attached to the city a part of such special school district? The trial court answered this question in the affirmative, and after a careful consideration we have reached the conclusion that the trial court's determination is correct.

The constitution of this state specifically provided that—

“The Legislative Assembly shall provide, at its first session after the adoption of this constitution, for a uniform system of free public

schools throughout the state." N. D. Constitution, § 148.

In conformity with this constitutional mandate, the North Dakota Legislative Assembly, at its first session, passed a law (chap. 62, Laws 1889-90) providing for a uniform system of free public schools throughout the state. In that act provision was made for the organization and government of special school districts. In order that the legislative policies with respect to special school districts may be more readily observed, the provisions as contained in the original enactment, and as subsequently modified and now in force, are set forth in parallel columns:

**As Contained in Chapter 62, Laws
1889-90.**

"All cities and incorporated towns and villages which have heretofore been organized under the general school laws, and which are provided with a board of education (except cities governed by special acts) shall be governed by the provisions of this article. Any city, or incorporated town or village, having a population of more than 300 inhabitants, may be constituted a special school district, in the manner hereinafter prescribed, and shall then be governed by the provisions of this article; Provided, That any city heretofore organized for school purposes under a special act, may adopt the provisions of this article, by a majority vote of the voters therein, in the same manner as is provided for the organization of a new corporation under the provisions of this article. "Laws 1889-90, chap. 62, § 169.

As Now in Force.

"All cities and incorporated towns and villages which have heretofore been organized under the general school laws, and which are provided with a board of education, shall be governed by the provisions of this article. Any city, or incorporated, or platted town or village, may be constituted a special school district in the manner hereinafter prescribed, and shall then be governed by the provisions of this article." Comp. Laws 1913, § 1229.

"Every such special district shall be a body corporate for school purposes by the name of "The board of education of the city, town or village,

"Every such district shall be a body corporate for school purposes by the name of 'the Board of Education of the city, town or village (as the case

(as the case may be) of — (here insert the corporate name of the city, town or village) of the state of North Dakota,' and shall possess all the powers and duties usual to corporations for public purposes, or conferred upon it by this act or that may hereafter be conferred upon it by law; and in such name it may sue and be sued, contract and be contracted with, and hold and convey such real and personal property as shall come into its possession." etc. Laws 1889-90, chap. 62, § 171.

"When a petition signed by one-third of the voters of a city or incorporated town or village, entitled to vote at school elections, is presented to the council or board of trustees thereof asking that said city, town or village be organized as a special school district, such council or board of trustees shall order an election for the purpose, notice of which shall be given and the election conducted and returns made in the same manner as is provided by law for the annual election of municipal officers of such corporation; and the voters thereof shall vote for or against 'organization as a special school district,' at such election." Laws 1889-90, chap. 62, § 173.

"When any city, town or village has been organized for school purposes, and provided with a board of education, under any general school

may be) of —," and that such school corporation "shall possess all the powers and duties usual to corporations for public purposes;" that "it may sue and be sued, * * * and hold and convey such real and personal property as shall come into its possession," etc. Comp. Laws, 1913, § 1241.

"When a petition signed by one-third of the voters of a city, incorporated or platted town or village, or a school district in which is located a city or incorporated or platted town or village entitled to vote at such election, is presented to the council, commission or board of trustees of such city, incorporated or platted town or village or school district, asking that such city, incorporated or platted town or village be organized as a special school district, such council, commission or board of trustees shall within ten days order an election for such purpose, notice of which shall be given, and the election conducted and the returns made in the manner provided by law for the annual school election; and the voters of such city, incorporated town or village or school district shall vote for or against organization as a special school district at such election." C. L. 1913, § 1243.

"When any special school district has been organized and provided with a board of education under any general law, or a special act, or under

law, or a special act, or under the provisions of this article, territory outside the limits thereof but adjacent thereto, may be attached to such city, town or village for school purposes by the board of education thereof, upon application in writing signed by a majority of the voters of such adjacent territory; and upon such application being made, if such board shall deem it proper and to the best interests of the schools of said corporation and the territory to be attached, an order shall be issued by such board attaching such adjacent territory to such corporation for school purposes and the same shall be entered upon the journal of the board; and such territory shall from the date of such order be and compose a part of such corporation for school purposes only, such adjacent territory shall be attached for voting purposes to such corporation, or if the school election is held in wards, to the ward or wards, or election precinct or precincts to which it lies adjacent; and the voters thereof shall vote only for school officers, and upon school questions." Laws 1889-90, chap. 62, § 170.

"The treasurer of any city, town or village comprising a special district shall be treasurer of the board of education thereof." Laws 1889-90, chap. 62, § 187.

the provisions of this article, territory outside the limits thereof but adjacent thereto may be attached to such special school district by the board of education thereof, upon application in writing signed by a majority of the voters of such adjacent territory; provided, that no territory shall be annexed which is at a greater distance than three miles from the central school in such special district, except upon petition signed by two-thirds of the school voters residing in the territory which is at a greater distance than three miles from the central school in such special district; and upon such application being made, if such board shall deem it proper and to the best interests of the school of such corporation and of the territory to be attached, an order shall be issued by such board attaching such adjacent territory to such corporation for school purposes, and the same shall be entered upon the records of the board. Such territory shall from the date of such order be and compose a part of such corporation for school purposes only. Such adjacent territory shall be attached for voting purposes to such corporation, or, if the election is held in wards, to the ward or wards or election precinct or precincts to which it lies adjacent; and the voters thereof shall vote only for school officers and upon such school questions. * * *"
C. L. 1913, § 1240.

"The treasurer of any city, town or village comprising a special district shall be treasurer of the board of education thereof; provided, however, should the said special school district

have within its boundaries and be comprised partly of territory without the limits of said city, town or village. then the said special school district shall elect, at its regular elections, a treasurer in the manner provided by law for the election of school district treasurer." C. L. 1913, § 1254.

"Any special district organized under the general school laws and provided with a board of education may become a part of the school district in which it is located whenever it is so decided by a majority vote of the school electors of the city, town or village and of such school district voting at an election called for that purpose. An election for such purpose shall be ordered and proper notice thereof given by the board of education and the school board of such district in the same manner as is required for the election for school officers in such district, when petitioned by one-third of the voters resident in such districts, and when so united the determination and division of the debts, property and assets shall be made by arbitration as provided in this act for school districts consolidated or divided. Towns and villages not incorporated but heretofore organized under the general school laws and provided with a board of education shall become a part of the school district in which they are severally located and the determination and division of the property, debts and assets shall be made by arbitration as aforesaid." Laws 1889-90, chap. 62, § 191.

"Any special district organized under the general school laws and provided with a board of education may become a part of the common school district in which it is located, whenever it is so decided by a majority vote of the school electors of the city, town or village and of such common school district voting at an election called for that purpose. An (election) for such purpose shall be ordered and proper notice thereof given by the board of education of the special district, and the school board of such common school district in the same manner as is required for the election of school officers in such district, when petitioned by one-third of the voters resident in such district; and when so united the determination and division of the debts, property and assets shall be made by arbitration as provided in this chapter for school districts consolidated or divided. Villages not incorporated but heretofore organized under the general school laws and provided with a board of education shall become a part of the school district in which they are located and the determination and division of the property, debts and assets shall be made by arbitration as aforesaid." C. L. 1913, § 1261.

In chap. 62, Laws 1889-90, the legislative assembly conferred upon the board of education of a special school district, among others, the powers:

"Second. To establish and maintain such schools in their city, town or village as they shall deem requisite or expedient, and to change or discontinue the same. * * *

"Seventh. To have the custody of all school property of every kind and to see that the ordinances and by-laws of the city, town or village in relation thereto are observed. * * *

"Twelfth. Each member shall visit, at least twice in each year, all the public schools in the city, town or village."

Laws 1889-90, chap. 62, § 181.

It also provided:

"When any board of education shall be organized under the provisions of this article it shall * * * assume control of the schools of the city, town or village, and shall be entitled to the possession of all property of the former district or districts or parts thereof lying within such city, town or village, for the use of schools." Laws 1889-90, chap. 62, § 190.

These statutory provisions have remained in force since their enactment. See §§ 1251 and 1260, C. L. 1913. In 1901 the legislative assembly passed an act "to provide for the creation of special school districts in incorporated cities, towns or villages constituting a part of a school district." Chap. 186, Laws 1901. Section 1 of the act read thus:

"Whenever any incorporated city, town or village having a population of over 200 inhabitants, shall constitute a portion of a school district, it may be organized into a special school district and the property and indebtedness of such organized school district divided as hereinafter provided." Section 1, chap. 186, Laws 1901.

This statute was subsequently amended, and as now in force reads as follows:

"Whenever any platted or incorporated city, town or village shall constitute a portion of a school district, it may be organized into a special school district, alone or with contiguous territory, and the property and indebtedness of such organized school district divided as hereinafter provided." Section 1230, C. L. 1913.

These statutory enactments evidence a definite legislative policy as to special school districts. It will be noted that originally only territory within an incorporated city, village, or town could be organized as a special school district. Laws 1889-90, chap. 62, § 173. This was later

changed so as to permit "a city, incorporated or platted town or village, or a school district in which is located a city or incorporated or platted town or village," to be so organized. Section 1243, C. L. 1913. It will also be noted that the law as first enacted only permitted that portion of a school district which was embraced within the corporate limits of an "incorporated city, town or village having a population of over 200 inhabitants" to become segregated from the remainder of the school district and organized as a special school district. 'Chap. 186, Laws 1901. Later this was amended so as to permit "any platted or incorporated city, town or village," which constitutes a portion of a school district, to be "organized into a special school district, alone or with contiguous territory." Section 1230, C. L. 1913.

It will be observed that in one respect a consistent legislative policy has been pursued during the entire history of this state as regards special school districts, and that is that no special school district can be brought into being unless there exists as a basis for its creation a platted or incorporated city, town, or village. While under the present laws a special school district may be organized either from the territory within the boundaries of such city, town, or village alone, or from such territory and territory contiguous thereto, such school district cannot be organized from a portion of the territory within a platted or incorporated city, town, or village or from a portion of the territory within such city, town, or village and contiguous territory. In other words our laws do not contemplate that a portion of the territory of an incorporated city or village may be within the boundaries of some other school district, the remainder within the boundaries of some other school district. While it is true that even when the boundaries of a special school district and the boundaries of an incorporated city or village are conterminous the special school district and the city or village are nevertheless separate corporate entities, it is equally true the lawmakers in providing for the creation and operation of special school districts had in mind, and clearly intended to provide a school system for the cities, villages, and towns of the state and territory contiguous thereto. Thus, where the boundaries of a special school district and the boundaries of the incorporated city or village are conterminous, the village or city treasurer is also the treasurer of the school district. Section 1254, C. L. 1913. And when adjacent territory is attached to a special school district, such territory becomes for voting purposes (in school matters) attached to

the ward or election precinct in the city or village to which it lies adjacent. Section 1240, C. L. 1913.

As has been observed, the legislative policy of this state as regards special school districts was originally announced in the act passed by the first legislative assembly. That act was passed for the avowed purpose of establishing a uniform system of free public schools in accordance with the constitutional mandate to such legislative assembly. As we construe both the original enactment and the subsequent acts amendatory thereof, the lawmakers have consistently manifested an intention that a special school district shall be organized only in case there exists as a basis for its organization a platted or incorporated city, town, or village. In other words, the lawmakers have said there can be no special school district unless there is in existence some platted or incorporated city, town, or village, the territory within which, either alone or together with contiguous territory, may be formed into a special school district; that the first essential to the creation of a special school district is a platted or incorporated city, town, or village; that a special school district may include more territory than that included within the limits of such city, town, or village, but cannot include less, i. e. that a special school district must in all instances include all the territory lying within the corporate limits of the city, town, or village, the existence of which is essential to bring the special school district into being. This being so, we are of the opinion that where an incorporated city alone is organized as a special school district, the boundaries of the special school district constantly remain the same as the boundaries of the city; and in no event can the territory embraced within the special school district be less than the territory within the corporate limits of the city. And where, as here, the boundaries of the city are extended, it follows, we think, as a necessary legal consequence, that the boundaries of the special school district are similarly extended, and that the territory so annexed to the city also becomes a part of the special school district, and subject to the control and jurisdiction of the Board of Education thereof. Similar conclusions have been reached by other courts in considering similar situations. *McGurn v. Chicago Bd. of Education*, 133 Ill. 122, 24 N. E. 529; *Cravener v. Chicago Bd. of Education*, 133 Ill. 145 N. E. 532; *School Trustees v. Peoria School Inspectors*, 155 Ill. App. 479; *City of Winona v. School District No. 82*, 40 Minn. 13, 41 N. W. 539, 3 L. R. A. 46, 12 Am. St. Rep. 687. See, also, *Vernon School District v.*

Board of Education of Los Angeles, 125 Cal. 593, 58 Pac. 175; Pass School Dist. v. Hollywood School Dist., 156 Cal. 416, 105 Pac. 122, 26 L. R. A. (N. S.) 485, 20 Ann. Cas. 87; Curtis v Bd. of Education, 43 Kan. 138, 23 Pac. 98; State v. Nichols 39 N. D. 4, 166 N. W. 813.

What has been said renders it unnecessary to consider the other ground urged by the respondent for an affirmance of the judgment. The question of the equalization of the assets and liabilities as between the plaintiff school district and Minot special school district on account of the change in the boundaries of said district is not before us. However, ample provision for such equalization is made under existing laws relating to the equalization of assets and liabilities in cases where property is attached to special school districts.

Judgment affirmed.

BIRDZELL, C. J. and BRONSON, J., concur.

ROBINSON, J., concurs in result.

GRACE, J. (specially concurring). In my opinion no other conclusion can be reached than that where a special school district is entirely composed of an incorporated city, and where the city limits are extended by annexation of territory adjoining the city, the special school district is by that act extended so as to include the newly annexed territory. This, as I view it, is the only question involved in the case.

I agree that the judgment should be affirmed.

L. P. LORENTZEN, on behalf of himself and all other persons similarly situated, Appellant, v. J. A. STILES, J. C. LEACH, W. R. CIBART, as the County Commissioners of the County of Sioux, State of North Dakota, and F. B. FISKE, as County Auditor and J. R. HARMON, as County Treasurer of Sioux County, and A. U. OSTRUM, Respondents.

(189 N. W. 249)

Appeal and error — judgment denying injunction restraining construction of court house affirmed where building has been constructed and paid for pending appeal.

1. For reasons stated in the opinion, it is *held* that questions presented on this appeal relative to relief by injunction have become moot, the acts sought to be restrained having been completed.

An appeal from a judgment of the District court of Sioux county, Pugh, J.

Judgment affirmed.

Sullivan, Hanley & Sullivan, for appellant.

The statute is explicit that the publication must be for thirty days. In this case even counting the first and last days, it would not exceed 29 days. The statute says that the publication must be for thirty days, and under the interpretations of our court, "for thirty days" means *through-cut, through, during the continuance of thirty days*. Dever v. Cornwell 10 N. D. 123, 86 N. W. 227.

It is invariably held, that such statutes, which are provided as a safeguard to the taxpayer against private rapacity and official indifference is *mandatory*, and it is held in all the cases that a failure to follow such mandatory provision makes the contract void. McCloud v. City 54 Ohio St. 439, 44 N. E. 95; Cases cited in the case of Comstock v. Eagle Grove City (Ia.) 111 N. W. 51.

"When an ordinary advertisement for sealed bids for proposals for the erection of a court house, and, after receiving, considering and rejecting all such as are presented to him, *makes changes in the plans and specifications of the proposed building, which in substantial respects vary its character and materially affect its costs, he cannot, without further*

advertising lawfully accept new proposals for the construction of the building and award a contract therefor." Manly Bldg. Co. v. Newton 40 S. E. 274; 114 Ga. 245.

Jacobsen & Murray, for respondents.

The price of the court house is \$6800.00. The vital question on this feature is can it be paid out of the annual revenue of the county for the current year, which current year began July 1st, 1921, and ends June 30th, 1922, If it can, then the plaintiff's case must absolutely fall. See § 3294, C. L. 1913; § 3280 C. L. 1913; § 3281 C. L. 1913; *Boetcher v. McDowell* (N. D.) 174 N. W. 759. We quote from the opinion: p. 67, *Tehama County v. Sisson*, (Cal.) 92 Pac. 65.

"In other words, that each year's income and revenue must pay each year's indebtedness or liability, and that no indebtedness or liability incurred in any one year shall be paid out of the income or revenue of any future year." *Fritsch v. Board of Commissioners of Salt Lake Co. et al.* (Utah) 47 Pac. 1026.

The language of § 3, Art. 14, Const., that no debt in excess of the taxes of the current year, shall be created, cannot be held to mean that the county may expend the entire revenue of the year, and in addition thereto create indebtedness equal to the tax levy of the year. *A debt cannot be incurred in one year and floated over to the next, and paid out of its revenue, without a vote. The indebtedness of the year must be paid out of its revenues."* *Pacific Undertakers v. Widber*, (Cal.) 45 Pac 273; *Smilie v. Fresno County* (Cal.) 44 Pac. 556.

Where a county contracts for the erection of a building, the payment to be made in installments each year as the work progressed, the debt or liability created is not the aggregate amount of such installments, but only that which arises from year to year on the separate installments; and if the installment is within the income each year it is not illegal, under the provisions of county government act of 1891. (Sections 5, 35) *forbidding counties to incur an indebtedness or liability exceeding in any year the income and revenue provided for that year."* *McBean v. City of Fresno* (Cal.) 44 Pac. 358; *McGowan et al. v. Ford*, (Cal.) 40 Pac. 231; *Smith v. Broderick*, (Cal.) 40 Pac. 1033; *Leavenworth Nat'l Bank v. Reilly*, (Kan.) 156 Pac. 747.

It is unlawful for the county board of any county in this state to make any contracts for or incur any indebtedness against the county in

excess of the tax levied for county expenses during the current year." State ex rel. Wessel v. Weir et al., (Neb.) 49 N. W. 785; Campbell v. State, (Okla.) 99 Pac. 778.

It is a well settled general principle of law that the pendency of a prior action or suit for the same cause between the same parties in a court of competent jurisdiction, will abate a later action or suit either in the same court or in another court with the same jurisdiction." 1 C. J. 45; 1 C. J. 49; 16 N. D. 138.

Although one is not nominally or formally a party to an action, he will be concluded by the judgment therein if he was represented, as to his rights or interests in the subject-matter, by a party legally entitled to represent him, or who actually conducted the prosecution or defense on the behalf and for the benefit of such person. 23 Cyc. 1245. 23 Cyc. 1269 ¶ T.

A judgment for or against a municipal corporation, in a suit concerning a matter which is of general interest to all the citizens or taxpayers thereof, as the levy and collection of taxes, or public contracts or other obligations, or public property, its title, character, or boundaries, *is not binding, not only upon the municipality and its officer, but also upon such citizens and taxpayers in so far as concerns their rights or interest as members of the general public.*" 23 Cyc. 1269 ¶ T; McIntire v. Williamson (Kan.) 65 Pac. 244; Wood v. Bangs, (Dak.) 46 N. W. 586; See 36 N. D. 570, Will v. City of Bismarck; McKenzie v. City of Mandan, 27 N. D. 546, 160 N. W. 852; 15 C. J. 550, § 245 and 243; McQuillan on Municipal Corporations, Vol. 3, § 1213; Carpenter v. St. Paul, (Minn.) 23 Minn. 232.

Plaintiff's remedy, if any, is an action on the bond, for damages, which bond was filed pending appeal. Thompson v. Vold, (N. D.) 165 N. W. 1076.

GRACE, J. This is an appeal from a judgment of the lower court denying plaintiff a permanent injunction, prohibiting the construction of a certain jail, vault, and a building intended to serve the purpose of a courthouse in Sioux county, and the payment therefor. Prior to the time of the trial a temporary restraining order was issued.

The facts necessary to be stated follow: The county of Sioux is one of the newly organized counties of the state. Prior to and at the time this action was brought the county officials conducted the official business of

the county in a small building—an old frame building—in height one and one half stories, and in dimension 14x28 feet, owned by the Sioux County Lumber Company, and rented by the county at \$25 per month. It was stipulated that the building was inadequate; that there is no vault; that there are, in lieu thereof, four cabinet safes, known as all steel safes of light character, where a portion of the county records are kept; that the necessity for a place to keep the records and to house the county officers is recognized by all; that the county has no jail; that the prisoners not giving bond are kept at Mandan, Morton county, through an arrangement with the county commissioners of that county.

On May 6, 1921, the county commissioners by resolution created a building fund to be known as the Sioux County Building Fund. On the 7th day of July, 1921, at their regular meeting, the county commissioners passed the following resolutions:

“Whereas, it was resolved by the board of county commissioners, on May 6, 1921, that a building fund be, and the same is hereby, created to be known as the Sioux County Building Fund, and that unexpended balances from such funds as are capable of transfer, after current bills and authorized expenditures, properly charged against such funds, remaining and unexpended, may be transferred to such Sioux County Building Fund, which is hereby created; and, it now appearing that there is imperative need for the building of a fireproof vault for the safety of valuable records, and that there is urgent need for a jail, as indicated in the resolution of May 6, 1921, and it further appearing that there are unexpended balances in funds as follows, to wit:

From the county sinking fund.....	\$2,735.72
From the county interest fund	1,677.58
From the county bond interest fund	696.84
From the emergency fund	1,500.00
From the interest and penalty fund	696.75

—and the county treasurer, J. R. Harmon, having certified in writing that all such balances are on hand, appearing upon the treasurer's ledger, June 30, 1921, at the full close of the fiscal year: Be it resolved, that all the said funds above indicated are hereby transferred to the said Sioux County Building Fund, and the county treasurer is hereby directed to so transfer all such funds, the same or so much as may be necessary of such Sioux County Building Fund to be used according to law for the build-

ing of a fireproof vault and a jail, as the board of county commissioners may contract and arrange for the building of the same.

"Motion being moved and seconded that the above and foregoing resolution be adopted, it was put to a vote and on roll call vote was as follows: J. A. Stiles, aye, J. C. Leach, aye; W. T. Cibart, no. Motion declared carried."

Thereafter eight taxpayers of the county presented a petition signed by them to Edward S. Johnson, then state's attorney, requesting him to take an appeal from the resolution; thereupon and thereafter he did, as state's attorney, take an appeal from said resolution, and made and filed a complaint in that cause in the district court of Sioux county. A copy of the notice of appeal and of the complaint are a part of this record. In that connection also an order to show cause was procured from F. T. Lembke, one of the judges of the district court of the Sixth Judicial district, in which Sioux county is situated requiring the defendant county commissioners to show cause before him at Carson, in said county, on the 20th day of July, 1921, why an injunction should not be granted restraining them permanently from proceeding with the construction of a jail at Ft. Yates, in said county, or the payment therefor, and from transferring unexpended balances of any of the funds of Sioux county into a building fund, and why any resolution calling for bids for the erection and construction of said jail should not be suspended until adjudicated on appeal.

There is also shown in the record a similar appeal on the petition of nine resident taxpayers to the district court of Sioux county from the resolution of May 6, 1921, by virtue of which the county commissioners created a building fund. The notice of appeal and complaint in that matter are a part of the record. Both such appeals are entitled in the district court, County of Sioux, a Municipal Corporation, Plaintiff, v. J. A. Stiles, J. C. Leach, and W. R. Cibart, County Commissioners of Sioux County, N. D., Defendants.

On the 20th day of July, 1921, the proceeding brought before Judge Lembke to restrain the defendants from doing any further acts or taking any further steps in the transfer of the funds referred to in the resolutions, or in constructing the jail or from doing the building referred to in the resolution, was dismissed; this left the two appeals from the resolutions of the county commissioners pending in the district court of Sioux county for trial. Subsequently, or about the 8th day of August,

1921, the plaintiff herein commenced this action against defendants to permanently enjoin the transfer of the funds above mentioned and the construction of the jail, vault, and building which the county commissioners had in the course of construction, the contract price of which was \$6,878. At the time of commencing action plaintiff procured a temporary restraining order pending the trial, which was returnable August 17th. The trial was had at Ft. Yates on the 23d day of August, 1921, pursuant to the stipulation of the parties, before Judge Pugh, who made an order for judgment on the 3d day of October, dismissing the action, and judgment was entered thereon on the 10th day of October, 1921. He also gave judgment against the defendant for \$88 costs. The plaintiff, desiring to appeal to the Supreme Court from the judgment, procured an order on or about September 29, 1921, directing that the restraining order theretofore made remain in force pending appeal. In connection with this appeal, he gave an undertaking in the sum of \$500, conditioned that he would pay all damages which the defendants might sustain by reason of the restraining order remaining in effect; this undertaking, it appears, was not served on defendants until October 18, 1921. The notice of appeal is dated April 3, 1922.

The defendants and respondents, after the court had ordered the temporary restraining order to remain in force pending appeal, applied to the court for a dissolution of it, on condition that they enter into an undertaking in a sum to be fixed by the court to abide any final judgment that should be rendered in favor of appellant. This application was granted, and the amount of the undertaking fixed by the court was \$1,000; it was duly executed and delivered by the defendants as principals and by two sureties. The court's order in this respect, omitting title, is as follows:

"This comes up on application to vacate or modify an order approving an undertaking and fixing bond for appeal thereon, and which order heretofore made continues in force the preliminary injunction, and that application is now made to the court for a modification of that injunctive order, and for the amount of bond to be fixed by the court for the respondents pursuant to § 7833 of C. L., and that in connection therewith the affidavit of J. A. Stiles, one of the county commissioners of Sioux county is filed with the court, which affidavit is sworn to October 24, 1921, and that the records and files in the case are before the court.

"The Court: It appears to the court that the order for judgment was made on or about the 29th day of September, 1921; that at or about

said time an order was made by the court, fixing the amount of the bond necessary for the continuance of the preliminary injunction until the termination of appeal, and that it further appears to the court that said bond and the order were not served upon the defendants or their attorneys until on or about October 18, 1921, and that in the interim the county commissioners have continued the erection of the building which is the subject of this litigation, and that the walls of said building have been built up above the foundation and that the material is on the ground and that 50 per cent. of the cost of the building, as set forth in the contract therefor, has been paid to the contractor, and that the building is in such shape at this time that, if building operations are suspended, material damage will result to the county; and, it further appearing to the court that on or about the 14th day of October, 1921, at the request of the plaintiff, the amount of the appeal bond was fixed by the court, and that the court was given to understand that said action would be immediately appealed, and it appearing under § 7833 they have a right to give undertaking in such sum as may be fixed by the court for the purpose of having such injunctive order modified, the court therefore, hereby fixed said undertaking in the sum of \$1,000, and, upon the filing and serving of said undertaking upon the plaintiff the injunctive order will be modified to the extent of permitting the said defendants to continue the work on said building, and that said bond be approved by the clerk of the district court."

It is clear from the record on appeal that, at the time the respondents gave the bond and procured a dissolution of the preliminary restraining order, the building was half completed and paid for, and that the material was on the ground for the completion thereof; and, it further appearing at that time the building was in such condition that, unless permitted to be completed, the county would suffer great damage, it is a reasonable presumption that the remainder of the building has since been completed, the contract wholly performed, and the contract price paid in full. It is now about seven months since the respondents procured the dissolution of the preliminary injunction. This left the contractor free to complete the building, as well as the county commissioners and other defendants free to proceed in the matter. There is no evidence that they have not proceeded, and the only reasonable presumption that can be indulged is that they have.

The respondents in their brief claim that the building has been completed and the money paid, and it is our recollection that their attorney

on oral argument stated likewise. Where the building is completed, or substantially so, the contract presumably wholly performed, the balance of the money in question presumably paid to the contractor or expended in the construction of the building, it is evident these acts cannot now be enjoined because they are in all probability already performed, and this record may be fairly said to show as much.

It is very clear in this case that the plaintiff had been dilatory in taking and perfecting his appeal. Laches, in a public matter of this character, is rarely ever justifiable, and is seldom viewed with leniency. As we view the matter, so far as this injunctive proceeding is concerned, the questions presented or intended to be presented through it have become moot; that is, the situation has become such that any relief intended to be procured by permanent injunction is not now available for the reasons we have above given. We express no opinion upon the merits. The questions involved in the two appeals to the district court must be very similar, so far as concerns the authority of the county commissioners to do the things specified in the resolutions appealed from, to the principal questions intended to be presented on the merits here. Perhaps such questions will be disposed of on their merits in the district court. It is very clear, in any event, that there is no reasonable ground upon which relief by permanent injunction, in the circumstances now existing, could be granted. *Thompson v. Vold*, 38 N. D. 569, 165 N. W. 1076.

It may also be well to observe that the respondents were not required to give the bond which they did, nor do we believe that bond was authorized under § 7833.

The temporary restraining order was vacated, although plaintiff did give a supersedeas bond. There is no statutory requirement in such case for a bond on the part of the respondents; they were unrestrained, and were at liberty to proceed, which they did.

The judgment appealed from is affirmed. Neither party shall recover any costs.

ROBINSON, J., concurs.

BRONSON, J. (concurring specially). I am of the opinion that the appeal should be dismissed because the question presented is moot through

the manner in which the injunctive order was vacated. See *Sayre v. Village of Alsen* (N. D.) 189 N. W. 240, and cases there cited. I am also of the opinion that the trial court did not err in dismissing the action upon its merits. See *Boettcher v. McDowell*, 43 N. D. 178, 174 N. W. 759.

CHRISTIANSON, J. (concurring specially). I concur in an affirmance, but am not prepared to hold that the questions involved in this case are moot. I am of the opinion that every legal question raised on this appeal is controlled by the decision of this court in *Boettcher v. McDowell*, 43 N. D. 178, 174 N. W. 759, and that, under the rules announced in that case, the judgment appealed from is correct.

BIRDZELL, C. J., concurs.

E. C. HECKENLAIBLE, Appellant, v. S. D. COOK, Respondent.

(189 N. W. 110)

Insurance—agent held not entitled to recover bonus on failure of consideration.

In an action for an accounting, where the plaintiff claimed credit for \$321.00 bonus under an agency contract, it is *held*:

1. The evidence shows that the consideration for the credit which had been agreed upon was that the plaintiff should continue his activity as an agent of the defendant for the remaining two months of the year and that this consideration had failed.

Evidence—evidence to establish consideration for credit in accounting held admissible under the parole evidence rule.

2. The evidence offered to prove the consideration for the agreed credit was admissible as against an objection based upon the parole evidence rule.

Opinion filed July 7, 1922

Appeal from the District court of Burleigh county, *Nuessle, J.*

Affirmed.

Scott Cameron, for appellant.

A mere promise to do or not to do a certain thing is not such a fraud as will avoid a contract. 12 R. C. L. 254; *Herbert H. Bigelow et al. v. Barnes*, 121 Minn. 148, 140 N. W. 1032, 45 L. R. A. (N. S.) 203.

The rule has been tersely stated in *Ruling Case Law* Vol. 6, p. 678 that the adequacy of the consideration is immaterial has been undoubtedly the law since the notion of consideration began to be developed. The reason is that the parties are deemed to be the best judges of the bargains entered into. As *Hobbes* says, the value of all things contracted for is measured by the appetite of the contractors. Accordingly, the courts do not ordinarily go into the question of inequality of considerations but act upon the presumption that parties are capable to contract, granting relief only when the inequality is shown to have arisen from the mistake, misrepresentation or fraud. 6 R. C. L. 678; *Freudenthan v. Espey*, 45 Col. 488, 102 Pac. 280; *Atlanta & W. P. Ry. Co. v. Camp*, 60 S. E. 177.

Newton, Dullam & Young, for respondent.

BIRDZELL, C. J. This is an action for an accounting. The plaintiff has appealed from the judgment, and has specified certain facts for review in this court. The facts essential to an understanding of the issue on appeal are as follows:

The defendant is the general agent in North Dakota of the Montana Life Insurance Company. The plaintiff was a special agent of the same company, who, prior to this action, had discontinued his agency. For several years prior to November 6, 1920, a stipulation had been in effect between the plaintiff and defendant, whereby it was agreed that if the plaintiff should write \$200,000 or more of accepted insurance in a year he should receive a bonus of \$2 for each \$1,000 worth of business so written. On November 6, 1920, a new agency agreement was made on a regular form, in all substantial particulars the same as the first agency contract. But the rider stipulation with reference to the bonus was omitted, and in lieu of it a rider was annexed to the new agreement to the effect that the plaintiff should receive \$2 per \$1,000 on all business written, and accepted from January 1, 1920, to November 6, 1920. In the monthly statement following, or in December, 1920, the plaintiff, in pur-

suance of this stipulation, was credited with \$321 as a bonus upon \$160,500 insurance at \$2 per thousand dollars of insurance written prior to November 6th. On November 27th the plaintiff obtained a position in the Bank of North Dakota, and went to work in the new position November 29th. It was understood, however, that the plaintiff might continue to write insurance, and in the accounts for subsequent months he was charged with office rent and light by the defendant. In January following, however, the defendant charged him with the \$321 bonus previously credited. The sole controversy here is as to the right of the plaintiff to recover the bonus.

The appellant argues that since the plaintiff, by writing \$39,500 additional insurance during November and December, would have been entitled to \$400 bonus under his pre-existing contract, and at a similar rate for all above \$200,000, his surrender of the prospect of earning this bonus, which might have exceeded \$400, was a sufficient consideration for the promise of the defendant to pay him \$321; that the surrender of the prospective and conditional bonus is a valuable consideration. Conceding the soundness of this argument, we think the conclusion contended for does not follow in view of the testimony. The testimony, in our opinion, does not establish absence of consideration, but rather failure of consideration. The defendant testified that the consideration for the waiver of the bonus condition which required the writing of \$200,000 of insurance in a year was that the plaintiff should continue his efforts as an agent. The record shows that after the new agreement the defendant did very little by way of soliciting insurance, and that after he accepted the position in the bank he did practically nothing by way of seeking new business for the defendant. He attributes his failure to secure any new business to the prevalence of adverse business conditions, and he calls attention to the fact that the defendant congratulated him upon obtaining a salaried position, and suggested that he retain it until the following spring. Notwithstanding this, however, we are of the opinion that the preponderance of the evidence shows that the consideration for the defendant's promise to pay the bonus of \$321 was the plaintiff's agreement to continue his efforts as an agent, and that this consideration has failed.

While it is argued that the evidence tending to establish this consideration is inadmissible on account of the parol evidence rule, we think the evidence is clearly admissible. It does not contradict any written promise, obligation, or even recital of consideration. The rider of November 6th

is silent as to the consideration for the credit agreed upon. It does state, however, that the pre-existing bonus agreement is terminated.

It follows that the judgment below should be affirmed. It is so ordered.

CHRISTIANSON, ROBINSON, and BRONSON, JJ., concur.

GRACE, J., concurs in the result.

STATE OF NORTH DAKOTA, Petitioner, v. JOHN O. GRUBB and
H. A. KIRKILIE, Respondents.

In the matter of removal from office of John O. Grubb and H. A. Kirkilie, county commissioners for Burke County, North Dakota.

(189 N. W. 326)

Appeal and error — petitioners, after charging misconduct, no longer parties to action and have no right of appeal.

1. For reasons stated in the opinion, it is *held* that the petitioners not in fact being parties to this action, were not entitled to appeal from the judgment therein.

Opinion filed July 7, 1922

An attempted appeal from the judgment of the District court of Ramsey county, *Buttz, J.*

Appeal ordered dismissed.

E. R. Sinkler, for petitioner.

Palda & Aaker, for respondents.

GRACE, J. Grubb and Kirkilie were elected county commissioners of Burke county. Grubb was one of the parties of a contest for the office

of county commissioner. The questions involved in that contest were finally determined by this court, a majority holding that he was duly elected to that office. See 187 N. W. 157.

In the present action, five electors, George White, Ed. J. Marks, W. G. Mitchell, Jake Dewing, and Louis Negaard, proceeding under a certain statutory law relative to the removal of certain officers as contained in article 2 of chap. 7, Session Laws of 1913, chap. 132, as amended by chap. 199, Session Laws of 1915, and other amendatory acts not necessary here to mention, made and filed with Lynn J. Frazier, as Governor of the State of North Dakota, certain charges, whereby they charged Grubb and Kirkilie, as county commissioners of Burke county, with misfeasance, malfeasance, crime and misconduct in office, specifically setting forth the corrupt official acts complained of. Gov. Frazier appointed H. H. Cooper of Kenmare, N. D., a commissioner to hear and report testimony for and against the accused and to file a report of such testimony. This having been done and the testimony taken and filed, Gov. Frazier then by a notice in writing, dated the 4th day of November, 1921, gave notice of a hearing to be held before him at his office at the state capitol, on the 12th day of November, 1921. In the taking of the testimony before Cooper, E. R. Sinkler, attorney at law of Minot, appeared for the petitioners, and in the capacity of Assistant Attorney General, and L. J. Palda, of the same city, appeared for the respondents. The testimony is of considerable length. This testimony was considered by the Governor who made his order dated November 16, 1921, removing Grubb and Kirkilie from office.

The respondents on or about the 30th day of November, 1921, gave notice of appeal to the district court of Ramsey county from the removal order. Such right of appeal is provided by laws to which reference has heretofore been made. Thereafter the action was tried in the district court of Ramsey county, before C. W. Buttz, judge, who made findings of fact and conclusions of law favorable to the respondents. The conclusions of law of the trial court were to the effect that the removal of the respondents by the order of the Governor was illegal and void; that they were the duly elected and qualified commissioners of Burke county and were entitled to judgment reinstating them as such; that Jake Dewing and Ed J. Marks, appointed by the Governor to fill the alleged vacancies by the removal of the respondents, were not legally appointed nor qualified commissioners of Burke county, and are not entitled to hold or

exercise the office of commissioners of that county, and on the 29th day of May, 1922, judgment was accordingly entered. Thereafter and on about the 31st day of May, these petitioners attempted to appeal from that judgment to the Supreme Court of this state.

The only question here necessary to decide is whether they are parties to the action; if they are, they have a right of appeal; if they are not, they have not that right. It will be noticed that the law in substance provides (chap. 199, Session Laws of 1915) that the official misconduct of the officers therein mentioned may be charged or informed against by five qualified electors of the county in which the person charged is an officer, except when the state's attorney of the county is the person against whom charges are made, when other procedure is provided. As we view the substance of this law, it means that the function of the five electors is to bring the official misconduct to the notice of the state of North Dakota, which in subsequent proceedings becomes party plaintiff, and the officer against whom the complaint is made becomes party defendant. These are the only parties to the action, and so continue to be, not only in the proceedings before the Governor, but also in a subsequent proceeding in an appeal, if any, from his decision or order. The five petitioners discharge functions in initiating such a proceeding somewhat similar to those discharged by a grand jury, whereby formally and according to law, by information or indictment, it accuses one of the commission of a crime, which when done terminates its duties in that respect. Thereafter the state is the party plaintiff, and the accused the party defendant. The same result might be shown by detailing the functions of a complaining witness, who gives information and makes complaint of the commission of a criminal offense to the proper court or judicial officer, and if the complaint is acted upon and further proceeding had, the state becomes the party plaintiff, and the accused the party defendant. In all such cases, it is hardly necessary to observe that where there is a right of appeal, it is a right reserved to the parties to the action. So, in this case, the petitioners performed the office of informing, or of complaining or charging the respondents with official misconduct, crime, misfeasance, or malfeasance in office; they are in effect complaining witnesses and are not in reality parties to the action. This being apparently clear, there is no right of appeal on their part. If any might have appealed from the judgment of the district court, it was one who was a party to the action; that is, either the state or the respondents.

The judgment was favorable to the respondents, and they did not desire to appeal, and the petitioners in the circumstances here, not being parties to the action, had no right of appeal. Their attempted appeal is ordered dismissed. Neither party shall recover costs.

BIRDZELL, C. J., and ROBINSON and BRONSON, JJ., concur.

CHRISTIANSON, J. (concurring specially). I agree with my associates that this appeal should be dismissed. The statute relating to removal of public officers by the Governor provides :

“The complaint or charges against any such official authorized to be removed by the Governor shall be entitled in the name of the state of North Dakota and shall be filed with the Governor. It may be made upon the relation of any five qualified electors of the county in which the person charged is an officer, or by the state’s attorney of such county, and such complaint and charges shall be filed by the Attorney General when directed to do so by the Governor. When the officer sought to be removed is other than the state’s attorney, it shall be the duty of the state’s attorney or other competent attorney upon request of the Governor to appear and prosecute, and when the proceedings are brought to remove the state’s attorney the Governor shall request the Attorney General, or other competent attorney to appear on behalf of the state and prosecute such proceedings.” Section 686, C. L. 1913, as amended by chap. 199, Laws 1915.

Under this statute, the five electors act merely as informers. Their control over the proceeding ceases upon the filing of the charges. It is made the duty of the Governor to request some competent attorney to appear and prosecute the proceeding.

In this case a special Assistant Attorney General appointed by the Governor (chap. 20, Laws Special Session 1919) appeared and prosecuted the proceeding before the Governor, and before the special commissioner appointed by the Governor to hear and report the testimony (§ 688, C. L. 1913, as amended by chap. 199, Laws 1915). After the respondents Grubb and Kirkilie had perfected an appeal from the Governor’s order of removal to the district court of Ramsey county, the Attorney General appeared and entered into a written stipulation with counsel for such respondents to the effect that said appeal and all issues raised there-

by be submitted on the merits thereof to Hon. C. W. Buttz, one of the judges of said court; that the case be submitted upon the record made before the special commissioner appointed by the Governor to hear and report the testimony; and that both parties would accept a decision on the merits as rendered by said district court as the final judgment in said proceeding, without further litigation. The district court rendered a decision on the merits in favor of the respondents. No appeal has been taken by the state. The appeal before us purports to have been taken by the five electors who filed the charges with the Governor. It seems clear that these persons cannot appeal from the judgment entered in this case.

STATE OF NORTH DAKOTA, EX REL., JOHN O. GRUBB, ET AL., Respondents, v. ED. J. MARKS, and JACOB DEWING and C. J. KOPRIVA, Appellants.

(189 N. W. 328.)

Case controlled by decision cited.

This case is controlled by the decision rendered in *State of North Dakota, v. John O. Grubb, et al.*, ante 1212, 189 N. W. 326.

Opinion filed July 7, 1922.

An attempted appeal from the judgment of the District court of Ramsey county, *Buttz, J.*

Dismissed.

Opinion Per Curiam.

E. R. Sinkler, for appellants.

Palda & Aaker, for respondents.

PER CURIAM. This is a mandamus proceeding involving the right of possession of the offices of county commissioners of Burke county. It

arises out of the removal proceedings against John O. Grubb and H. A. Kirkilie, and was submitted at the same time as *State v. Grubb et al.*, ante, 1212, 189 N. W. 326, and involves the right of possession of the same offices involved in that proceeding. It appears that after the district court had rendered the decision reversing the removal order entered by the Governor and reinstating Grubb and Kirkilie in their respective offices, the two persons, namely, E. J. Marks and Jacob Dewing, who had been appointed to fill these offices after Grubb and Kirkilie had been removed by the Governor, refused to surrender the offices, and said Grubb and Kirkilie instituted a mandamus proceeding to compel said persons to surrender the offices to them. It further appears that the sole ground on which Marks and Dewing claim the right to said offices is that they were entitled to hold them until the removal proceeding had been terminated; and that inasmuch as an appeal had been taken from the judgment setting aside the Governor's order of removal, they were entitled to possession of the offices until such appeal was determined. Upon the oral argument, however, it was stated that Grubb and Kirkilie had been permitted to come into possession of the offices in controversy during the pendency of the appeal, and that they are at the present time occupying the offices and performing the functions thereof. In *State v. Grubb et al.*, ante 1212, 189 N. W. 326, the position taken by Marks and Dewing has been held to be untenable. Under the judgment of the district court, as affirmed by this court, Grubb and Kirkilie are the lawful incumbents of the offices; and under the conceded facts before us they are now in possession of such offices. Hence the questions involved in the mandamus proceeding have either become moot or are controlled by the decision in *State v. Grubb et al.*, supra.

Appeal dismissed, without costs to either party.

BIRDZELL, C. J., and ROBINSON, CHRISTIANSON, GRACE, and BRONSON, JJ., concur.

HARVEY BAUERNFEIND, Respondent, v. R. A. NESTOS, Governor of the State of North Dakota, Sveinbjorn Johnson, Attorney General of State of North Dakota and Joseph Kitchen, Commissioner of Agriculture and Labor of the State of North Dakota, and as such constituting the Industrial Commission of the State of North Dakota and G. A. Fraser, Adjutant General of the State of North Dakota, Appellants.

(189 N. W. 506)

Where a returned soldiers' compensation act provides for the payment of \$25.00 per month for each month of engaged service in the war, to a resident returned soldier, in the order in which the claims are received, filed, and approved, out of a special fund created by the levy of a direct tax annually,

And, where the Adjutant General, under the supervision and direction of the Industrial Commission, is granted the statutory authority, in his discretion, to give priority to claims,

And, where, in an attempt to expedite the present payment the claims that may be deferred for several years by reason of insufficient funds, the Industrial Commission and the Adjutant General have ordered or consented to a contract with certain investment companies which proposes to discount all soldiers' claims 18% by an arrangement through which the Commission purchases all soldiers' claims at 82% of their face and issues notes therefor to the investment companies which, in turn, furnish the equivalent in cash less 3% commission, and binds the Adjutant General and the Industrial Commission to give priority to all such purchased claims and not make any other contract with any one else concerning the same,

It is *held*, in an action to restrain the making of such contract, viz:—

Bounties — returned soldiers' fund a public fund.

1. The Returned Soldiers' Fund is a public fund: The moneys therein public moneys.

Bounties — industrial commission not empowered to make contract as to exercise of discretion, with respect to priority of claims for returned soldiers' compensation.

2. The Industrial Commission has no authority, to bargain by contract, their statutory discretion so as to legally bind its further exercise by them or their successors, or so as to inhibit the control of the legislature thereover.

States — industrial commission not empowered to make loan or pledge state's credit for purpose of obtaining money with which to pay off returned soldiers' claims.

3. So far as such proposed contract may be considered a loan, or the pledging of the state's credit, the Industrial Commission have no power so to do.

Opinion filed July 7, 1922.

Action of injunction in District court, Burleigh county, *Nuessle, J.* The defendants have appealed from an order overruling a demurrer to the complaint.

Affirmed.

Sveinbjorn Johnson, Attorney General, for appellants.

The payment of a bonus or pension for past services in time of war showing appreciation by the people of sacrifices made in the public interest, has by an almost unbroken line of authority been held to promote the general welfare, and to be for a public purpose. *People v. Westchester Nat. Bank* 15 A. L. R. 1344, 132 N. E. 241, 231 N. Y. 465; *Hill v. Roberts*, 217 S. W. 826, (Tenn.); *Gustafson v. Rhinow*, 175 N. W. 903, (Minn.); *State v. Clausen*, 194 Pac. 793, (Wash.)

The fact that the legislature has recognized this to be a public purpose, is entitled to great weight and is ordinary conclusive as far as the courts are concerned. *People v. Westchester National Bank*, supra; *Green v. Fraser*, 176 N. W. 11; 40 S. Ct. 499.

Sullivan, Hanley & Sullivan, for respondent.

The so-called returned soldier's act is on its face an act passed for special purpose to provide for a gratuity for a special class with a public taxation placed upon all of the property of this state for the use and benefit only of such class. *People v. Westchester Bank* (N. Y.) 132 N. E. 241.

Statement.

BRONSON, J. The plaintiff, a taxpayer, seeks to restrain the Industrial Commission and the adjutant general from entering into a certain contract concerning the soldiers' compensation. The trial court overruled a demurrer to the complaint. The defendants have appealed from the order.

The facts admitted by the demurrer and alleged in the complaint are as follows: The Industrial Commission made a resolution and order which recited that there were a large number of certificates issued to returned soldiers which, pursuant to the tax levied therefor, would not be paid for several years; that there was no market for the sale of such certificates for the reason that they bore no interest, and the date of their maturity was uncertain; that the Commission had made negotiations with various investment companies so as to thereby procure for the holders of the certificates a price approximating the face value thereof, and so that all holders might be placed on the same basis of value thereof without regard to date of filing or approval of claims. This resolution ordered the members of the Commission to execute a proposed contract attached, if accepted by the investment companies.

This contract, in its essential principles, provides: The Industrial Commission agrees to purchase all soldiers' certificates issued to the amount of \$6,500,000, the estimated amount outstanding or thereafter to be issued, which may be offered to it by the holder thereof on or before November 15, 1922, for the cash price of 82 per cent. of the face value thereof. The moneys to be paid therefor are to be received from certain investment companies, named as parties in the contract, in exchange for notes issued by the Industrial Commission. The Industrial Commission agrees to issue its negotiable coupon notes upon payment by the investment companies of the purchase price which it is agreed shall be 97 per cent. of the aggregate principal sum of such notes, plus accrued interest to the date of delivery. The investment companies agree to purchase and pay for such notes. It is provided, however, that the investment companies shall not be required to purchase such notes unless soldiers' certificates had been previously purchased and deposited as collateral by the Commission in an aggregate amount sufficient to pay the principal and interest of such notes and unless such notes are tendered by the Commission before November 5, 1922. It is further agreed that each of the notes shall be dated July 1, 1922, and shall be for the sum of \$1,000 or a multiple thereof, and shall bear interest at 6 per cent. per annum, payable semi-annually. \$250,000 principal shall mature on the 1st day of April, May, and December, 1923, and January, 1924, and \$250,000 principal thereafter on such days. They are made payable at the offices of the Empire Trust Company in New York City. It is also agreed that all soldiers' certificates purchased by the Commission shall be deposited with

the Minnesota Loan & Trust Company of Minneapolis, and the First National Bank of Bismarck, who, as trustees, shall hold the same as collateral security for the payment of the notes. The adjutant general, a party to the contract, the Industrial Commission giving consent, agrees that he will give priority to all soldiers' certificates purchased by the Commission and will cause to be paid such certificates in their order as so purchased by the Commission before any other certificates now or hereafter issued excepting certificates now outstanding that will be regularly reached March 1, 1923. Such will be governed by the plan now in operation excepting that any such certificate holders may sell the same to the Commission. The adjutant general and the Industrial Commission agree that they will make no similar contract or arrangement, during the term of such agreement, with any other party, and that no notes or obligations of the Commission secured by such soldiers' certificates shall be sold, issued, or delivered to any other person whatever. The form of the proposed notes is attached; likewise the form of the certificate to be executed by the joint trustees. The order and resolution of the Commission further provides that these notes and the interest thereon shall be paid at maturity, in accordance with the terms of the proposed contract from funds received by the State Treasurer out of the taxes heretofore or hereafter levied for the returned soldiers' fund. In respect to these proceedings of the adjutant general and the Commission, it is alleged that they had no authority to enter into such contract, to purchase such soldiers' certificates, to deliver the notes mentioned, or to deposit the soldiers' certificates with the trustees; that the Commission has no authority, in law, to require the adjutant general to perform the acts specified in the contract; that the adjutant general has no authority to fix the order of payment of such soldiers' certificates; that the Commission has no authority to borrow money for the uses and purposes named in the contract. It is further alleged that the soldiers' certificates are not valid obligations of the state; that the state is not obligated to continue the levy of the tax to pay such certificates; that there is no authority, in law, to obligate the state to continue the levy and collection of the tax provided; and, that the laws providing for such fund are unconstitutional.

Contentions

The defendants maintain that the soldiers' bonus law is constitutional and its purpose public. They maintain that the Industrial Commission

as created by law, is a business board to whom has been granted, by law, a wide discretion; that in the management of the utilities, industries, and projects of the state the members were given the powers of a board of directors thereover and such powers as might be expedient in conducting any business intrusted to their management. They urge that, concerning the proposed contract and notes, the Commission in reality does not purchase soldiers' certificates. The Commission simply accepts, by assignment, the legal title for the sole purpose of holding such certificates in trust for the assignors until the investment company has paid a stipulated price; that the Commission does not borrow money to pay such certificates; it does not pay them; it simply acts as a trustee for the beneficiaries of the soldiers' act; that in fact, the Commission does not agree to pay the notes excepting as they shall be paid out of the bonus fund; that in reality it is a trustee of two *cestuis que* trust holding the legal title for the beneficiaries as trustee only; that the Commission, accordingly, may act as trustee, has authority so to do, and following the decision of this court in *State ex rel. Bauer v. Nestos*, (N. D.) 187 N. W. 233, it may, as such trustee, assist the adjutant general in carrying out the law; that, in any event, if the position be taken that the proposed contract amounts to a purchase by the Commission, it has that power; that, as a business board, it has all discretion necessary to carry out the supervisory powers granted to it; that under the home builders law it may purchase soldiers' certificates if it becomes necessary in order to facilitate the acquisition of farm homes by returned soldiers.

The plaintiff urges that the act is unconstitutional because violative of constitutional provisions concerning special privileges and immunities and because the taxes levied are not for a public purpose; that the Industrial Commission and the adjutant general have been granted no legislative authority to make the contract proposed; that the Commission and the adjutant general have no power, by contract, to bargain away the discretion awarded to them concerning the priority or manner of paying soldiers' certificates.

Decision.

Chap. 206, Laws of 1919, first established a returned soldiers' fund. It provided for the levy of one-half mill per dollar upon the assessed valuation of all taxable property. Its stated purpose was to enable returned soldiers to secure a home or a farm home or to complete their

education. It entitled any returned soldier, a resident of the state, to receive \$25 per month for each month of engaged service, for the purpose of purchasing a home or farm home, or, in lieu thereof, to pursue or complete his educational training. It directed the adjutant general to make payment from the fund annually to such returned soldiers pro rata out of any funds available. It gave power to the adjutant general, under the supervision of the Industrial Commission, to have charge and supervision of all such payments.

Chap. 55 of the Laws of the Special Session of 1919 amended the prior act. It provided for a levy of three-fourths of one mill and the creation of a special returned soldiers' fund to be used for the following purposes:

“(a) To secure a home or a farm home and improve, furnish or repair same; (b) To make payments on pre-existing indebtedness on such home or farm home or on any improvements or furniture connected therewith; (c) To procure farm machinery, seed grain, live stock, poultry and feed for same, and to pay off any pre-existing liens or mortgages against same; (d) To establish, or invest in, a business or trade, including the tools of a craftsman or to pay off any pre-existing indebtedness, mortgage, or liens against same; (e) To complete or procure an education in any approved educational institution, including correspondence schools; (f) To secure medical care or treatment and surgical services.” Section 1.

It provides that any returned soldier should be entitled to receive \$25 per month for each month of engaged service; that payments should be made in one payment from such fund to such returned soldier in the order in which their applications were received, filed, and approved, on vouchers issued by the adjutant general and approved by the State Auditor. It provided further that the adjutant general, with the consent of the Industrial Commission, might, in his discretion, give priority to claims under the act.

Chap. 103, Laws of 1921, further amended the prior acts. It increased the levy to one mill. It provided that any returned soldier should be entitled to receive from the fund \$25 per month for each month of engaged service; that payment should be made in one payment from such fund in the order in which applications were received, filed, and approved out of any funds available therefor. It provided further that the adjutant general, with the consent of the Industrial Commission,

might, in his discretion, give priority to claims under the act. It empowered the adjutant general, under the supervision of the Industrial Commission, to have charge and supervision of all payments and the carrying out of the act. It provided that the compensation paid should be used within the state of North Dakota only, unless the adjutant, under direction and consent of the Industrial Commission, should otherwise direct.

The returned soldiers' fund is a public fund. The moneys therein are public moneys. They are collected directly by taxation. Necessarily, if the law be constitutional, they are so collected for a public purpose. The legislature has prescribed a method for disbursing such fund to returned soldiers. This method requires the full payment to a returned soldier in the order in which the applications are received, filed, and approved, and that the compensation paid shall be used within the state of North Dakota only. The exceptions are that the adjutant general, with the consent of the Industrial Commission, may, in his discretion, give priority to claims, and, further, that the adjutant general, under the direction and consent of the Industrial Commission, may otherwise direct the use of the compensation paid without the state.

The legislature has given a discretionary power to the adjutant general subject to the direction and supervision of the Industrial Commission.

If, as the defendants contend, the proposed contract is not to be construed as a loan or borrowing of money, and not thereby in any manner, to bind the state and use its credit, then such proposed contract is to be given the same construction as if the adjutant general and the Industrial Commission had agreed by contract to give priority to all claims purchased by the investment companies at 82 per cent. of their face value. Such contract does and would, in its essence, bargain away the right of the Industrial Commission to exercise its discretion concerning the priority of claims, not only for the present, but for the future. Such a contract, if valid, would automatically deprive the adjutant general and the Commission of the very discretion that the legislature had granted. For, concerning all claims not purchased by the investment companies, the discretionary right conferred by statute would be taken away. Furthermore, such contract, if valid, would be directly opposed to the statutory requirement that payments shall be made from the fund in the order in which the applications are received, filed, and approved. It would reverse the statute and deprive the officers charged with the administra-

tion of the fund of all discretion not only the officers for the present, but the officers for the future. Indeed, such a contract would permit public officers to disburse a public fund pursuant to the bargain of their contract, with their sovereign discretionary power eliminated for the present and for the future.

Manifestly this discretionary power, conferred by statute, is a continuing discretionary power. It is a sovereign delegated power termed quasi judicial. Throop on Public Officers, §§ 533, 553. It is subject to the rule of strict construction. It cannot be delegated: Mechem Public Officers, §§ 830; 567. Its purpose is obvious. A returned soldier, crippled, disabled in the service of his country, and needy, may, pursuant to this discretionary power, be given rights of priority over a returned soldier not needy and who has never been to the front. But it is urged that the claims of all returned soldiers, under the proposed contract, will now be paid without delay at the average amount of their face value. This may be true; yet the alternative is presented whereby a returned soldier, disabled and needy, is necessarily required to discount 18 per cent. his claim, otherwise payable, perchance, upon March 15, 1923, in full under the proposed contract, in order to secure payment and avoid indefinite postponement of payment. But again it may be urged that this discretion is conferred by statute, and that such proposed contract is simply one of the methods of exercising such discretion. However, if the nature of such discretion is to be so construed, what would be said of a contract made by the adjutant general and the commission to the effect that they would pay the claim of Jones, a returned soldier, prior to the claim of Smith, another returned soldier, if Jones would accept 18 per cent. discount. The answer may be made that the proposed illustration would be unfair and unjust, whereas the proposed contract affords a just and fair method of present disbursement; nevertheless, necessarily, in some cases under the proposed contract some of such returned soldiers must submit to a discount of 18 per cent. or thereabouts that they would otherwise not be compelled to pay under the present plan. The law requires the payment of the compensation awarded to the soldiers 100 cents on the dollar. The contract submitted proposes to discount the award and pay to each soldier 82 cents on the dollar. The contract stipulates that the investment companies shall pay 97 per cent. of the principal sum of the notes to be issued by the Industrial Commission. This grants a 3 per cent. commission to the investment companies. This must

be paid either by the state or out of the soldiers' claims. The statute confers no authority to pay a commission out of the state funds or to deduct a commission from the soldiers' claims. The statute permits the exercise of a discretion in determining priorities. The proposed contract takes away this discretion and destroys all priority. The statute fixes, ordinarily, the priorities. The contract destroys these priorities. The proposed contract, if valid, necessarily must bind this discretion of the Commission until all the assigned claims purchased thereunder are paid and destroys the right of the Commission to exercise any discretion preferential to such assigned claims until they are entirely paid. Supposing the legislature should desire to further amend the law by providing some method of paying these claims in full 100 cents on the dollar, or otherwise should desire to give certain priorities to needy and disabled soldiers; would it be contended that by this contract the hands of the Legislature are tied, and all claims so purchased and assigned pursuant thereto must be paid out of the public funds exactly pursuant to such contract? The present law requires that the compensation paid shall be used within the state only. The adjutant and the Industrial Commission are granted a discretion to otherwise direct. Nothing is said in the proposed contract in this regard. Yet it necessarily follows that 18 per cent. of the public funds will necessarily be disbursed without the state and at the city of New York, the place of payment stated in the proposed notes. Furthermore, the resolution and proposed contract does not show that the beneficiaries, the holders of the soldiers' certificates, either present or prospective, have consented to the arrangement by which the Industrial Commission, as the defendants contend, will act as trustees.

Manifestly broad questions of public policy are involved as well as general principles underlying the essentials of a valid contract. The legislature has conferred a continuing discretionary power. The proposed contract bargains this discretion and eliminates its continuing force. The legislative act requires the payment of the award out of public funds in full. The proposed contract requires the certificate holder to accept a lesser amount. This borders upon the exercise of a legislative power which is contrary to the legislative mandate requiring payment to be made in full. See *Lukens v. Nye*, 156 Cal. 498, 105 Pac. 593, 36 L. R. A. (N. S.) 244, 20 Ann. Cas. 158; *Brule County v. King*, 11 S. D. 294, 300, 77 N. W. 107. Again, if it be conceded that such power to bargain the discretion conferred is permissible, the proposed contract operates

to stifle competitive bidding upon all the certificates for all time to come. The proposed contract gives to the investment companies the exclusive right to purchase all such certificates. If some other company, tomorrow or on the day thereafter, should offer a more favorable rate to the soldiers, the Industrial Commission have waived their discretion and abandoned their right to negotiate.

The purposes of the proposed contract may, indeed, be highly laudable. The attempt to secure expeditious payment of the moneys to returned soldiers is deserving of commendation. Indeed, the returned soldiers each and every one of them, should receive 100 cents on the dollar awarded by statute to them. Clearly the purposes of the act is to secure compensation and disbursement of compensation, 100 cents on the dollar. The defects existing in the present law, which does not provide a method of financing the present payment of soldiers' claims, is a matter addressed to the legislature. It is not a matter wherein the executive authority may assume a legislative power, nor the courts, by judicial fiat, create a legislative power. Praiseworthy as the effort may be, the majesty of the law must be upheld, as it is prescribed without emasculation by judicial fiat. For the reasons stated the proposed contract, considered as not pledging the state's credit, cannot be upheld.

If, as the defendants otherwise contend, the proposed contract be construed as a loan or borrowing of money, we are clearly of the opinion that no express legislative authority exists for the exercise of such power by the adjutant general and the Industrial Commission.

Although the Industrial Commission are given wide discretionary powers concerning state enterprises and utilities, nevertheless these powers, generally speaking, are concerned with such activities functioning separate from the state. *Sargent County v. Bank of N. D.* (N. D.) 182 N. W. 270. The funds involved herein are public funds raised by the state, directly through taxation, in its sovereign capacity, for a public purpose. These funds may not be impaired by hypothecation of the officers in charge, nor the state's credit pledged, unless there exists express authority therefor. In the case of *State ex rel. Bauer v. Nestos et al.* (N. D.) 187 N. W. 233, express statutory authority was there conferred in the statute concerned. It is not conferred in the soldiers' acts, and accordingly is not possessed by the officers concerned. It is entire-

ly unnecessary to consider the constitutional questions raised. In our opinion the trial court properly overruled the demurrer to the complaint.

BIRDZELL, C. J., and CHRISTIANSON, J., concur.

GRACE, J., not participating.

ROBINSON, J. (concurring specially). On June 29th the contract in question was made, and this action commenced. On June 30th the action was submitted to the district court. On July 1st an order was made overruling a demurrer to the complaint. On July 1st an appeal was taken to the Supreme Court, and a motion made to advance the case. On July 3d, at 10 a. m., the case was argued and submitted to this court, all in good record time.

The plaintiff brings this action to enjoin the state officers from making a contract in regard to the payment of soldiers' bonuses. The real and manifest purpose of the action is not to enjoin the making of the contract, but to obtain a judgment of this court in favor of the proposed contract. This is a made-up case, a legal sham battle.

The complaint avers that on June 29, 1922, the Industrial Commission and the adjutant general contracted with the Minnesota Loan & Trust Company for the payment of soldiers' bonus certificates; that the adjutant general approved and joined in the contract, which is to this effect: The trust company agrees to purchase soldiers' bonus certificates to the amount of \$6,500,000 for the cash price of 82 per cent. of the face value of the same; the money to be paid on certificates of the Industrial Commission and the adjutant general giving a list of the bonus certificates, showing that the same represents valid obligations of the state of North Dakota, under chap. 103, Laws of 1921, chap. 206, Laws of 1919, and chap. 55, Laws of Special Session of 1919; that no defense exists or will be interposed to the payment of such soldiers' certificates as may be purchased by the company; that for the sum loaned the commission agrees to make notes to the company, dated July 1, 1922, each for \$1,000 or multiples thereof, with interest at 6 per cent. payable semiannually; that, in making payment of the bonus certificates, preference must be given to certificates represented by the trust company over any other certificates now or hereafter issued under said statutes.

The agreement is lengthy, and it purports to be signed by the Industrial Commission, the several members of the Commission, the Governor, the adjutant general, and the trust company. There are several reasons for reversing the order and dismissing the action:

(1) It is a sham case. It presents no legal dispute. While the plaintiff sues to enjoin the making of the contract, the real purpose of the action is to obtain a judgment sustaining the contract.

(2) There is no showing that the Industrial Commission has any power to make such a contract, and they have no such power.

(3) Another reason is that the constitutional validity of such bonus acts is not clear beyond question, and some courts hold against such acts on the ground that the legislature may not take the property of one citizen and give it to another person, or class of persons, however deserving they may be (*People v. Westchester County Nat. Bank*, 231 N. Y. 465, 132 N. E. 241, 15 A. L. R. 1344), but in this case there is no occasion for passing on the constitutional validity of the several acts. If it be conceded that the acts are all valid, and do authorize the levying and collection of taxes for the payment of the bonus, it must be conceded that the state was under no legal obligations to pass the acts or to pay the bonus. At best, the several bonus acts do constitute a gratuitous promise, which, however, laudable, any subsequent legislature may revoke and undo. There is no occasion for an extended argument, because it is entirely clear on elementary principles, and on the reading of the industrial commission statute, that it has no power to make the contract in question.

Hence the order overruling the demurrer is affirmed.

JOHN KAUTZMAN, Respondent, v. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURG, PA., a corporation, Appellant.

(189 N. W. 325.)

Pleading — complaint so framed as to state cause of action on more than one legal theory not subject to demurrer because not stating fact sufficient to constitute cause of action.

Where a complaint is so framed as to state a cause of action or causes of action upon more than one legal theory, a demurrer to the com-

plaint on the ground that it does not state facts sufficient to constitute a cause of action should be overruled.

Opinion filed March 6, 1922. Rehearing denied July 8, 1922.

Appealed from the District court of Hettinger county, *Berry J.*

Appealed from an order overruling a demurrer.

Order affirmed.

Sullivan, Hanley & Sullivan, for appellant.

"The mere fixing of the amount of loss is not, of itself, an admission that any liability exists against it upon such policy and *does not raise an implied promise to pay.*" 2 Wood Fire Ins. ¶ 450 Willoughby v. St. Paul German Ins. Co. (Minn.) 71 N. W. 272.

"To result in a contract, an offer must be certain. The parties must make their own agreement and not leave it to the court to construct one for them," 9 Cyc. 248.

So it has been held that the following agreements have been held void for uncertainty.

"A promise by debtor to pay more if he could afford it." Clark v. Pearson, 53 Ill. App. 310.

A promise to make "advances" without specifying any sum. Gafford v. Broskauer, 59 Ala. 264.

A promise to rent land to another on his paying the same rent that the promisor might be able to obtain from other parties. Gilston v. Sigmund, 27 Md. 334.

A testator promised to leave a child something at his death. No amount was specified. There was nothing by which the amount could be ascertained. The contract was held too indefinite to support an action. Freeman v. Morris, et al. (Wis.) 109 N. W. 982.

V. H. Crane, for respondent.

When pleadings are so indefinite and uncertain that the precise nature of the charge is not apparent, the proper procedure is by motion to make more definite and certain. Section 7459 C. L. 1913.

Forms of action are abolished. Section 7439 C. L. 1913.

Where the demurrer is upon the ground that the complaint does not state facts sufficient to constitute a cause of action, the demurrer must be overruled and the complaint sustained if it states a cause of action

upon any theory of the case. *Darrah v. Boyce*, 29 N. W. 102; *Hemingway v. Poucher*, 98 N. Y. 281; *Abbott's Trial Brief*, Vol. 1, p. 181, 183.

If the pleading states facts constituting a cause of action unnecessary allegations cannot make the pleading bad on demurrer. *Abbott's Trial Brief*, Vol. 1, p. 193, ¶ 137.

A consideration is necessary to make the accord and satisfaction valid. 1 C. J. 528, ¶ 14; *Brief*, 1 L. R. A. 303.

Though the parties to an accord are bound to execute it, yet it does not extinguish the obligation until it is fully executed. Section 5826, C. L. 1913; 1 C. J. 572; *Lehde v. Nat'l Union Fire Ins. Co.*, 180 N. W. 56; 1 C. J. 530, ¶ 17; 533, ¶ 21; *Hayes v. Mass. Mut. Life Ins. Co.*, 1 L. R. A. 303.

BIRDZELL, J. This is an appeal from an order overruling a demurrer to the complaint. In the complaint it is alleged that, in consideration of the payment of a premium of \$245, the defendant issued to the plaintiff its policy of insurance insuring him against loss or damage on account of failure of his crops due to "hail or any cause except fire, floods, winterkill, or failure on the part of the plaintiff to properly prepare the ground for seeding, and properly seed, care for, protect, and harvest said crops during the season of 1917, not to exceed \$7 per acre for total loss," etc.; that the plaintiff performed and complied with all the terms and conditions of the policy on his part; that the crops covered by the policy were partially destroyed and damaged from causes within the policy risk; that the damage or loss was adjusted between the plaintiff and defendant at the sum of \$1240 that after the loss has been so adjusted an adjuster of the defendant represented to the plaintiff that the defendant company was in financial difficulties on account of its liabilities occasioned by heavy losses to policy holders; that the company had determined the percentage of losses it was able to pay, and that, if the policy holders were not willing to accept the amount so determined in full settlement of such losses, the company would be forced into bankruptcy; that the company was then bankrupt, and, if forced into bankruptcy, a policy holder suffering losses would get little or nothing, and that the said company was only able to pay 50 per cent. of the loss to policy holders, and, in the event the company found it could pay more, and did pay more to other policy holders in settlement of losses, it would pay the plaintiff more"; that, relying on representations so made, plaintiff was

induced thereby to agree to accept in settlement of his loss the sum of \$620 and a promise to pay more in the event the company found it could and did pay more to other policy holders; that thereafter the defendant paid the plaintiff the sum of \$620, whereupon plaintiff surrendered his policy; that the statements and representations were false and untrue; that the promise of the agent that the company would pay more in the event it later could pay more, and did pay more to other policy holders, was made without any intention of being kept or performed, and for the purpose and with the intent of cheating and defrauding the plaintiff by inducing him to accept less than the amount of the debt owing to him by the defendant that in fact the company was not in financial difficulties—was not bankrupt; that it was able to pay its losses to the policy holders in full; that it did not contemplate going into bankruptcy; that the company was able to pay more than 50 per cent. of the losses, and did pay more to policy holders who would not accept the amount offered by the agent and adjuster; that, after the plaintiff had agreed to accept \$620, and the promise of the agent to pay more as alleged, the agent and adjuster of the defendant presented to the plaintiff a paper printed and written in English, and, upon the statement by the plaintiff that he could not read English, the agent stated that the same contained and was the agreement made between the plaintiff and the agent; that it was necessary for the plaintiff to sign the same in order to get his money; that the plaintiff is informed and believes that the paper so signed did not contain the terms of the settlement, but that the same purports to be an accord and satisfaction of the disputed claim and a release of the company from liability; that the recitals therein are false and untrue; that the agent of the defendant obtained the plaintiff's signature to the said paper in furtherance of the design to cheat and defraud the plaintiff, and well knowing that the plaintiff could not read the same, and well knowing the plaintiff's belief that the same contained the oral agreement of settlement entered into; that, by reason of the deceit and false representations the plaintiff has been damaged in the sum of \$620, with interest thereon at the rate of 6 per cent. per annum from the 19th day of December, 1917. Wherefore, plaintiff prays judgment against the defendant for the sum of \$620, with interest, etc.

The demurrer is a general demurrer, the only ground being that the complaint fails to state facts sufficient to constitute a cause of action. Upon this appeal the appellant says that the complaint must stand or fall on one of three theories, viz.:

(1) As a suit on a contract of insurance in which the plaintiff has anticipated the defense of settlement by alleging false representations for the purpose of setting it aside.

(2) As an action on an accord seeking to recover the unpaid portion thereof.

(3) As an action for damages sustained by reason of false representations inducing a settlement.

As we read the brief of the appellant, it seems to be assumed that upon this appeal the respondent should be put to an election or the demurrer sustained as to one or more of the causes, so that the defendant will be better able to answer. The only question here for decision is whether or not the complaint states facts sufficient to constitute a cause of action. 31 Cyc. 289, 290. We are clearly of the opinion that it does. *Lehde v. National Union Fire Insurance Co.* (N. D.) 180 N. W. 56. By a demurrer on the sole ground that the complaint does not state facts sufficient to constitute a cause of action, the plaintiff is not put to an election between the different causes of action alleged. 31 Cyc. 277, 278; 6 Ency. Pl. & Pr. 318, 319, 340, 341. Neither is the court concerned with the plaintiff's theory or theories as to his right to recover provided a cause of action is sufficiently stated.

Order affirmed.

CHRISTIANSON, ROBINSON, and BRONSON, JJ., concur.

GRACE, C. J., disqualified, did not participate.

FARMERS STATE BANK, a corporation, Appellant, v. W. J. RICHTER, Respondent.

(189 N. W. 242.)

Banks — and banking — bank's purchase of stock in electric company to enable bank to procure electric lights held not an "investment in stock of other corporations" in violation of statute.

1. Where the cashier of a banking institution at the direction of the directors thereof, subscribed for stock in another corporation, an electric light company, and who at their direction placed \$500 in the bank to the

credit of the electric company, which was checked out by it, and where it further appears that the purchase of the stock in the electric company was for the purpose of enabling the bank to procure electric light in the bank, it is *held* that such purchase was not a violation of § 5187 C. L., as amended by chap. 54 of the Session Laws of 1915, prohibiting banking institutions from investing in the stock of other corporations.

Opinion filed July 8, 1922.

An appeal from a judgment of the District court of Dickey county, and from an order denying the motion for judgment notwithstanding the verdict or in the alternative for a new trial, *McKenna, J.*

Order and judgment affirmed.

F. J. Graham, for appellant.

The doctrine of ultra vires, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action rests, as this court has often recognized and affirmed, upon three distinct grounds: The obligation of anyone contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subject to risks which they have never undertaken, and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law. *North Star Boot & Shoe Co. v. Stebbins*, (S. D.) 48 N. W. 833.

"Cashier of bank must act within scope of power authorized by directors. Cashier cannot contract for purchase of merchandise for bank." *Des Moines Mfg. Co. v. Milling Co.* (S. D.) 70 N. W. 839.

"Officers are not bound by contracts unauthorized by directors." *Bank of Commerce v. Hart*, (Nebr.) 55 N. W. 631; *Morse on Banks and Banking*, 2nd ed. p. 155.

"The general manager of a corporation may bind it within the scope of its corporate business but not in excess of its powers. (Iowa) 126 N. W. 190."

"A corporation cannot ratify a contract which it had not the power to make." 82 N. W. 13.

"It is a general rule that a corporation may ratify any act or contract which it might lawfully have done or made originally." 110 N. W. 715.

"The powers of a corporation are strictly limited to those granted by

their charter or by the statute under which they are organized." 13 Minn. 59.

"The directors of the bank could not legally ratify that which they had no power to authorize." 10 Cyc. 787. 10 Cyc. 787-919; § 7986, 7987, C. L. 1913; Thom. Corp. Vol. 5; §§ 5482, 5877; 2 Thom. Corp. 2nd ed. § 1768.

"The president of a corporation is liable for its torts, fraud and conversion. 2 Thom. Corp. 2nd ed. §§ 1489, 1490, 1765; Corpus Juris 14 a, §§ 1869, 1873, 1922, 2508, 2514, 2533.

E. E. Cassels, and W. S. Lauder, for respondent.

The act complained of is not within the prohibition of chap. 54, Laws 1915.

This statute says that a bank shall not "employ or invest" its funds in the stock of any other corporation.

The word "invest" means "to lay out money in some permanent form so as to produce an income." Bouvier Law Dictionary. *People v. Feitner*, 67 N. Y. Supp. 893.

"To lay out money or capital in business with the view of obtaining an income or profit." Webster Dictionary. *San Diego County Bank v. Barrett*, 126 Cal. 413, 58 Pac. 914.

"Investment means the loaning or putting out of money at interest so as to produce an income. *State v. Bartley*, 41 Neb. 277, 59 N. W. 907.

GRACE, J. This appeal is from a judgment and from an order denying the motion for judgment notwithstanding the verdict, or in the alternative for a new trial. The action is one for the recovery of damages in the sum of \$500 against the defendant, while acting as plaintiff's cashier, on the theory that he had wrongfully paid out that sum. The trial was had to the court and jury. The verdict was in defendant's favor.

The defendant was the owner of 69 out of 150 shares of the bank. The Forbes Electric Company was a corporation organized to erect and maintain electric connecting wires between the Ellendale electric plant and Forbes, and for the organization and maintenance of an electric light system in Forbes. The electric plant in Forbes had been destroyed by fire, so that there remained no lighting system therein. The plaintiff was

interested in having this electric system constructed, so that it might have light in its banking institution. A subscription list to the stock of the Forbes Electric Company was drafted, wherein was described the purposes of its organization. Those desiring to obtain stock were required to sign this list, specifying the number of shares of \$100 each for which they subscribed. The defendant was directed by the president and a majority of the board of directors to subscribe for five shares of stock. He did so, subscribing for four shares at one time, and one share at another. His direction to subscribe for such stock was not given or authorized at any regular or special meeting of the board of directors of the bank. On July 22, 1919, the defendant, as cashier of plaintiff, placed in the bank to the credit of the Forbest Electric Company the sum of \$500 in payment of the five shares of stock. On the same date he made out a memorandum note for that amount, payable to the plaintiff and signed the name of the Forbes Electric Company to it, by W. J. Richter, cashier. On the face of the note he made the notation, "For bank."

The defendant was a director, as well as the cashier, of the bank. The certificate of the five shares of stock was issued August 18, 1920, to A. S. Marshall, the president and a stockholder of the bank. The defendant, during a portion of the time prior to the time the stock was issued, was secretary of the Forbes Electric Company. With the exception of one share which was not one of the five paid for by the money of the bank, he issued no shares during the time he was secretary. It is unnecessary to set forth the pleadings to any greater extent than is necessary to present a clear understanding of the issues. The substance of the complaint is to the effect that defendant as cashier, invested \$500 in the stock above mentioned and wrongfully misappropriated and paid out that sum of the cash assets of the bank; that, to conceal the misappropriation and wrongful payment, he prepared and placed among the assets of the bank to represent the amount so misappropriated the memorandum note above mentioned. The \$500 deposited by the cashier and credited to the electric company was checked out by that company. It is sought in this action to be recovered of defendant on the theory that it was paid out in violation of chap. 54 of the Session Laws of 1915. This chapter prohibits, as therein specified, banks from applying their money or assets directly or indirectly in trade or commerce, or the investment thereof in the stock of any corporation, bank, partnership, firm, or association, or in produce or other commodities, except as advances for grain, or produce in store or

in transit to market, except that a bank may invest sufficient of its funds in the stock of the Federal Reserve Bank of the district in which it is situated to enable it to become a member of the Federal Reserve Association.

The answer, after making certain admissions relative to the corporate character of the plaintiff interposed a general denial of the allegations of the complaint. It further shows that the acts of the defendant were authorized by the officers, directors, and stockholders of the bank for the purpose of securing electric lights and electrical conveniences in and about their banking institution in the village of Forbes; that said bank placed in its place of business electric lights and other electrical appliances such as are needed; that all of the conveniences which induced the plaintiff, its officers, directors, and stockholders, to subscribe the \$500 to the electric company, have been complied with; that plaintiff is now using such electrical conveniences and receiving the benefits thereof.

There is abundant evidence to support the verdict of the jury. The evidence fully establishes the fact that the \$500 expenditure was not contemplated by the officers and directors of the bank, nor by this defendant, as an "investment," as that term is commonly understood, in the stock of the electric company. It does in reality show that all that was contemplated by the expenditure was to assist in producing a means whereby the electric light might be installed in the bank. The only conclusion that reasonably can be arrived at from a study of the evidence is that the \$500 was expended as an incidental and necessary expense to the conduct of the business of the bank, and this with the same authority that it might have installed any fixture or incurred any other incidental expense for the purpose of facilitating the carrying on of its business. This bank had a capital stock of \$15,000. Under § 5151, C. L. 1913, it could invest 35 per cent. of its capital stock and unimpaired surplus in a banking house, furniture, fixtures, and the parcel of land on which the banking house is located. Certainly it would seem that the electrical appliances necessary to furnish light through the bank might properly be denominated fixtures such as were necessary in carrying on the business. In any event, the expenditure could be denominated nothing less than an ordinary incidental expense, which it would be idle to contend the directors did not have right and authority to incur, equally as much perhaps as though the expenditure had been one for fuel or for janitor service.

The evidence clearly shows that the directors did authorize the de-

defendant to expend the \$500 in the manner hereinbefore stated, but it does not show that such authority was given at any regular or special meeting of the board. They in effect, however, made him their agent to do exactly what he did do. No one is complaining of what the cashier did in this respect, except the directors, who authorized it. Certainly it would seem that the directors of the bank are estopped from any recovery in this action by reason of their conduct; certainly they should not lead or direct the cashier into making the expenditure, then be permitted to mulct him in damages for doing what they directed him to do; certainly if any one should be liable for this misappropriation of the funds in the circumstances here, it would not be the cashier. Looking through the form of the investment to its substance, it is clear that it was merely an expense item. The case as a whole on the part of the plaintiffs is highly technical, and especially so in view of the fact that defendant acted in the highest of good faith, under direction and authority, in a matter which was in reality an expenditure, and not an investment, and from which the defendant did not receive one penny of profit.

The appellant has assigned a vast number of errors, 99 in all. Substantially 86 of them, however, are based upon alleged error of the court in the admission of certain evidence over plaintiff's objection, or in the exclusion of evidence offered. A careful examination has been made of all these, and the conclusion is that none of them constitute prejudicial or reversible error. Several assignments of error are based upon alleged errors in the instructions given by the court. These have been examined critically, and the conclusion reached that there is no reversible error in any of them. The court in its instructions fully recognized the law as set forth in chap. 54 of the Session Laws of 1915, an amendment of § 5187, C. L. 1913, and fully instructed the jury that, if they found the investment was in violation of that law, they should return a verdict for the plaintiff for \$500 and interest.

It, however, instructed the jury, thus:

"I charge you that it is a question of fact for you to determine from all of the evidence in this case, and the law as I am giving it to you in these instructions, as to whether or not the defendant, with the knowledge, consent, or approval of a majority of the board of directors of the plaintiff bank, in the summer of 1919, paid to the Forbes Electric Company the sum of \$500 as an investment in the stock of the said electric company, or whether it was paid to the said electric company as

a contribution or as an item of expense in the legitimate and reasonable carrying on of the banking business.”

“As I charged you heretofore, if you find from the evidence that the defendant, either with or without the approval of the board of directors, paid the said money to the Forbes Electric Company, for the purpose of an investment in the stock of said company, then and in that case, your verdict must be for the plaintiff for the full amount sued for.”

“On the other hand, if you believe from the evidence that said money was not paid to the Forbes Electric Company for the purpose of investing in the stock of the said company, but was in good faith with the knowledge and consent of a majority of the board of directors as expenses or a contribution, merely for the purpose of securing electric lights for the plaintiff bank for the lighting of its building and premises and to enable the bank to carry on its business more easily or expeditiously or comfortably, then I charge you it is a question of fact for you to determine from all the facts and circumstances in this case whether or not such outlay of \$500 was reasonable, under all the circumstances surrounding the defendant as cashier and director, and around the other directors and around the plaintiff bank itself, at the time such expenditure was made, as to whether or not such expense was reasonable and proper under all the circumstances, as disclosed to you by the evidence.”

It would seem unnecessary to add any comments to these quotations of the instructions. They both express the law fairly and clearly and at the same time point out to the jury the crucial facts necessary to be determined by them under the evidence and the law as given them by the court. It can be said of the instructions as a whole that they are a fair and sufficient statement of the law of the case. There is no part of them which can be fairly said to be the basis of error. We are clear there is no reversible error in them; if anything, those parts of the instructions complained of were too favorable to plaintiff.

The court did not err in refusing to direct a verdict in plaintiff's favor at the close of all the evidence.

The order and judgment appealed from are affirmed. Respondent is entitled to his costs and disbursements on appeal.

BIRDZELL, C. J., and ROBINSON, CHRISTIANSON, and BRONSON, JJ.,
concur.

STATE OF NORTH DAKOTA, upon the relation of Carl R. Kositzky, Respondent, v. WILLIAM J. PRATER, Appellant.

(189 N. W. 334)

Statutes — Codifiers presumed not to have intended to change law; changes in revision of statute not regarded as altering the law, unless there is a clear intent to do so; legislative intent may be ascertained by reference to prior statute, in construing a revised statute; right of board and university and school lands to remove commissioner of university and school lands arbitrary.

Where, concerning the office of the Commissioner of University and School Lands, the statute provided that the Commissioner's term of office should be for two years and should be at all times subject to the immediate control of the board who appointed him, and, where, in the revision and codification of the law in 1895, the statute was changed so as to provide, for the Commissioner, a term of two years subject to removal by the board, and where, upon investigation of the legislative history of the act no legislative intent is disclosed to change the law or the legislative policy, it is *held*.

1. The general presumption obtains that the codifiers did not intend to change the law as it formerly existed.

2. Changes made in the revision of the statute by alteration of the phraseology will not be regarded as altering the law unless there is a clear intent shown so to do.

3. In ascertaining the legislative intent reference may be had to the prior statute.

4. The statute, now sections 285 and 296 C. L. 1913, upon principles of statutory construction, grants to the board an arbitrary right of removal.

Opinion filed July 8, 1922.

Proceeding of mandamus in District court, Burleigh county, *Nuessle, J.*, to compel the defendant to deliver up the office of commissioner to the relator appointed by the board. The defendant has appealed from a peremptory writ in favor of the relator.

Affirmed.

William Langer, W. S. Lauder, Geo. E. Wallace, for appellant.

"We have not found any case where an officer who was appointed

for a fixed term—and when the power of removal was not expressly declared by law to be discretionary—has been held to be removable except for cause, and wherever cause must be assigned for the removal of the officer he is entitled to notice and a chance to defend.” *Hallgren v. Campbell*, 82 Mich. 255; *Field v. Com.*, 32 Penn. St. 478; *State v. City of St. Louis*, 90 Mo. 19 (1 S. W. Rep. 757).

“In such a case, the rule is, and on principle must be, that the power of arbitrary removal is vested in the person or board vested with the appointing power, as incidental to the power of appointment, unless the law places a limitation on such power.” *Mechem Pub. Off.* § 445; *Throop Pub. Off.* §§ 304-361; *Ex Parte Hennen*, 13 Pet. 230; *People v. Robb*, 126 N. Y. 180, 27 N. E. 267; *Miles v. Stevenson*, (Md.) 30 Atl. 646-648; *Lease v. Freeborn* (Kan. Sup.) 35 Pac. 817; *People v. Fire Comm’rs. of New York*, 73 N. Y. 441; *People v. Shear* (Cal.) 15 Pac. 92; *Newsom v. Cocke*, 44 Miss. 352; *State v. City of St. Louis*, (Mo. Sup.) 1 S. W. 757-758; *People v. Hill*, 7 Cal. 97; *Smith v. Brown*, 59 Cal. 672.

The authorities are practically unanimous and it is well settled that it is only where no term or tenure is fixed by the constitution or the statute that the officer holds at the pleasure of the appointing board.

The case of *Lease v. Freeborn*, Kansas 35 Pac. Reports 817 is typical of the holdings. *People v. Jewett*, 6 Cal. 291; *People v. Hill*, 7 Cal. 97; *People v. Freese*, 76 Cal. 633, 18 Pac. 812; *Mechem Pub. Off.* 385.

It is well settled by the authorities that it is only where no term or tenure is fixed by the constitution or the statute that an officer holds at the pleasure of the appointing power. *Jacques v. Little*, 51 Kan. 300, 33 Pac. 196; *Mechem Pub. Off.* 445, 454; 19 Amer. & Eng. Enc. Law, pp. 562 f, 562 g; *State v. Board of Police Com’rs.* 88 Mo. 144, 19 N. W. 824; *Throop Pub. Off.* 341.

Of course, any trustee may be removed “for good cause shown” but this fact becomes a condition precedent, and the cause or causes enumerated must be alleged, and the party notified, and causes examined. *State v. City of St. Louis*, 90 Mo. 19, 1 S. W. 757; *Page v. Hardin*, 8 B. Mon. 648, 672; 1 Dill. Mun Corp (4th ed.) 240-256.

Sveinbjorn Johnson, Attorney General, and Geo. F. Shafer. Assistant Attorney General, for respondent

The office was created by the legislature and, of course, the legislature might abridge the term by express words or the legislature might specify an event upon the happening of which the term should end. *People ex rel. Gere v. Whitlock*, 92 N. Y. 190, 198.

In the case at bar the term is two years unless the board in its discretion should decide to cut it short and abridge it. This has been done by the Board of University and School Lands and was done on Saturday, April 8th, and of this the defendant and appellant cannot justly complain.

We take the position that the phrase in our statute "subject to removal by the board," and the phrase in the South Dakota statute "unless sooner removed by him" mean by necessary implication one and the same thing, namely, they imply a discretion in the appointing power to remove at discretion and without specifying the constitutional causes required in the cases referred to in §§ 196 and 197 of the state constitution.

See *State v. Kipp*, *supra*, which we believe is on all fours in point and decisive of this case. See also *People ex rel. Gere v. Whitlock*, *supra*, and *State ex rel. Little v. Mitchell*, 33 Pac. 104.

So, where the statute authorizing the appointment contains a reservation of the right of removal without preferring charges and this power is exercised by the removal of the incumbent and the appointment of another in his stead, the right of the former to the office will cease. *State v. Somers*, 53 N. W. 146; *Townsend v. Kurtz*, 83 Md. 331; 34 Atl. 1123.

BRONSON, J. This is a proceeding of mandamus involving the office of Commissioner of University and School Lands. The trial court found that the relator was entitled to the office. The defendant has appealed from the order.

The facts are not disputed. They are as follows: The defendant was appointed Commissioner on September 1, 1921, for a period of two years. He qualified and took office. On April 8, 1922, the board by resolution removed the defendant, declared the office vacant, and thereafter appointed the relator to fill the same. No charges were preferred; no notice thereof served. The board assumed the power to declare such office vacant in its discretion without the necessity of preferring charges of misconduct, malfeasance, crime, or misdemeanor in office, habitual drunkenness or gross incompetency, and without making any findings that some or all of such charges were true.

The defendant maintains that he was appointed for a specific term; that the statute prescribes a specific term (§§ 285, 296, C. L. 1913); that he was not holding such office at the pleasure or discretion of the board; that in the absence of statutory authority the rule of the common law, and the rule applicable here, is that a public officer holding a definite term can be removed only for cause after notice and hearing. The relator contends that the term of the defendant was not for a definite two-year period, but is subject to the limitation "subject to removal by the board," which necessarily implies that the board, in its discretion, may sooner remove the Commissioner; that the legislature might abridge the term by express words, or might specify an event upon the happening of which the term would end. There is practically no controversy upon the law. It is practically conceded that a public officer, appointed for a definite term with a delegate power of removal granted to the appointive power, can only be removed for cause after notice and hearing. This is the rule of the common law. *Hallgren v. Campbell*, 82 Mich. 255, 46 N. W. 381, 9 L. R. A. 408, 21 Am. St Rep. 557; *People v. Whitlock*, 92 N. Y. 191. See *Mechem on Public Officers*, § 445.

It is likewise conceded that where a public officer is appointed for a term not designated, or indefinite, the appointing power may exercise its right of removal at its pleasure at any time without notice or hearing. *State v. Archibald*, 5 N. D. 359, 66 N. W. 234; 22 R. C. L. 562. In the former case the power of removal is conditional; in the latter, arbitrary, 29 Cyc. 1408. The office involved is statutory. It was wholly within the power of the legislature to prescribe the method of appointing and of removal. 22 R. C. L. 561; *State ex rel. Wehe v. Frazier* (N. D.) 182 N. W. 545. This legislative power of removal concerning a public office created by statute is not subject to the restrictions of the constitutional provisions concerning the removal of certain officers by impeachment or other officers upon stated grounds. Sections 196, 197, Const.; *State v. Archibald*, 5 N. D. 359, 379, 66 N. W. 234; *State ex rel. Wehe v. Frazier*, *supra*. The power of removal may be exercised in a manner prescribed by the legislature. *State ex rel. Shaw v. Frazier*, 39 N. D. 430, 434, 167 N. W. 510. Accordingly, the question presented upon this appeal is entirely one of statutory construction and interpretation. If the statute read, "Subject to removal for cause," or "subject to removal without cause," no difficulties would be apprehended in either construction or interpretation. Likewise, if the statute fixed specifically a term

for two years with an independent power of removal, otherwise stated, the difficulties of interpretation and construction would be less pronounced. However unpleasant the function may be, it nevertheless is made our duty to ascertain the legislative intent concerning the power of removal, which in the statute might have been fully and clearly expressed without doubt by the use of two simple words. This court may neither reverse a legislative policy nor confer a right of office unless the legislative intent appears so to do. *People v. Woodruff*, 32 N. Y. 355, 363.

The board of university and school lands was first created by chap. 25, Laws of 1890. This act gave the board full control of all public lands, and the investment of permanent funds derived therefrom. This act was supplemented by chap. 146, Laws of 1890, which granted to the board the control of school and university lands and the investment of funds arising therefrom. The legislature, 1893, amended the acts mentioned. It granted to the board the power to appoint a commissioner. The pertinent provisions are as follows:

"Section 3 *Authority*.—Subject to the provisions of article 9 of the constitution and the provisions of this act, such board shall have full control of the selecting, appraisement, sale, rental, disposal and management of all school and public lands of the state, and the investment of the permanent funds derived from the sale thereof, or from any other source, and shall have power to appoint a competent person to act as the general agent of the board in the performance of all their duties pertaining to the selection, sale, lease, contracting in any manner allowed by law, and the general management and control of all matters relative to the care and disposition of the public lands of the state, all of whose acts *at all times* shall be subject to the approval and supervision of the board, *and whose term of office shall at all times be subject to their immediate control*. The title of such agent shall be that of Commissioner of University and School Lands, and before entering upon his duties as such shall take the oath of civil officers and give a bond in the penal sum of ten thousand dollars (\$10,000), with not less than two sureties, to be approved by the board; said bond to be recorded in the office of the Secretary of State and filed, when recorded, in the office of the State Auditor."

"Section 12. *Term of Office of Commissioner of University and School Lands*.—The first term of office of the commissioner provided for in this act, shall be for three years from the date of his appointment

or until his successor shall be appointed and qualified, and after the expiration of the first term, all succeeding terms shall be for two years. In case of vacancy by death, removal, resignation or any other cause, the Board of University and School Lands shall fill the same by appointment." Chap. 118, Laws of 1893.

For purposes of showing the authority granted, I have underscored some of the words in the statute quoted.

In 1893 the legislature provided for the appointment of a revising commission by the Governor. Each of the commissioners was required to qualify by taking an oath of office and filing the same with the Secretary of State. The law provided that such commissioners should hold their office for the term of two years, or until the duties prescribed shall be duly performed, unless sooner determined by law. It was made generally the duty of this commission to examine, revise, and codify the laws and to prepare the same for publication. Chap. 74, Laws of 1893.

In 1895 some seven different Codes, prepared by the Revising Commission, were introduced in the legislature as bills and enacted into laws. By legislative act these Codes were not printed as session laws of the state. Chap. 26, Laws of 1895.

Among these Codes was the Political Code for the state of North Dakota. It is embodied in the Revised Codes of North Dakota for the year 1895. Sections 170 and 179 thereof read as follows:

"Section 170. *Board, Powers of.* Subject to the provisions of article 9 of the Constitution and the provisions of this article, such board shall have the full control of the selecting, appraisement, rental, sale, disposal and management of all school and public lands of the state, including the real property donated to the territory of Dakota under the provisions of chap. 104 of the Laws of 1883, except such as has been sold, and the investment of the permanent funds derived from the sale thereof, or from any other source and shall have power to appoint a competent person to act as the general agent of the board in the performance of all its duties pertaining to the selection, sale, leasing or contracting in any manner allowed by law, and the general control and management of all matters relating to the care and disposition of the public lands of the state, all of whose official acts shall be subject to the approval and supervision of the board. The title of such agent shall be Commissioner of University and School Lands, and before entering upon his duties as such he shall take the oath prescribed for civil officers and give a bond

in the penal sum of ten thousand dollars with not less than two sureties, to be approved by the board, and recorded in the office of the Secretary of State and filed, when recorded, in the office of the State Treasurer."

"Section 179. *Term of Office of Commissioner.* The first term of office of the Commissioner provided for in this article shall be for three years from the date of his appointment and until his successor is appointed and qualified and after the expiration of the first term, all succeeding terms shall be two years, and until his successor is appointed and qualified, subject to removal by the board. In case of vacancy by death, removal, resignation or any other cause, the board shall fill the same by appointment."

These sections constitute the present law. Sections 285 and 296, Compiled Laws of 1913.

This Political Code of North Dakota prepared by the Revising Commission was introduced as House Bill No. 165. The original bill is typewritten and bulky. The final bill was not engrossed or redrafted, but amendments made were incorporated in this original bill, in some cases by drawing lines through the typewritten words and inserting written words above or by additions and eliminations. An examination of the legislative journal discloses that many amendments were made to this Political Code on the floor of both houses. The bill was introduced by a joint committee of both houses appointed to consider the report of the Revision Commission. In the House, on February 25, 1895, the joint committee reported a recommendation that the bill do pass. The bill was then, on February 26, 1895, read the first and second times, and was referred to its third reading. It was made a special order of business, and came up for third reading. On February 27th the third reading was concluded. The bill was then considered for purposes of amendment. Several amendments were made. On March 1, 1895, it was passed by the House. It was received by the Senate on March 1st, and on the next day read the first and second times, and referred to the judiciary committee. On March 4, 1895, this committee recommended the bill for passage with many amendments. The committee report was adopted. On March 7, 1895, amendments to the bill were made on the floor of the Senate, and the bill was passed by the Senate. The bill then, on March 3, 1895, was reported to the House, with the statement that the amendments of the Senate were attached to the proper sections of the Code. The House did not concur in the amendments, but appointed a conference commit-

tee. On March 8th, the conference committee concurred in the Senate amendments, the report of the committee was adopted, and the bill was re-passed as amended. Thus it was finally enacted. This bill specifically repeals chap. 118, Laws of 1893.

Section 173 thereof, including both the original and the amended language, reads as follows:

"Section 173. Subject to the provisions of article 9 of the Constitution and the provisions of this article, such board shall have the full control of the selecting, appraisalment, rental, sale, disposal and management of all school and public lands of the state including the real property donated to the territory of Dakota under the provisions of chap. 104 of the Laws of 1883, except such as has been sold, and the investment of the permanent funds derived from the sale thereof, or from any other source, and shall have power to appoint a competent person to act as the general agent of the board in the performance of all its duties pertaining to the selection, sale, leasing or contracting in any manner allowed by law and the general control and management of all matters relating to the care and disposition of the public lands of the state, all of whose *official acts at all times* shall be subject to the approval and supervision of the board, ~~and who shall hold office during the pleasure of the board.~~ The title of such agent shall be Commissioner of University and School Lands, and before entering upon his duties as such he shall take the oath prescribed for civil officers and give a bond in the penal sum of ten thousand dollars, with not less than two sureties, to be approved by the board and recorded in the office of the Secretary of State and filed, when recorded, in the office of the State Treasurer. (S. 3. Id.)"

Section 182 thereof reads as follows:

"Section 182. The first term of office of the Commissioner provided for in this *article* shall be for three years from the date of his appointment ~~and~~ ~~or~~ ~~until his successor shall be~~ is appointed and qualified, and after the expiration of the first term all succeeding terms shall be for two years, ~~and until his successor is appointed and qualified subject to removal by the board.~~ In case of vacancy by death, removal, resignation or any other cause, the board shall fill the same by appointment. (S. 12. Id.)"

In the above-quoted sections, the words with lines drawn through the same are thus in the original bill eliminated with pen and ink. They are

typewritten words. Italicized words are words written in the original bill with pen and ink. From an examination of the House Journal we have not been able to find that the amendments (by written words), thus made in §§ 173 and 182, were either reported by the legislative committees or adopted on the floor of either house.

Many amendments, however, were made to this bill during its passage, as the legislative journals disclose; some were made to the original bill by drawing a line through a word in the bill and writing above, with pen and ink, the amendment. For instance, in the House Mr. Hanna moved that the pay of the clerk of the judiciary committee for the Senate should be amended by striking out the word "seven" and inserting, in lieu thereof, "five." H. J. p. 534. This was done in the original bill by drawing a line with pen and ink through "seven" and writing above such word "five."

Upon the facts thus stated what principles of statutory construction apply? The general presumption obtains that the codifiers did not intend to change the law as it formerly existed. *Braun v. State*, 40 Tex. Cr. R. 236, 49 S. W. 620, 622; *U. S. v. Ryder*, 110 U. S. 729, 740, 4 Sup. Ct. 196, 201, 28 L. ed. 308. Changes made in the revision of statutes by alteration of the phraseology will not be regarded as altering the law unless there is a clear intent so to do. *McDonald v. Hovey*, 110 U. S. 619, 4 Sup. Ct. 142, 28 L. ed. 269; *Becklin v. Becklin*, 99 Minn. 307, 109 N. W. 243; *Inhabitants of St. George v. Rockland*, 89 Me. 43, 35 Atl. 1033; *Taylor v. Caribou*, 102 Me. 401, 67 Atl. 2, 4, 10 Ann. Cas. 1080; *Schmidt v. U. S.*, 133 Fed. 257, 66 C. C. A. 389; *Brown v. Randolph County Court*, 45 W. Va. 827, 32 S. E. 165; *East Boyer Tel. Co. v. Vail (Iowa)* 129 N. W. 298; *Piper v. Railroad*, 75 N. H. 435, 75 Atl. 1041; *Stearns v. Graham*, 83 Vt. 111, 74 Atl. 486; *State v. Holland*, 117 Me. 288, 104 Atl. 159; *King v. Smith*, 91 N. J. Law, 648, 103 Atl. 191; *Greenfield v. Plumbing Co.*, 17 Ga. App. 637, 87 S. E. 912; *State v. Bushnell*, 95 Ohio St. 203, 116 N. E. 464, 466; *Investment Co. v. Railway (D. C.)* 226 Fed. 976; *Jones v. State*, 10 Ala. App. 152, 65 So. 411; *Dennis v. School Dist.*, 166 Iowa, 744, 148 N. W. 1007; 36 Cyc. 1168. In ascertaining the intention of language used in a code revision, reference may be had to the prior statute for the purpose of ascertaining the legislative intent. *Becklin v. Becklin*, *supra*; *Stevens v. Bridge Co.*, 115 Me. 402, 99 Atl. 94.

Considering these principles and presumptions, it is clear that Chap.

118, laws of 1893, granted an arbitrary power of removal, and made the term of the Commissioner depend upon a limitation. It is also clear that the language of the original typewritten bill likewise grants an arbitrary power of removal, making the office of the Commissioner dependent upon the pleasure of the board.

The legislative intent expressed in the original statute was clear, the language used in the original typewritten bill is also clear, and, if so adopted, would have expressed clearly the legislative intent. This language in the original typewritten bill was changed by eliminating the phrase "and who shall hold office during the pleasure of the board" in § 173 and by adding to § 182 the pertinent words, "subject to removal by the board." If these changes had been made by legislative committees considering the bill or upon the floor of either house, potent force would be given to the argument that there was a legislative intent to prescribe a conditional, instead of an arbitrary, right of removal. *State v. Mitchell*, 50 an. 289, 33 Pac. 104, 20 L. R. A. 306; *People v. Whitlock*, 92 N. Y. 191. However, an investigation of the legislative record has failed to disclose any such action taken by the Legislature. Accordingly, there exists no showing of any legislative intent to change the law, unless it be inferred that the revisioners intended to change the law, or that the committee who considered the bill before its introduction likewise intended to change the law. This, however, is a matter of proof and not of inference. Changes were made in the original bill. It is the duty of the court to ascertain, not to make, legislative intent. The legislative intent in the original law and in the original bill appears clear. To construe the present statute as urged by the defendant would require a reversal of the legislative policy as disclosed by the original act. Following the presumptions and principles hereinbefore stated, the change of language employed in the revision of the statute does not indicate, presumptively, any legislative intent to reverse the legislative policy. The consideration of the legislative history discloses no legislative intent to the contrary. The changes made can as well be explained upon the grounds that they were made for the purposes of conciseness and to place the power of removal in that section of the statute that concerned the Commissioner's term, as that the change was made to reverse the legislative policy. We are of the opinion, accordingly, that no legislative intent has been shown to change the theretofore existing law when it

was revised, and that therefore an arbitrary right of removal was preserved as it existed under chap. 118, Laws of 1893. The order of the trial court should be and is affirmed, without costs.

BIRDZELL, C. J., and CHRISTIANSON, J., concur.

GRACE, J. (specially concurring). It reasonably appears to my mind that the result arrived at in the principal opinion accords to a considerable degree with the reasoning contained in my dissenting opinion in the case of *State ex rel. Wehe v. Frazier* (N. D.) 182 N. W. 545.

I concur in the result.

ROBINSON, J. (specially concurring). Under the former state administration defendant-appellant was Commissioner of University and School Lands; under the present administration he was removed without cause, and the relator was appointed as his successor. This is an appeal from the judgment sustaining the removal. The appeal is based on two grounds: (1) That the appellant is a public officer; (2) that a public officer may not be removed without cause. By statute the Governor, Secretary of State, State Auditor, Attorney General, and Superintendent of Public Instruction do constitute a board of university and school lands. Comp. Laws, § 284. The board has full control of the appraisal, rental, sale, and management of the lands, and has power to appoint a person to act as agent of the board and to perform all its duties, and all his official acts are subject to the approval and supervision of the board. Section 285. The statute is not materially different from the original act. Laws 1893, chap. 118. The Commissioner is appointed for two years, "*subject to removal by the board.*" Now the term "*office*" implies a delegation of a portion of the sovereign power and the possession of it by a person filling the office. Every office in the constitutional meaning of the term implies an authority to exercise some portion of the sovereign power, either in the making, execution, or administration of the laws. *State of Florida v. Howker*, 39 Fla. 477, 486, 22 South. 721, 63 Am. St. Rep. 174; 36 Cyc. 852, note 40; 39 Cyc. 1363, note 17—19.

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A public office imports an officer in whom is reposed some portion of the sovereign power of the state, and of necessity having some connection with the legislative, judicial, or executive department. *Montgomery v. State*, 107 Ala. 381, 18 South. 157; *State v. Watkins*, 3 Mo. 481; *State ex rel. Wingate v. Valle*, 41 Mo. 31.

Clearly a person who acts as a mere agent or underling, who can do nothing of himself, whose every act is subject to approval by another, who exercises no part of the sovereign power, is not a public officer. The appellant was not a public officer. He was merely a special agent or employee appointed for two years, "subject to removal by the board." There is no reason why the courts should amend the statute by construction to make it read, "subject to removal for cause." And there are many good reasons why the board should have a right to remove its agent without cause and why the board should not be compelled to do business through an agent whom they may distrust or an agent in any way unfriendly to them, their policies or politics. It might be wholly different if the agent were appointed to do some independent business, and not merely to act in subservience to and subject to the approval and control of another. Surely the case presents no occasion for circumlocution.

Affirmed.

JOHN E. HURLEY, Respondent, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a corporation, Appellant.

(189 N. W. 322)

Damages — \$1,500 verdict for injuries to neck and shoulders held not excessive.

1. Plaintiff was a passenger, with a drover's pass, upon a certain freight train. Part of the train, for causes shown in the evidence, left the track; plaintiff was riding in the caboose which did not leave the track. He received certain injuries in the manner and of the nature shown by the evidence. The jury returned a verdict in his favor for damages

in the sum of \$1,500.; a judgment was entered on the verdict; it is *held* that the evidence is sufficient to sustain the verdict.

Carriers—in action for injuries to passenger on a derailment, question of carrier's negligence held for jury; proximate cause of injury to a passenger on derailment held for the jury.

2. The sufficiency of the evidence is such, that the questions of negligence and the proximate cause of plaintiff's injuries were questions of fact for the jury.

Appeal and error—statement of plaintiff's counsel in argument to jury held not ground for reversal.

3. For reasons stated in the opinion, it is held that error is not available to defendant, on account of certain alleged prejudicial remarks of plaintiff's counsel to the jury.

Opinion filed June 27, 1922.—Rehearing denied July 8, 1922

An appeal from a judgment and an order denying a motion for a new trial of the District court of Grant county, North Dakota, *Lembke, J.*

Judgment and order affirmed.

Ed. L. Grantham, A. T. Nelson, for appellant.

The only portion of the plaintiff's testimony upon which the verdict could stand is not only made incredible by all the evidence in the case, but it is intrinsically improbable. In such cases the trial court, which is vested with a very broad discretion, far more so than this court, should promptly set aside the verdict. *Badger v. Janesville Cotton Mills*, 95 Wis. 599; *Vorbrecht v. Gueder & P. Mfg. Co.*, 96 Wis. 277; *Maitland v. Gilbert P. C. Wis.* 491; *Peat v. C. M. & St. P. Ry. Co.*, 128 Wis. 86, 107 N. W. 355.

"A sworn statement which is obviously false in the light of reason and common sense and facts within common knowledge, is not to be received in court as true because some witness wilfully or ignorantly or recklessly so testifies." *Beyer v. St. P. F. & M. Ins. Co.* 112 Wis. 138, 88 N. W. 57.

"Testimony may be so in conflict with conceded and established physical facts as to be incredible for the reason that its truth is morally impossible or so improbable in the course of nature as to approximate im-

possibility." When, however, any fact essential to a verdict is supported only by evidence thus rendered incredible, the setting aside of such verdict is no longer discretionary with the trial court but a duty failure of which is error reversible on appeal. *Flaherty v. Harrison*, 98 Wis. 559-562, 74 N. W. 360; *Cawley v. La Crosse C. R. Co.* 101 Wis. 145, 77 N. W. 179; *O'Brien v. C. St. P. M. & So. Ry. Co.* 102 Wis. 628, 78 N. W. 1084; *Musbach v. Wis. Co. Co.*, 108 Wis. 57, 84 N. W. 36. *Bourda v. Jones*, 110 Wis. 52, 85 N. W. 671; *Ellis v. C. M. & St. P. Ry. Co.* 120 Wis. 645, 98 N. W. 942.

Jacobsen & Murray, for respondent.

Appellant has failed to serve or file any specifications of error, or specifications of insufficiency of the evidence, with his notice of appeal. He has also failed to serve or file in connection with the motion for new trial, any specifications of the insufficiency of the evidence. Consequently, this court is precluded from reviewing any error, except such error as may appear on the face of the judgment roll. *Patrick v. Nurnberg*, 21 N. D. 377; § 4, chap. 131, laws of N. D. 1913; *Masset v. Chaffner*, 31 N. D. 579.

The law regulating the degree of care of the company to those riding on a drover's pass is well settled by the Supreme Court of this state, and the Supreme Court of the United States. *McGregor v. G. N. Ry. Co.*, 31 N. D. 471; *McAllister v. Chesapeake & Ohio Ry. Co.*, 244 U. S. 276, 37 Sup. Ct. Rep. 499.

"So far as this court knows, the conclusion of defendant's counsel as to what the plaintiff's counsel said, may have been entirely erroneous. The party predicated error on improper argument must present a record showing: 1st, the objectionable language used, 2nd, the objection made, 3rd, the courts ruling on the objection." *Johnson v. Union Pac. Ry. Co.* 100 Pac. 390; *Erickson v. Wiper*, 33 N. D. 193.

"Misconduct of counsel for the prevailing party in addressing the jury must be shown to the court by affidavit on the hearing of a motion for a new trial." *Atchison v. T. & S. F. Ry. Co. (Kans.)* 39 Pac. 1010.

"To obtain a new trial for misconduct of the prevailing party, the motion must be sustained by affidavits showing the alleged charge to be true; and where it is not so supported and the motion is denied, the

misconduct is not available as a ground of reversal." *Gay v. Torrance* (Cal.) 78 Pac. 540; *Wadman v. Trout Lake Lumber Co.* (Minn.) 153 N. W. 269; *Ewert v. Cooper*, (Okla.) 166 Pac. 138; *Larkin v. City of Butte, et al.*, (Mont.) 158 Pac. 316.

"So long as the jury system is in vogue courts must assume that jurors possess sufficient intelligence and force of character to discharge their duty, when properly directed. Appellants failed to ask the trial court to admonish the jury and for that reason the order denying their motion for a new trial should be discharged." *Scott v. Times Mirror Co.*, (Cal.) 184 Pac. 672, ¶ 11 of opinion; *Dimon v. New York Cent. Ry. Co.* 66 N. E. 628.

The granting of a new trial on the ground of misconduct of counsel is within the discretion of the trial court. *Kahn v. Telephone Co.* (Ore.) 152 Pac. 240; *Battischill v. Humphreys et al.* (Mich.) 38 N. W. 581; *Riley v. Chi. Mil. Ry. Co.* (Minn.) opinion by Judge Mitchell, 74 N. W. 171.

GRACE, J. This is an appeal from a judgment in the plaintiff's favor, and from an order denying defendant's motion for a new trial.

The material facts of the case, in so far as it is necessary to state them here, are as follows: On the 23d day of June, 1920, plaintiff was a passenger, with a drover's pass, upon a certain freight train, consisting of 32 cars, aside from the caboose. About three miles from Tulare, S. D., 8 cars of the train left the track. The first car to leave was a large gondola car. It was the ninth car from the engine. It and the 7 cars immediately following were the only ones that left the track. Behind these 8 were 16 other cars attached to the caboose, none of which left the track; and there were 8 cars attached to the engine, none of which left the track. There was a broken flange on one of the wheels of the gondola car. This break was 8 or 9 inches in length. The train was equipped with air brakes. The speed of the train at the time the cars left the track according to the evidence was from 15 to 25 miles per hour. Plaintiff was riding in the caboose, and at the time of the wreck was sitting on a bench at a distance of 12 or 14 feet from the front end of the caboose. He was thrown against the front end of the caboose. The following day he was stiff in the neck, shoulders, and back. He was dizzy; had pains in the head and a headache. He has had a headache every two or three days since the injury. When he looks up he gets

dizzy. He does not sleep well; he attributes this to the injury to his neck and shoulders and the intense pain there.

The plaintiff in his testimony in substance states that the caboose stopped instantly at the time the cars went off the track, while the testimony of the defendant is that it came to a gradual stop. The conductor and brakeman were in the cupola, and, upon the cars leaving the track, the conductor applied the emergency brake, and then climbed to the floor. The plaintiff got off the train without assistance; had no appearance of being injured; walked to the engine, climbed on it, took a seat beside the fireman and went to Tulare, a distance of about three miles. He had dinner with the trainmen and did not greatly complain of any injury. He did not report any injury to the company.

The three cars containing the horses after the wreck were attached to another train and proceeded to their destination (St. Louis), on the way passing through Mitchell, Des Moines, Sioux City, and Moberly, Mo. The horses were unloaded and fed at some of these places. The plaintiff accompanied them the whole way, riding in the caboose. He testified he saw a doctor in Des Moines and got some liniment. This doctor was at the hotel where he stopped. He did not know his name, though he wrote to a friend at Des Moines to get some information in that respect. He stayed in St. Louis only just a very short time. Having completed the transaction of business, he returned. About seven months after the injury he was examined by a physician, Dr. J. E. Curtis, of Lemmon, S. D., who found the right side of plaintiff's neck and the inside of his shoulder to be tender on pressure; that he was sensitive on the inner side of the right shoulder and on the brachial plexus. He testified that this condition was due to some injury, and that he thought the condition he found would be more or less permanent, giving him more trouble at certain seasons of the year than at others; that he would not be able to do a great deal of work which required raising the arm from the body very far.

It is unnecessary to review all the evidence. It is only necessary to say that it is sufficient to make the questions of negligence and the proximate cause of plaintiff's injuries questions of fact for the jury.

The plaintiff testified:

"I noticed a heavily loaded gondola, loaded with lumber, double-

decked, and the lumber was swaying from one side of the road to the other." It was swaying a lot." "I remarked to the brakeman that that car was overloaded, and he just laughed about it."

The evidence is clear that the gondola car was the first that went off the track. It did so at a curve in the road. Presuming that this testimony was true, and that the car was heavily loaded and double-decked and was swaying from side to side, these facts would be some evidence that that car was improperly and negligently loaded. If the lumber were double-decked, that would likely mean that it was piled quite high on the car, and the weight of it swaying towards the inside of the curve would have a tendency to throw or pull that car from the track, and especially would this be true on the curve. That condition, we think, would tend to pull the flange of the wheels more firmly against the rail, and, if any flange on the wheels of this car toward the inside of the curve gave way, the car could not well help leaving the rails.

The foregoing evidence, taken in connection with other evidence showing the improper condition of the track at the curve, establishes facts sufficient upon which the jury could say that the defendant was negligent. With reference to the condition of the track, the plaintiff testified:

"I noticed that it was soft along that bend. I noticed a crew working there.

"Question. This condition of the track you were talking about, you mentioned about loose dirt, was the loose dirt that was loosened by the wreck? Answer: It was loose dirt where there had been men working there.

"Question. How do you know? Answer: Because I saw it.

"Question. Did you see it in any other place but where the cars had gone off? Answer: Forward of where the cars went off when I walked up to the engine."

We think also that the jury could say that under the evidence the negligent manner in which the gondola car was loaded and the improper condition of the track at the place of the accident were the proximate cause of plaintiff's injuries. The jury, having found in plaintiff's favor on a general verdict, must have found that the defendant was negligent in the respects we have just mentioned, and that such negligence was the proximate cause of plaintiff's injury. We think the amount of damages

resulting from the injuries sustained has been established by competent evidence.

Defendant objected to the introduction of the evidence of Dr. Curtis on the theory that, his examination of the plaintiff having been made on the 10th day of January, 1921, about seven months after the injury, there was no foundation laid and no basis on which the defendant might be held responsible for the condition the plaintiff might have been in at the time of such examination. The objection was overruled, and in this we think there was no error. Dr. Curtis testified only to the physical condition in which he found plaintiff at the time of the examination. There was other evidence which fairly showed plaintiff's physical condition from the time of his injuries until the time Dr. Curtis examined him as well as other evidence as to the character of the injuries. The court did not err in submitting the case to the jury. It is claimed that the plaintiff's testimony is in conflict with the physical facts, undisputed evidence, and the weight of the testimony. All of the facts, the credibility of the witnesses, and the weight of the testimony were for the jury. The verdict is not against the law and is not excessive. The court properly denied the defendant's motion for a directed verdict at the close of the evidence.

Error is assigned on a refusal of the court to give certain instructions. In this there was no reversible error, as the substance of the requested instructions was fairly covered in the general charge. It is assigned and specified as error that certain language of the plaintiff's counsel in his address to the jury was prejudicial. The defendant states that at such time the language used was as follows:

"The law says to the railroad company that the law allows you to charge those high rates so we will have enough surplus money to pay those personal injury claims."

Defendant objected to this language. The trial court merely stated:

"Yes; the counsel will confine himself to the evidence introduced in this case."

The plaintiff in his brief claims that the language to which objection is made was used by his attorney in reply to certain language used by defendant's attorney while addressing the jury to the effect:

"That the jury by bringing in a verdict against the defendant would ultimately have to pay that verdict themselves, in the form of freight rates and passenger rates; that the expenses the railroad company were put to in paying those personal injury judgments were the cause of the high freight rates and passenger rates."

If this were true, and the irregularities in this respect complained of by both parties were properly presented to the court, under the rule announced in *Leidgen v. Jones* (N. D.) 179 N. W. 714, defendant would not be in a position to complain; furthermore, the irregularity complained of was not properly presented to this court, there being no sufficient record showing the language used. *Erickson v. Wiper*, 33 N. D. 193, 222, 157 N. W. 592.

Defendant at the trial on its cross-examination of plaintiff endeavored to show that on one occasion he had been thrown from a horse; that on another occasion he had been in an automobile accident; that he had freely used intoxicating liquors; that the pain which plaintiff suffered might be due to rheumatism. It is sufficient to say that there is no evidence that shows or tends to show that plaintiff's injuries and his pain and suffering as established by the evidence are in any degree attributable to any of these matters.

We find no reversible error in the admission or exclusion of the evidence, nor in the instructions of law given by the court in its charge to the jury. There is no prejudicial reversible error in the record. The evidence is sufficient to sustain the verdict.

The judgment and order appealed from are affirmed, and the respondent is entitled to his costs and disbursements on appeal.

BIRDZELL, C. J., and BRONSON and ROBINSON, JJ., concur.

CHRISTIANSON, J. (concurring). I concur in an affirmance. In my opinion the questions of negligence and proximate cause were for the jury. I believe that under the evidence presented in this case reasonable men in the exercise of reason and judgment might reasonably differ as to whether the defendant was negligent, and whether such negligence was the proximate cause of the injury sustained by the plaintiff.

I agree with what is said in the opinion prepared by Mr. Justice Grace as to the errors assigned on the instructions given and refused.

As to the error assigned upon remarks made by plaintiff's counsel during the argument of the jury, I am of the opinion that the appellant has wholly failed to present a record showing error. The record presented does not show the language used. It merely shows the statement of defendant's counsel as to what he claimed the language was. This

statement was denied by plaintiff's counsel. As I read the record here the case falls squarely within the rule announced by this court in *Erickson v. Wiper*, 33 N. D. 193, 222.

STATE OF NORTH DAKOTA, Respondent, v. GEORGE WILLIAMS, Appellant.

(189 N. W. 625)

Bail — error to deny motion to undo forfeiture of bail of one civilly dead.

In Cass County defendant was accused of carrying concealed weapons and bound over to the District Court. His wife borrowed and deposited in Court \$1,400 as bail for his appearance at the November Term of Court. But when his case was called he was in the state's prison at Stillwater and his appearance was impossible. He was civilly dead. Hence the court erred in denying a motion to undo the forfeiture of his bail. Order reversed.

Opinion July 12, 1922.

Appeal from an order of the District court of Cass county; *Cooley, J.* Order reversed.

William Lemke, for appellant.

The relief asked for rests largely in the discretion of the court, and upon the Statute Law, § 11125, Compiled Laws of North Dakota, reads: "If, without sufficient excuse, any person who has given an undertaking in any criminal action, etc." The phrase, "without sufficient excuse" means but one thing, and that is, that there are cases in which the court will excuse failure to appear, and under similar statutes, the courts have almost universally held that it is sufficient excuse if it appears that it was impossible for the person under arrest to appear, and it has been held that then relief may be obtained at any time before final judgment. Ar-

quette v. Board of Supervisors, 39 N. W. 264; Harbin v. State, et al., 43 N. W. 210; Rawlings v. State, 57 N. W. 286; State v. Bongard, 94 N. W. 1093; James Argis et al. v. W. V. Bagley et al., cited in 23 L. R. A. (N. S.) 136; Com. v. Fleming, Ky. L. Rep. 491.

Wm. C. Green, C. C. Wattam, for respondent.

In Ann. Cas. 1912C at p. 748 it is said:

"The rule is well settled that arrest in another jurisdiction for a second and different offense will not operate to discharge the sureties on the first bond for the reason that the surety has the legal power to prevent his principal's departure from the state." And in support of such statement we cite the following: Taylor v. Taintor, 16 Wall. 266, 21 U. S. (L. ed.) 287; affirming 36 Conn. 242; U. S. v. Marrin, 170 Fed. 476; U. S. v. Van Fossen, 1 Dill 406, 28 Fed. Cas. No. 16, 607; Cain v. State, 55 Ala. 170; Witherow v. Com. 1 Bush. (Ky.) 17; Yarborough v. Com. 89 Ky. L. Rep. 151, 12 S. W. 143; Hall v. Com. 20 Ky. L. Rep. 99, 45 S. W. 458; State v. Horn, 70 Mo. 466; King v. State 18 Neb. 375, 25 N. W. 519; Devine v. State, 5 Sneed, (Tenn.) 623; U. S. v. French, 1 Gall, 1; Grant v. Faagen, 4 East. 189; Respublica v. Gaoler, 2 Yeates, 265.

ROBINSON, J. In Cass county defendant was accused of carrying concealed weapons and bound over to the district court. His wife borrowed and deposited \$1,400 as bail for his appearance at the November term of the district court. When his case was called he was civilly dead. It was as impossible for him to appear as if he were actually dead. He was at Stillwater in the state's prison under a sentence for life on a charge and conviction of bank robbery. When his case was called in the district court of Cass county, his counsel who had received some good pay, failed to appear for him and plead the fact that he was legally dead and in the penitentiary at Stillwater, Minn., and that his appearance had become an impossibility. Hence the court declared the forfeiture of his bail money. In 1922 the defendant and his wife on proper affidavits made a motion to vacate the forfeiture. On May 8th the motion was denied. The case is before this court on an appeal, and on a stipulation that it be submitted on the record and on briefs filed by counsel.

The wife makes affidavit showing that on her property she borrowed the bail money. She sent \$1,500 to Mr. Barnett, who appeared as coun-

sel for the defendant. By Laws 1915, chap. 83, the carrying of concealed weapons is made a felony punishable by imprisonment in the penitentiary not more than two years, or in the county jail not more than one year, or by a fine of not more than \$100, or by both such fine and imprisonment. The minimum penalty is a fine of \$100, and it is seldom that a greater penalty is imposed for the mere carrying of concealed weapons without any attempt to use them. The bail exacted in this case is grossly excessive, and it is suggested that the real purpose of fixing the bail at such a figure was to hold the defendant awaiting extradition papers. For the purpose of the motion we may well assume that defendant was guilty of carrying concealed weapons, a .32 revolver, and that he was guilty of the charges preferred against him in Minnesota, and that he was justly sentenced and imprisoned for life.

It appears that on the motion to undo the forfeiture counsel for the state insists that defendant should have remained in this state, and that his arrest in Minnesota does not excuse the default. But that is rather technical. If he had not gone to Minnesota, we may well assume that he would have been forcibly taken there. We may assume that he has gotten his just deserts, and that this state is just as well rid of him as if he had killed himself, and in that way made it impossible for him to appear in the district court of Cass county. The \$1,400 was put up to secure the appearance of defendant, and by his fault or misfortune his appearance became impossible. If we allow everything that has been charged against defendant, it is no reason for robbing him, or his wife, who put up the bail money. There is no honesty in retaining the money. While demanding honesty of all men, it behooves the state to set an example of honesty. It is not for the state to adopt the principle that he may take who has the power, and he may keep who can. The showing is that defendant's wife borrowed the money by mortgaging her property. Defendant and his wife join in the petition that the forfeiture be vacated and the money refunded to the wife, after deducting all the actual court expenses.

The motion is fair and reasonable. Order denying the motion is reversed.

BRONSON, J. (specially concurring). In Minnesota the defendant was arrested, convicted, and sentenced to the state penitentiary for life for bank robbery. In North Dakota, previously, he had been arrested

charged with carrying concealed weapons. His wife deposited \$1,400 cash bail for his appearance in the district court of Cass county to answer such charge. When the time for his appearance occurred, he then was incarcerated in the Minnesota penitentiary. The trial court forfeited his bail. The defendant and his wife moved to vacate such forfeiture, and to remit the cash bail. The grounds asserted therefor are: That the defendant was and is incarcerated as above stated; that his wife borrowed the money and made the cash deposit; that she is without funds, and has been ill for a long period of time; that when the bail was deposited neither she nor the defendant knew that charges were pending against him in Minnesota.

The carrying of concealed weapons is made, by statute, a felony. Chap. 83, Laws of 1915. By statute bail might have been furnished by an undertaking. Section 11122, C. L. 1913. In lieu thereof a cash deposit may be made. Section 11119, C. L. 1913. The statute further provides that if, without sufficient excuse, any person, who has given an undertaking in a criminal action, neglects to appear, the court may declare forfeited the money deposited, but, at any time before final adjournment, when such person or his bailor appears and satisfactorily excuses the neglect, the court may direct the forfeiture to be discharged upon such terms as may be just. Section 11125, C. L. 1913. I am of the opinion that the record clearly discloses a satisfactory excuse for the neglect or failure of the defendant to appear, and that the ends of justice demand that the bail, as given, be remitted to the wife, less expenses incurred by the state. This court stated in *State v. Funke*, 20 N. D. 145, 150, 127 N. W. 722, 30 L. R. A. (N. S.) 211, Ann. Cas. 1912C, 743, that the rule is and should be that uncontrollable circumstances preventing appearance, pursuant to stipulations in the bail bond, should be sufficient to excuse a forfeiture. The record does not disclose that through connivance or conspiracy the wife deposited this cash bail, in order that the defendant might abscond or leave the state. So far as the record discloses, she is innocent of any intentional wrongdoing, and tried, in a spirit of loyalty, to assist her husband, who was in trouble.

Under the general theory of bail, the defendant, upon his release through cash bail, was in the custody of his bailor, his wife. She might surrender his person, or cause him to be arrested and his bail withdrawn, at any time. See 6 C. J. 891; § 11124, C. L. 1913; note 23 L. R. A. (N. S.) 137; Ann. Cas. 1912C, 746. She might even pursue him into an-

other state and there arrest him. See *North Carolina v. Lingerfelt*, 109 N. C. 775, 14 S. E. 75, 14 L. R. A. 605, and note; *Taylor v. Taintor*, 83 U. S. (16 Wall.) 371, 21 L. ed. 290. After the arrest and incarceration of her husband in Minnesota, the wife, as bailor, could secure, neither in Minnesota nor in North Dakota, the person of her husband for delivery in response to the bail requirements. The mighty arm of a sister sovereign state had arrested her power to produce or to compel the delivery of the person bailed. The arrest and conviction had in Minnesota did not in any manner result through the act of the defendant, while in the theoretical custody of his wife as bailor. Upon principles of comity and through extradition, the state of North Dakota might have surrendered the person of the defendant to the state of Minnesota. The more serious offense had occurred in Minnesota. The record fails to disclose any neglect or fault on the part of the bailor. The punishment that might have been imposed upon the defendant in North Dakota is now being carried into execution by a greater punishment imposed upon the defendant by a sister state. Presumably the defendant is incarcerated in the penitentiary for his lifetime. He is civilly dead. The failure of the bailor, therefore, to deliver the person of the defendant, pursuant to the requirements of the bail, are sufficiently excused.

Under the circumstances, it would be unjust to enforce a forfeiture of the bailor's money. In effect, the enforcement of a forfeiture, under the circumstances, would operate to punish the bailor in money loss much more severely than the penalty by fine imposed for the crime. Chap. 83, Laws of 1915. Accordingly, the cash deposit should be remitted to the wife, less expenses incurred by the state.

GRACE, J., concurs.

BIRDZEIL, C. J. and CHRISTIANSON, J., dissent.

W. A. STALEY, Appellant, v. BISMARCK BANK, a corporation, I.
P. BAKER and CHAS. T. STALEY, Respondents.

(189 N. W. 236)

Partnership — all partners must join as plaintiffs in action to recover damages to firm from tort.

Where a tort results in damage to the firm, that is to say where all partners suffer a joint damage, as where a third party converts the property of the partnership, all partners must join as plaintiffs in an action brought to recover damages for such conversion.

Opinion filed July 12, 1922.

Appeal from the District court of Burleigh county, *Nuessle, J.*

Plaintiff appeals from the judgment and from an order denying a new trial.

Affirmed.

Per Curiam opinion.

O' Hare and *Cox*, for appellant.

It is a well established principle of law that a mortgagee is liable for a conversion where he takes possession under the mortgage and refuses to sell in accordance with its terms but delays for an unreasonable time after default, and that he is liable to the mortgagor for the difference between the value of the property and the amount of the mortgage debt. *Hanson v. Skogman*, 14 N. D. 445, 105 N. W. 90; *Howry v. Hoover*, 66 N. W. 772; *Force v. Peterson Mach. Co.* reported in 116 N. W. 84.

Benton Baker, for respondents.

There is no conversion where the property is sold with the consent of the mortgagor or in accordance with the terms of the mortgage, or if the mortgagee's interest in the property clearly exceeds its value. Nor is it a conversion that mortgaged property is not sold at the place where it is taken into possession nor that it is sold on credit. An act done to preserve and protect the property, in order that it may remain subject to

the lien and which is equally beneficial to those having subordinate rights, and not in antagonism thereto, is not a wrongful conversion. 11 C. J. 590, 591.

In *Pitts Agri. Works v. Baker*, 11 S. D. 346, 77 N. W. 586, an action in claim and delivery to recover mortgaged property on the ground that the mortgagor became liable for conversion by failure to sell within the statutory period after seizure, it was held that the statute did not deprive the mortgagee of his right of possession, notwithstanding failure to sell within the prescribed period. *Peoples Saving Inst. v. Miles*, 76 Fed. 252.

It is a defense to an action by the mortgagor against the mortgagee for conversion that the mortgagor had consented to or ratified the acts of the mortgagee. 11 C. J. 595 and note 20.

In an action at law by partners, all must be entitled to recover, or the action cannot be maintained; as the cause of action is joint and not joint and several. Accordingly if one of the partners does an act which bars him from maintaining a suit on the firm claim, it will defeat all. 30 Cyc. 556, note c 71.

PER CURIAM. The plaintiff brought this action to recover damages for the conversion of certain horses which he claims that the defendant bank took into its possession under a chattel mortgage which it held on them and thereafter converted to its own use. In the complaint it is alleged and the evidence shows that the horses belonged to a copartnership consisting of the plaintiff and the defendants I. P. Baker and Chas. T. Staley; that the defendant bank held a mortgage on these horses executed thereon by the plaintiff. It further appears that the horses did come into the possession of the defendant bank. No damages or other relief was asked against any of the defendants except the defendant bank. The evidence also shows that the defendant Baker is one of the principal officers of the bank. At the close of plaintiff's case and again at the close of all the testimony defendants bank and Baker moved for a directed verdict on the ground that the evidence showed that the horses belonged to a copartnership and that an action for the conversion of the horses must be instituted by and in the name of all the partners, and not merely by and in the name of one of the partners. The motions were denied, and the case submitted to a jury. The jury failed to agree upon a verdict, and the court thereupon directed a verdict in favor of the defendants for a dismissal of the action, judgment was entered, and plaintiff has ap-

pealed. In our opinion a verdict was properly directed on the ground that the action was not brought by the real party in interest. The interest of each member to a partnership extends to every portion of its property. Section 6390, C. L. 1913. It is a well-settled rule that an action cannot be maintained in the name of one partner either upon a partnership contract (15 Ency. Pl. & Pr. 854) or for a tort which results in a joint damage to all the partners. 15 Ency. Pl. & Pr. 864. Manifestly a conversion of all of the property belonging to a partnership by some one not a member of the firm constitutes a wrong against all the members of the firm, and results in a joint injury; and where compensation is sought for the injury occasioned, all members of the firm should join as plaintiffs. 15 Ency. Pl. & Pr. 864; 20 R. C. L. 920.

One of the principal contentions of the plaintiff is that he was injured by the action of the defendant Baker in refusing to permit a sale of four carloads of the horses to be made. It is further contended that in so doing Baker was acting as an officer of the defendant bank, and his action that of the bank. No damages are asked against the defendant Baker. As already indicated the action is one in conversion, and is predicated upon the theory that the bank took into its possession certain horses on which it had a chattel mortgage; that it failed to foreclose its mortgage, and converted the horses to its own use. There is no contention that plaintiff is entitled to recover from the defendant Baker on the ground that he failed to discharge the duty which he owed to his partners as a member of the partnership—the sole contention is that the bank, of which he is an officer, converted to its own use all of the property belonging to the partnership. In our opinion an action for conversion may not be maintained by one of the partners under these circumstances, and the motion for nonsuit should have been granted. 20 R. C. L. 920. Hence the judgment appealed from is affirmed, without prejudice, however, to the right of the plaintiff or the members of the copartnership to assert whatever rights of action, if any he or they have, in some other appropriate action or proceeding.

BIRDZELL, C. J., and CHRISTIANSON, ROBINSON, and BRONSON, JJ.,
concur.

GRACE, J., concurs in the result.

NORTHWESTERN TRUST COMPANY, Petitioner-Respondent, MARY E. KELLY, as Executrix of the Last Will and Testament of Anna B. Murphy, Deceased, Appellant; JAMES MURPHY, John Murphy, Margaret Meehan, Mary P. Barrett, Thomas Meehan, Margaret Meehan, Anna Meehan, Catherine Casper, Christ Meehan, John Murphy, Helen Post, Richard Murphy, Joseph Murphy, Margaret Londo, Mary Londo, John Murphy, Michael Murphy, Richard Murphy, Frank Murphy, Anna Thornton, Mary Coleman and Hannah Murphy, Respondents.

(189 N. W. 497)

Executors and administrators — order of county court deducting expenses before fixing amount of legacy under will giving legatee one-third of estate, made without abjection, will not be disturbed on appeal.

A testator by his will first directed the payment of the expenses of last sickness, funeral and just debts; second devised and bequeathed to his wife one-third of his estate; then made certain general bequests in specific amounts, and bequeathed the residue to a class of more remote relatives. A final report, account and petition for distribution was allowed and approved in County Court in which the basis for computing the amount of the provision for the widow was taken as the gross estate less all indebtedness and expenses of administration. The widow objected to the basis for the computation of her one-third being reduced by the expense of administration and claimed interest from the date of the decease. It is *held*:—

1. No objection having been made in the County Court to the deduction from the gross estate of the expenses of the last sickness, funeral and amount required to pay debts, and the testator's intention with respect to these items being in doubt, the decree of the County Court, in so far as these items are concerned, is not disturbed on appeal.

Wills — husband's will held to entitle wife to one-third of estate without first deducting expenses of administration.

2. The will is construed and it is *held* to disclose an intention on the part of the testator to fix the amount of the gift to his wife at one-third of the estate, disregarding the expenses of administration.

Wills — residuary legacy embraces only what remains after discharge of bequests; general legatee not required to contribute to expenses of decrease of estate where contribution would enhance residuary legacy and decrease general legacy.

3. A residuary legacy, under Section 5720 of the Compiled Laws of 1913, embraces only that which remains after all bequests of the will are discharged; and a general legatee is not required to contribute to the ex-

penses of administration where the contribution would enhance a residuary legacy and decrease a general legacy.

Conversion — equitable conversion not affected where no duty is imposed upon executor requiring the sale of the real estate.

4. Where there is no mandatory direction to sell real property and no duty imposed upon the executor requiring sale, no equitable conversion is effected.

Wills — where provision for wife constituted both a legacy a devise and amount was dependent upon value of estate including expenses, dividends, and accretions, wife was not entitled to interest.

5. Where a provision is made for the widow which is both a legacy and a devise, and where the amount of the gift is dependent upon the value of the estate, including expenses, dividends and accretions, the widow is not entitled to interest under Section 5732, Comp. Laws 1913.

Opinion filed Jan. 6, 1922. Opinion on rehearing filed July 12, 1922.

Appeal from the district court court of Grand Forks county, *Cooley, J.*

Modified and remanded with directions.

H. M. Barstow, & McIntyre, Burtness & Johnson, for appellant.

The question, therefore, is: Are the general and residuary legatees to be placed on the same footing as to the taking of their beneficial interests for the purpose of meeting expenses and debts?

To this question, we submit, the answer must be in the negative.

There is no other rule or method directed than that prescribed by § 5722, and it is clear, definite and mandatory.

Dealing with this precise question, the California Supreme Court, in May, 1920, said:

"Section 1516 of the Code of Civil Procedure (8730, C. L.) and § 1358 of the Civil Code of California make the entire estate chargeable with the debts and expenses of administration. * * * In the absence of any other statutory regulation in regard to the payment of debts, it is apparent that all legacies would be reduced in equal proportion. * * * These sections, however, are supplemented and modified by other Code sections. * * * The most specific provision for the order of resort for the payment of debts and expenses of administration is § 1359, Civil Code (5722, C. L.). * * * Held: That a lapsed residuary legacy must be first resorted to as being property not disposed of by the will. Estate of Hall, 59 Cal. Dec. 596 (May 27th, 1920).

"A residuary legacy is only what remains after paying debts, and other classes of legacies, and as it is conditional on something remaining after the paramount claims on the testator's estate are satisfied, it follows that the loss resulting from an insufficiency of assets must fall first on the residuary legatee and he cannot call upon either the general or specific legacies to abate in his favor, even though the entire estate is exhausted so that there is no residue." Cyc., Vol. 40, p. 1902, citing decisions from many states.

In note on p. 1903 we find it stated:

"The priority of general over residuary bequests is not affected by the fact that there is but one general legacy—in such case the general legacy has priority over all others." *Farnum v. Bacon*, 122 Mass. 282 and 285, and also *Estate of Williams*, 112 Cal. 521.

The right to interest on a legacy is a mere incident of the principle demand. *Kent v. Dunham*, 106 Mass. 586, 590.

"The legatee is not entitled to interest if the will provides that same shall not be chargeable." *Estate of Brown*, 143 Cal. 450.

Minahan, Minahan, Minahan & Duquaine and *Murphy & Toner*, for respondents other than the Northwestern Trust Company. *Bangs, Hamilton & Bangs* for Northwestern Co.

"Estate, when used to signify property which a person leaves to be divided at his death, includes indebtedness as well as assets." *Stevens v. Underhill*, 36 Atl. 370.

"The Supreme Court of California construed the term 'estate' in the same manner in *Estate of Hinckley*, 58 Cal. 457, at 514. The question there was whether bequests to charitable uses in a will exceeded the 'one-third of the estate' limitation of such bequests by statute. The lower court had held that bequests to charitable uses might be made to the extent of one-third of the appraised value of all of the property of the deceased. The Supreme Court, however, decided that the bequest to charitable uses could not exceed one-third of the distributable assets, 'being one-third of the residue of the estate after payment of the debts, etc.'"

"The gift to the widow does not bear interest."

"The will makes no provision for the payment of interest upon the gift to the widow. The claim that the widow is entitled to interest is based upon § 5732 C. L., which provides:

"A. Legacies bear interest from the time when they are due and

payable, except that legacies for maintenance or to the testator's widow bear interest from the testator's decease."

B. But the gift to the widow is not a "legacy" and hence the statute has no application."

"A legacy, of course, is a gift of personal estate by will. The word 'devise' is usually employed to denote a gift, by will, of real estate, or any interest therein." *Evans v. Brice*, 8 N. E. 854, 857, 118 Ill. 543.

"A legacy is a testamentary disposition of personal property and a legatee is a person to whom the bequest is made." *Nye v. Grand Lodge, etc.*, 9 Ind. App. 131, N. E. 429, at 436.

"A legacy is a bequest of goods and chattels by will or testament." *Probate Court v. Matthews*, 6 Vt. 269, 275.

"A legacy is a gift or bequest of personal property. It includes any gift of personal property by will, as well as those made in lieu of dower as those which are gratuitous." *Orton v. Orton*, (N. Y.) 3 Abb. Dec. 411, 414 (cited in 5 W. & Ph. 4055).

"The word 'legacy' as it is usually understood and in its legal import, belongs especially to a gift of personality." *Browne v. Cogwell*. 87 Mass. 556, 557.

"'Legacy,' in its technical sense, means a testamentary disposition of personality, and is not accurately applied to a testamentary disposition of land." *In re Fetrow's Estate*, 58 Pa. 424, 427 (cited in 5 W. & Ph. 4056).

"A legacy is defined by Webster to be 'a gift by will of personal property' and this definition is substantially the same as that given by Black and Bouvier in their law dictionaries." *Harding's Administrator v. Harding*, 132 Ky. 133, 116 S. W. 305, 307.

"While the word 'devise' is the appropriate term to pass title to real estate, and 'bequeath' a term applicable to gifts of personal property, a strict adherence to technical words is not necessary to give effect to a testator's intent, and the fact that the word 'devise' is not used does not prevent the title to real estate passing by use of the word 'bequeath.' *Mills v. Tompkins*, 97 N. Y. Supp. 9, 10; 110 App. Div. 212 (cited in 3 W. & Ph., 2nd Series, 63.)

In re Campbell's Estate, 27 Utah, 361; 75 Pac. 851.

"Strictly speaking, the term 'legacy' refers to personal property, but it may be, and often is, used in a more extended sense by persons unacquainted with the precise meaning of legal terms, and when so used,

may embrace real estate." *Russell v. Elden*, 15 Maine, 193, 196 (cited in 3 W. & Ph., 2d Series, p. 63).

BIRDZELL, J. This is an appeal from a judgment of the district court of Grand Forks county, affirming an order of the county court, which overruled certain objections to a final account, and approved the report of the executor.

Richard H. Murphy died testate November 6, 1913. His will, which was duly probated, is as follows:

"I, Richard H. Murphy, being of sound and disposing mind and memory, but conscious of the uncertainty of life, do hereby make, publish and declare this my last Will and Testament hereby revoking all former wills at any time made by me.

"First, I direct the payment of the expenses of my last sickness and funeral, and any just debts that I may leave owing.

"Second, I give, devise and bequeath to my wife Annie R. Murphy one-third of my estate, both real and personal.

"Third, I direct my executor hereinafter named to erect a monument on my grave at a cost approximating ten thousand dollars (\$10,000.00).

"Fourth, I give, devise and bequeath to my brother James Murphy residing near Waseca, Wisconsin, and to my brother John Murphy, residing near Waseca, Wisconsin, each the sum of five thousand dollars (\$5,000.00); and to my sister, Margaret Mehan, Manitowac County, Wisconsin, to my crippled nephew whose name I think is Richard, son of my sister Margaret Mehan, residing with his mother, and to my niece Hannah Murphy, daughter of my brother James Murphy, each the sum of ten thousand dollars (\$10,000).

"Fifth, the rest and residue of my estate I give, devise and bequeath to the Northwestern Trust Company of Grand Forks, North Dakota, as trustee, however, in trust, for the equal use and benefit of my nephews and nieces other than my nephew Richard and my niece Hannah hereinbefore provided for, to hold, manage, invest and reinvest the same and to pay over the income arising therefrom in equal shares to my said nephews and nieces until they shall respectively reach the age of twenty-five years, at which time a pro rata share of the principal of said trust estate as then invested shall be paid and transferred to the person reaching such age.

"Sixth, I hereby make, nominate and appoint the Northwestern Trust Company, of Grand Forks, North Dakota, executor of this will and trustee of the trusts herein created, hereby giving to said Northwestern Trust Company, in whichever capacity it may be acting, power to sell, transfer, convey and assign any and all real estate when in its judgment it shall be for the best interests of the parties interested in this will, and to invest and reinvest the trust estate hereinbefore devised and bequeathed to it. Provided, however, that the stock in the Farmers' National Bank of La Moure, North Dakota, held by me at the time of my death, shall be held intact for a period of ten years and not sold in whole or in part during such period."

The will was admitted to probate in January, 1914, and soon thereafter an inventory of the estate was filed, in which the real property was appraised at \$15,000 and the personalty at \$135,276.88; total, \$150,276.88. A final report and account was duly presented for approval covering the receipts and disbursements of the executor from January 3, 1914, to May 12, 1919, and in November, 1919, an amended final account was presented making some slight changes in the original account, which were made necessary by a subsequent transaction. The amended report shows receipts aggregating \$180,082.11 and disbursements as follows: Administration expenses, \$10,302.85; taxes and insurance, \$834.04; expenses of last sickness and funeral, \$1,646; widow's allowance, \$5,250; debts and claims, \$13,768.51; total, \$31,801.40. Partial distribution to Annie B. Murphy, \$46,800; payment in full to all legatees whose legacies are provided for in definite amounts, \$40,000; expenditure for monument (directed by will,) \$9,473.43; partial distribution to residuary legatees, \$40,000; leaving a balance of cash on hand, \$11,932.20.

The county court arrived at the amount of the legacy of Annie B. Murphy by subtracting from the total receipts the total of the debts, taxes and insurance, expenses of last sickness, widow's allowance, and expenses of administration, and dividing the remainder by three. The amount of distributable estate by this calculation was \$148,280.71, and the legacy of the widow, \$49,426.90. Objections and exceptions to the final account and petition for distribution were filed by the widow, in which it was claimed that the basis for computing her share was the total estate, as shown by the final account, less the expenses of last illness, and funeral, and the total debts and claims (minus a bank stock assessment of \$750, which it is claimed was not properly allowed as a debt), or \$164,917.60. and specific objection was made to reducing this basis by the further sub-

traction of expenses of administration, taxes and insurance, the widow's allowance, amounting in all to \$17,060.39. It is further objected that the account does not include interest on the widow's legacy. To quote the exceptions:

"First. This respondent assigns these deductions (expenses of administration) as errors, and claims that by the law itself she is made a preferred legatee, is entitled to one-third of the estate after deducting the expenses of last illness, funeral and amount of all debts and claims paid. * * * Second. Such final account does not include interest upon the legacy so given to this respondent. * * *"

Notwithstanding that no exception was taken to that part of the account which deducted expenses of last illness and total debts and claims paid from the gross estate before computing the widow's share, and that the objector, in fact, submitted as a basis for computing such share the gross estate less these same expenses and debts, it is now asserted in this court that the gross estate is the proper basis for computation.

The controversy in this case, as will be seen from the foregoing statement, arises over the question of the basis upon which to compute the widow's legacy. Is she entitled to one-third of the gross estate; to one-third of the estate after subtracting the expenses of the last sickness, funeral, and debts, or is she entitled to one-third of the net or distributable estate; that is, one-third of what is left after the payment of all debts and expenses of administration? In addition, a minor question is presented as to whether or not interest should be allowed upon the legacy.

In view of the fact that no issue was presented in the county court concerning the debts generally, that the counsel for the objecting legatee and appellant expressly recognized the propriety of deducting expenses of last sickness, funeral, and debts from the gross estate and leaving the remainder as the basis upon which to compute the legacy of one-third, and in view of the doubt as to the intention of the testator upon this subject this court will refrain from deciding whether or not the gross estate is subject to this deduction before determining the amount of the widow's legacy. In this respect the decree of the county court as made with the tacit approval and acquiescence of the appellant will remain undisturbed.

The questions presented here are not so much questions of law as of fact. The solution seems to us to depend altogether upon the intention of the testator, and intention is a question of fact to be determined by the court from the will. The statutes provide for giving full effect to

this intention when ascertained. None of the various Code sections cited by counsel professes to more than lay down rules for carrying out the testamentary intention, either expressed or implied. For the most part, they are mere aids to construction. Pomeroy on Equity Jurisprudence, vol. 3, § 1135. We are of the opinion that all questions presented finally resolve to the one query: How much did the testator intend his wife to receive? What amount was intended when he provided that she should receive one-third of his "estate, real and personal?" Did he intend that she should receive one-third of the gross estate? She herself has otherwise construed the will, and we will not reverse this construction. Perhaps it was a correct interpretation. See *Briggs et al. v. Hosford*, 22 Pick. (39 Mass.) 288; *Terry v. Smith*, 42 N. J. Eq. 504, 8 Atl. 886, reversed *Smith v. Terry*, 43 N. J. Eq. 659, 12 Atl. 204. Then did he intend that the amount of her legacy should be affected by the costs of administration? If a portion of the estate had been left undisposed of so as to go to the heirs, it would seem that the amount of the legacy would not have been affected by the expenses of administration. In *re Purdy's Estate*, *In re Tompkins*, 9 Misc. Rep. 436, 30 N. Y. Supp. 382; *Estate of Traver*, 145 Cal. 508, 78 Pac. 1058. It seems to us that the will, in fact, affords ample affirmative indication that the amount of the wife's legacy was not to be affected by the expenses of administration to any greater extent than the other general legacies. It will be observed that the testator provided for his wife before making provision for any other legatee, thus evidencing an intention to deal with her at least as favorably as with any other class. He also provided for a class of residuary legatees. If it be held that the expenses of administration are to be subtracted before the basis is arrived at for determining the widow's one-third, as was done below, it would be equivalent to holding, in the circumstances of this estate, that the widow was, to all intents and purposes, a residuary legatee. This conflicts with the expressed intention, for a group of residuary legatees is named excluding her from the class. It was clearly not intended that she should be so considered.

We think, where the actual intention is doubtful, that that construction of a will should be adopted which tends to fix or make certain the amount of all legacies above the class of residuary legacies, rather than one which tends to aggravate the uncertainty by rendering the amount contingent upon indefinite quantities which do not appear to have been present in the mind of the testator, or, if present, to have been intended to have any peculiar effect on one of a naturally favored class. Furthermore, com-

petition and conflict between residuary legatees and general legatees should be avoided, if possible. We are of the opinion that the testator intended to give to his wife at least one-third of the property he would leave after payment of the obligations he had in mind when he made the first direction in the will.

Since the amount of the legacy becomes fixed as above indicated, we are not concerned with § 5722 of the Compiled Laws, upon which so much argument is expended in an effort to determine its application or nonapplication to the case in hand. Any remaining conflict between the widow and the residuary legatees concerning expenses is resolved by § 5720, which defines a residuary legacy by stating what is included within it. It is "only that which remains after all the bequests of the will are discharged." Manifestly the bequest to the wife will not be discharged if a portion of the amount intended for her is taken to pay expenses. It follows that the legacy of the widow must be computed without taking into consideration the expenses of administration.

Is the widow entitled to interest on her legacy? The claim to interest is based upon § 5732, C. L. 1913, which provides that legacies bear interest from the time they are due and payable, except that legacies for maintenance or for the testator's widow bear interest from the testator's decease. As a matter of strict legal definition, the provision for the widow in the will in question is both a legacy and a devise, as it was at all times within the range of legal possibility for the executor to fully discharge the provision by a payment partly in money and by allowing her to succeed to her interest in the realty through the nonexercise of the power of sale. There was no mandatory direction or duty imposed to sell the real property; hence, no equitable conversion was effected. *Penfield v. Tower*, 1 N. D. 216, 46 N. W. 413. 3 Pomeroy's Eq. Juris. § 1160. In view of the peculiarity of the provision made, we are of the opinion that it does not fall within the character of legacy upon which the statute requires interest to be paid from the date of the decease. Neither do we think it within the contemplation of the statute that the widow, in circumstances such as presented in the instant case, should be entitled to participate in the increment to the estate while in the hands of the executor and be allowed interest upon a share which is computed upon a basis that includes the increment. This process would be analogous to compounding interest.

The judgment appealed from is modified, and the district court is directed to enter a judgment directing the county court to proceed with

the final accounting and distribution in a manner not inconsistent with this opinion.

CURISTIANSON, J., concurs.

GRACE, C. J., concurs in the result.

BRONSON, J. (dissenting). I am of the opinion that the judgment of the district court should be affirmed. Two courts, the district court and the county court, apparently with painstaking care and attention, have arrived at an interpretation of the will of the decedent consonant with the judgment rendered. The widow, the appellant herein, filed in the county court objections and exceptions to the final account and petition for distribution. In such objections she stated that the total estate account showed the sum of \$179,582.11. (This amount included the proceeds realized upon the conversion of the realty and personalty into cash, the interest, and the earnings thereof, all during the course of administration). She asserted that, after deducting the last illness and funeral expenses and the total debts and claims, amounting to \$14,664.51, there remained, as a basis for the computation of the widow's share, \$164,917.60. She objected to the deduction of the expenses of administration, of the Sawyer bank assessment, of taxes and insurance, and of the widow's allowance, amounting to \$17,060.39. She claimed "that by the will itself she is made a preferred legatee" and "is entitled to one-third of the estate after deducting the expenses of last illness, funeral, and amount of all debts and claims paid." She also claimed that she was entitled to interest at the rate of 7 per cent. per annum from the date of decedent's death upon her testamentary interest, until paid, less interest on accounts paid from time to time to her upon partial distribution.

Hon. L. K. Hassell, judge of the county court, in an extensive and able memorandum opinion, found, pursuant to amended reports, that the total estate amounted to \$180,082.11, and the total disbursements for sickness and funeral expenses, debts, widow's allowance, and expenses of administration, amounted to \$31,801.40, leaving a balance of \$148,280.71, distributable estate. In considering the objections of the widow, he quoted §§ 8730 to 8733, C. L. 1913, which provide that all the property of the decedent, with certain exceptions as to homestead, etc., shall be

chargeable with the payment of his debts, the expenses of administration, and the allowance to the family. That the estate real and personal, given by will to legatees or devisees, is liable for the debts, expenses of administration, and allowance to the family, in proportion to the value or amount of the several devises, but special devises or legacies are exempt from such liability if it appears to the court necessary to carry into effect the intention of the testator and there is other sufficient estate. He found that there was nothing to indicate that the legacy to the widow was a specific legacy; that the statutes quoted applied, and the act of the executor in subjecting the widow's interest to its proportionate share of the expenses of administration was in accordance with the law. Concerning the allowance of interest, he found that § 5732, C. L. 1913, did not apply; that the legacy to the widow was not a pecuniary legacy; that it was one-third of the estate, that is, one-third of the distributable estate; that it was impossible for the executor to determine what one-third of the estate would be until the expenses were all paid; that, during the six years since the death of the testator, one item alone amounted to over \$15,000, as interest accrued since the death of the testator; that, approximately, \$15,000 concerns the proceeds received from the real estate, of which a substantial sum consists of the proceeds of crops upon lands; that these items are included in arriving at the net distributable estate; that, if interest should be allowed, it would be necessary to compute the distributable estate at the time of the testator's death and not at the time of distribution. Accordingly, he approved the report of the executor, thus allowing the widow one-third of \$148,280.71. From such order of approval the widow appealed to the district court.

The parties stipulated the facts. They stipulated that \$12,297.51, as items of interest and dividends, had been collected and reported since testator's death and prior to entry of judgment in county court; that such other items—as may accrue shall be reported in a supplemental final accounting; that the appeal in the district court should be heard without oral argument and upon written briefs. Upon consideration of the appeal and the stipulation, Hon. Charles M. Cooley, district judge, affirmed in all things the action of the county court, and judgment was entered accordingly. This judgment determined the distributable assets to be \$148,280.71; one-third thereof to be \$49,426.90; advances made to the widow to be \$46,800—leaving the balance due her, \$2,626.90.

It is difficult to understand the contentions of the widow, upon this appeal, with reference to the exact amount that should be awarded to

her. In appellant's opening brief, it is stated that the official inventory and appraisal showed an estate of \$150,276.88, one-third of which would be \$50,093.29, as a basis for interest; that, in addition to this, a fair allowance could easily be made on increased values (over appraised amounts) when obtained, and upon values realized though not inventoried; per contra, any loss or deficiency as compared with the appraised value would be deductible from accretions in excess thereof. In a short brief, filed subsequent to the oral argument before this court, the widow made a calculation of the award due her as follows: Gross estate, \$180,-\$82.11. Funeral, last sickness, and death, \$11,872.35. (This latter amount was apparently ascertained, viz.: Administration expenses prior to amended report, \$10,226.35. Last sickness and funeral expenses, \$1,-646. Total, \$11,872.35). Balance, \$168,209.76. One-third of this amount, \$56,069.92. Widow entitled to interest on above, less \$15,-889.51, being the interest received by the estate during course of administration. That the trial court erroneously deducted following items before calculating widow's one-third: Amount paid creditors, \$13,768.51. Allowance to widow, \$5,250. Total, \$19,018.51. That judgment should in any event be modified and executor directed to pay one-third of above amount, or \$6,339.50, to widow. In other words, the widow, although in ascertaining her share she made no objection in the county court to the deduction of the total debts and claims, and such was her status before the district court, because she filed no further objections, pursuant to the stipulation made, yet now she asserts that the trial court and the county court erroneously deducted the amount paid to creditors upon such debts and claims. Further, she, pursuant to the calculation made, now deducts the expenses of administration (those prior to the amended report), although previously she complained in the district court and county court of its action in so doing.

Accordingly, upon the record, the objections made by the widow in the county court, the stipulation concerning the appeal in the district court, and the briefs of the widow before this court, it appears that the widow did not object, in the county court or the district court, to the deduction of funeral and last illness expenses and total debts and claims in the computation of her share. Not so objecting, consent, and waiver of objection, follow. In this court pursuant to her calculation, she again consents to the deduction of funeral and last illness expenses, and, for the first time, consents to the deduction of administration expenses, and, for the first time, objects to deduction of total debts and claims. Ac-

cordingly, the only consistent objection that is made throughout is the objection to the deduction of the allowance made to her, viz. \$5,250, the allowance to her during the course of administration. Thus, upon such record, upon such objections and nonobjections, and upon such contentions, this court is asked to interpret anew the will concerning the widow's share and to award to the widow one-third of the testator's property together with interest thereupon, free from any deductions for last illness and funeral expenses, debts and claims, allowances to widow, or expenses of administration. Assuredly, if the rule still obtains, the widow is bound by her exceptions and objections made in the courts below. The majority opinion of this court so recognizes in its disposition of this case. The question of interest is also determined adverse to the widow's contention. If the calculation made by the widow that now expenses of administration be deducted, be recognized, her contentions in that respect upheld, there remains for consideration only the propriety of deducting the widow's allowance in the computation of the widow's share. Perhaps, inadvertently, the widow had misstated her calculations and contentions. Even so, there remains for consideration and review, only, the action of the court below in deducting the total claims and debts and expenses of administration, including the widow's allowance.

Disregarding, however, the concessions or admissions made in the courts below, the appellant contends, in effect, for a principle of construction concerning the word "estate," namely, that the phrase "one-third of my estate," as used in the will, means, and was intended to mean, one-third of all the property left by the deceased. I am of the opinion that one of two possible constructions must necessarily obtain in the interpretation of the provisions of the will concerned: Either, the phrase "one-third of my estate," as used in the will, means one-third of all the property left by the decedent, or one-third of the distributable assets of the estate of the decedent. I am further of the opinion that the majority opinion errs in the construction placed upon the term "estate," as used in the legacy to the widow, and in the application of the statutory law applicable thereto. Further, that the resultant construction, so placed by the majority opinion, cannot be sustained either upon principle or as consonant with the intention of the testator. The word "estate" of course, has a peculiar meaning as used in a will. Manifestly, it is not the same as the word "estate" when used in connection with real property, such as, to speak of an estate in realty. It must be remembered that the legacy or devise, however termed, to the widow, is not a specific legacy or

devise. It is not a gift of a specific thing or things, such as a horse, specific chattels, specific amount of money, or specific realty. The legacy or devise is general. Is the word "estate," as used, synonymous with the word "property?" Even so conceding, what is property? Is it the specific thing, if it be dollars, a horse, certain furniture, or specific realty, such as 160 acres of land, or is it, rather, the right to use, enjoy, and dispose of things capable of being owned? Is not much confusion in legal terminology and definition occasioned by considering too much the term "property" in the objective sense, as specifying the thing or things possessed of, tangible, concrete things, whether several or in the aggregate? As a general term, and in legal parlance, does it not signify and comprehend the right rather than the thing itself? For instance, labor may be property. Thus, choses in action and other intangible things. See §§ 5245—5253, C. L. 1913, on the nature of property; *Fleming v. Sherwood*, 24 N. D. 144, 149, 139 N. W. 101, 43 L. R. A. (N. S.) 945; *Rigney v. Chicago*, 102 Ill. 64; *State v. Kreutzberg*, 11 4Wis. 530, 90 N. W. 1098, 1100, 58 L. R. A. 748, 91 Am. St. Rep. 934; 32 Cyc. 648; 22 R. C. L. p. 37.

For the purposes of illustration, supposing the testator had given to his wife, inter vivos, by bill of sale or deed, or by both, one-third of his estate both real and personal in precisely the same language as has been used in the will. Supposing that his estate consisted of realty with mortgage of \$5,000 thereon and personalty with a mortgage of \$5,000 thereon. If the word "estate" means property what would be the wife's share, in property? In computing the property, or its amount, would it be free from, or subject to, deduction of the liens? What was, in such case, the property interest of the giver? The whole amount of the value of the specific things, or the value thereof less the liens? In such case, in our opinion, the value of his property is determined by deducting the liens. To these suppositions, the answer may not be made that if the giver had given one-third of his property, specifically describing, it the wife would not be subject to the debts of the giver in computing the value of the property interest, for, in such case, the gift would be specific, and the term "property" would then have specific reference to specific things. Supposing, further, in determining the meaning of the word "property," as a general item, the testator in this case possessed a homestead of the value of \$5,000; would she claim that the property interest or the deceased's estate was all his specific property plus the homestead? That one-third of such amount comprehended her share? Yet the prop-

erty interest of the deceased's estate, by law, was not the entire homestead, for such he could not thus devise, but the right in, or the value of, the remainder subject to the life estate of the widow therein, as her property. Manifestly, she could not claim both that the deceased's estate possessed a property interest in such life estate, of which she was entitled to one-third, and that such property interest therein was owned by her entirely during her lifetime pursuant to the statute is provided. The estate of a decedent, testate or intestate, may represent a different property interest than the estate (if the term be so used) of such decedent immediately prior to his death. Then (at the time of death) all of his estate becomes subject to control by the county court, and chargeable with expenses of administration, allowance to the family, and claims of creditors, excepting the homestead and exempt personal property. Sections 8730—8733, C. L. 1913; § 5721, C. L. 1913.

The status of the decedent's estate is peculiar. The property interest of the decedent's estate is not the same as it was while the decedent was alive. The growth of the law concerning the property interest of decedents reveals the peculiar status. In the early history of the law, the realty of the intestate decedent descended to his heirs free from control by the representative of his estate. The estate of the decedent (so using the term) retained neither property interest nor right in such realty. 18 C. J. 881. It was not assets of the estate. Underhill, Wills, vol. 1, p. 512. Now, the estate of a decedent possesses a right, a property right, in the deceased's realty. The representative has right of possession, right of control, right of action, rights of sale, concerning the same. Sections 8707, 8767—8779, C. L. 1913; *Honsinger v. Stewart*, 34 N. D. 513, 159 N. W. 12; *Magoffin v. Watros* (N. D.) 178 N. W. 134, 136. So, in the early history of the law, personalty of an intestate vested in the administrator. Now, it passes to the heirs, the same as realty subject to control of the county court and the administration. Section 5742, C. L. 1913. Thus there is now a recognition of rights, property rights and interests, in the "estate" of a deceased. Again, the land of a testate decedent, formerly, passed to the devisee, through the will operating as a conveyance. 40 Cyc. 1095. It was not assets of the estate. Now, such land devised passes subject to an "estate" property right and control, the same as land of an intestate decedent. Section 5640, C. L. 1913. Formerly, personal property specifically bequeathed passed to the legatee; personal property not specifically bequeathed to the executor, 40 Cyc. 1996. In the latter instance, administration was necessary to per-

fect the right or title of the legatee. 40 Cyc. 1997. Now, personal property bequeathed passes to the "estate of the decedent" the same as other realty or personalty. Thus, it may be seen that now the "property" of an "estate of a decedent," whether testate or intestate, consists of that property which the law states shall pass to the "testate" or over which it exercises a control, right, or property interest.

This "property" interest of the "estate," what is it? How may it be computed? How ascertained? Manifestly it does not include the life estate of the widow, or her right in the absolute exempt personal property. What is the amount or the value of this "property" interest of the "estate?" Is it the aggregate value, or the amount, of the specific things, realty or personalty, that have passed to the "estate," either in a general or limited way. The aggregate value or amount of such things, over which the "estate has control or possession or a limited interest therein for certain purposes? Or, is this "property" interest of the "estate" the aggregate value or amount of such things, or of the limited or qualified interest therein, subject to, or freed from, the liens which the statute has created thereon, to wit, homestead rights, absolute exemptions, family allowances, expenses of administration, and claims of creditors. We are of the opinion that the latter is the only proper interpretation that may be given to the ascertainment of the "property" interest of an "estate of a decedent" where the term "property" is used as a general term and its legal sense. *Briggs v. Hosford*, 22 Pick. (39 Mass.) 288, 289. Consideration may now be given to the term "estate" as used in the will. It apparently does not embrace all of the property of the deceased. It would not embrace the homestead, in toto, of the decedent. But it appears that he had no homestead. It would not embrace the absolute exempt personal property. No absolute exempt personal property has been listed. Manifestly, the decedent possessed some at his death. At least, personal clothes. Assuredly, the intention of the testator is to be carried out if it is possible to do so. It is to be carried out in accordance with the language that he has used and the evident intent and purpose of such language. What was this estate? It has been shown that it is not the same as property interest of the decedent at the time immediately prior to his death. Is an estate of a decedent composed of assets alone? May not and are not liabilities also comprehended within the term "estate?" In determining the value or the amount of an estate, are the assets alone to be computed?

It appears evident that the "estate" of the decedent is not the equi-

valent, in amount or value, of the property, in amount or value, possessed by the decedent at the moment of time preceding his death. One-third of his "estate" is not the same or the equivalent of one-third of his property then possessed before his death. *Smith v. Terry*, 43 N. J. Eq. 659, 666, 12 Atl. 204. Furthermore, the whole context of the will, its various bequests or legacies, the property disclosed, and concerning which the testator must have directed his attention, evince an intention that contradicts the construction asserted by the appellant widow. The parties themselves, the widow, the devisees and legatees, the executor, all have disclosed a contrary construction in their actions during the course of administration and in the proceedings of two trial courts. If the testator intended to give to his wife one-third of all his property possessed by him at the moment before his death (not one-third of his estate), why did he give to his executor a specific power over all of his real estate and specific directions to hold certain personalty (bank stock) for a period of ten years? If the wife was entitled to one-third of his property, so possessed by him before his death, to pass to her upon his death, one-third of his realty, one-third of his bank stock, one-third of his notes, etc., why did he give specifically to another the power and the right to possess, sell, and control this property for a period of time which has now exceeded six years? The power and the right to enhance or depreciate such property, or the returns thereupon, and during a period of time when the amount or value of the wife's property and interest therein was and has been determined (as the widow contends) since the death of the testator? Again, what does the term "estate," as used in the will, mean? In any event, the general intent of the testator, as gathered from the whole will, is not to be defeated by language of a single clause, even if doubtful or uncertain. *Stevens v. Underhill*, 67 N. H. 68, 36 Atl. 371. In this case, the court said:

"For 'estate,' when used to signify property which a person leaves to be divided at his death, includes indebtedness as well as assets."

See *Johnson v. Miller*, 33 Miss. 553, 557.

The question of construction herein involved is answered by a case in California. Our Probate Code and the provisions particularly involved are largely borrowed from California. In that case, *Estate of Hinckley*, 58 Cal. 457, the court says:

"Suppose a testator declares in his will, 'I give one-third of my estate to my son, A,' can there be any doubt that the word 'estate' would be held to mean distributable assets?"

In that case the question arose:

"Do the words 'one-third of the estate' as used in § 1313 of the Civil Code, * * * mean one-third of the gross estate of the testator, or one-third of the 'distributable assets.'"

Among other things, the court said:

"The word estate is indeed *nomen generalissimum*. Originally perhaps it was used to designate the interest which one had in land; then to indicate the land itself—technically the corpus; it was afterwards extended to all property real and personal (Burr. L. D. 'Estate'). In wills the import of the term depends in a great degree upon its association with other expressions. * * * As said by Mr. Abbott: 'Estate is used in several variant senses. Only the context, or the circumstances under which it is employed can guide one in assigning to it the meaning intended.' * * * The same writer adds: 'In a very common use estate signifies the entire condition in respect to property of an individual; as in speaking of a bankrupt, decedent, or insolvent estate, or of administering upon an estate. Here not only property but indebtedness is part of the idea. The estate does not consist of the assets only; if it did, such expressions as insolvent estates would be misnomers.' * * * It is indeed true that the word 'estate' is used at times in the Code of Civil Procedure as signifying all the decedent's property. (Section 1645 (practically same as 8758, N. D. C. L. 1913). * * * Elsewhere too in the same Code we find the expressions 'the residue of the estate,' 'the residue of any estate.' (Code Civ. Proc. 1665, 1668 (§ 1665 same as § 8846, N. D. C. L. 1913). But too much stress ought not to be placed upon these applications of a term, which in the Codes themselves is employed in different senses. Thus: 'The executor is to deliver to the heir, legatee, or devisee, the whole portion of the estate to which he may be entitled,' i. e., a portion of the distributable assets. (Code Civ. Proc. 1661 (§ 1661 same as § 8844, N. D. C. L. 1913). 'Before any distribution of an estate is made,' etc. (Id. 1669 (practically same as § 8848, N. D. C. L. 1913). 'When any estate is assigned.' (1691 (practically same as § 8867, N. D. C. L. 1913). 'The court must direct * * * the distribution of an estate.' (1651.) 'An order for the distribution of the estate.' (1650.) 'In the decree assigning and distributing the estate.' (1686 (same as § 8850, N. D. C. L. 1913). In the sections last cited the word estate is clearly used as the equivalent of distributable assets.' The generalization of counsel for appellant would seem to be correct: Where the Code of Civil Procedure speaks of claims of creditors, settlement of the

estate, sales of property, and partnership interests, it refers to the whole estate of the decedent; but where it speaks of the distribution of an estate, and of persons entitled to such distribution, and their proportionate interests, it refers to the disposable assets only. When it speaks of an insolvent estate, the word includes, in idea, the indebtedness as well as the property. In deciding in what sense the term is used in § 1313 of the Civil Code, therefore, the very slightest, if any, weight should be given to the fact that it sometimes signifies the estate in gross. The first section of the first chapter of the title Civil Code (§ 1270) which treats of wills—the chapter which includes § 1313—reads as follows: 'Every person over the age of eighteen years, of sound mind, may, by last will, dispose of all his estate, real and personal, and such estate not disposed of by will is succeeded to as provided in the title VII of this part, being chargeable in both cases with the payment of all the decedent's debts, as provided in the Code of Civil Procedure.' (Section 1270 is same as § 5640, N. D. C. L. 1913.) True, a specific bequest is payable first out of the residuum, but in such case the residuum is previously ascertained by providing for the debts. A devise or bequest of an aliquot part of an estate would give right only to the portion of the residuary estate. 'Suppose a testator declares in his will, "I give one-third of my estate to my son A," can there be any doubt that the word estate would be held to mean distributable assets?' " 58 Cal. 514. See in re McLennan's Estate, 179 Mich. 595, 603, 146 N. W. 265.

In *Abila v. Burnett*, 33 Cal. 658, the testator in the third subdivision of his will stated, "My said wife shall receive one-half of all my property of which I may die seized," etc., 33 Cal. 661. The inventory showed that the testator died seized of certain real and personal property, of the value of \$5,595.25, per appraisal. One-half of this amount was authorized by the court to be transferred to the widow, who was also one of the executors. Another one of the executors made application to the probate court for an order authorizing the sale of realty of the estate for the purpose of satisfying a claim in his favor for services and expenses as executor. As a result of proceedings in the courts contesting the will, costs amounting to over \$3,900 had been incurred. Burnett, one of the parties interested, objected to the allowance of the petition, upon the ground among others, that the distribution to the widow of half of all the property was unauthorized and was subject to the payment of expenses of administration; that the executor, having aided in such appropriation, should be charged in his account with the value of the

personalty so appropriated. The probate court allowed the petition. Burnett appealed. The Supreme Court stated, concerning the nature of the devise to the widow, viz.:

"There is nothing, however, in the will in the nature of a specific devise. * * * Under the will she took all she took subject to administration, that is to say, one-half of what might remain after the payment of debts and expenses of administration. It follows that the court erred in considering the personal property delivered to the widow—being one-half of the cattle belonging to the testator at the time of his death—as no longer constituting a part of the estate. They are a part of the estate, and must be sold before a resort to the land can be had, and must therefore be taken into account in determining the necessity for any sale of the latter."

In *Estate of Traver*, 145 Cal. 508, 78 Pac. 1058, it is to be noted that the will provided, so far as material, viz.:

"At the death of my wife, it is my will that one-half of the property hereby given, devised and bequeathed to my wife during her lifetime, shall descend and go to L—— D. N——, C—— T. N——. and R—— D——, in equal proportions.' * * * 'If my wife dies before I do, in that event I give, devise and bequeath one-half of the whole of my property to L. D. N——, C. T. N—— and R. D.——," etc.

All of the property was community property. He devised or bequeathed one-half of it, that over which he had testamentary capacity. The above were the only provisions of the will disposing of his estate. The testator's wife died before he did. The effect was to vest the entire community property in him. Accordingly, he died intestate as to the other half of the property. In the course of administration the debts and expenses of administration were charged to the intestate property. The heirs complained. The Supreme Court affirmed the method adopted upon the ground that the statute made the intestate property subject to appropriation. It is to be observed that the will bequeathed one-half of the whole of my property: It did not state "one-half of my estate." As hereinbefore discussed, one-half of the whole of my property, while the testator is alive, is not the equivalent of one-half of my estate, when the testator is dead. To point out the distinction for purposes of illustration, one general rule may be stated, viz.: "Where the terms of donation are general, and the testator has not the absolute and exclusive ownership, but his interest is qualified, partial, or undivided in the property, and he uses general words of disposition, as 'all my estate,' 'all my

land,' etc., prima facie the rule is that he must be taken to intend to dispose only of what he had the power to dispose of" otherwise stated, "The presumption that, by the use of general words of donation, he intends strictly to dispose only of what is capable of being disposed of, may be rebutted by the character and terms of the will and it is therefore a fair question of construction in what sense the words 'estate' or 'lands' or "property" are used by the testator, whether it is limited to the partial or undivided interest which, in contemplation of law, will be subject to be disposed of under the will after his decease, or is intended to include the entire property owned, possessed, and enjoyed by him in his lifetime," *In re Gotzian*, 34 Minn. 159, 164, 165, 24 N. W. 920, 922 (57 Am. Rep. 43).

Accordingly, the phrase, one-third of my estate, in the legacy to the widow either means one-third of all of the property owned by the testator at the time of his death and during his lifetime, or, one-third of the distributable assets of his estate. The latter construction has been adopted by both the county court and the district court in its respective decisions in this case. The widow herself by her conduct, in admission and construction, has not construed the will to mean that she is entitled to one-third of all the decedent's property; so the majority opinion admits. I am of the opinion that the parties are bound by the course of construction and admission that they have pursued during the course of administration and the proceedings had in two courts. I am further of the opinion that only through such latter construction may the will be harmonized in all of its parts and the powers and directions of the testator effectuated.

The majority opinion, as I view it, adopts a half-way ground of construction based upon specious reasoning. It finds that the legacy to the widow is a general legacy; that the will provides for a class of residuary legatees; that there is an affirmative indication in the will that the amount of the widow's legacy was not to be affected by expenses of administration to any greater extent than other general legatees; that construction otherwise concerning expenses of administration would be equivalent to holding that the widow was a residuary legatee. If statutory distinctions in the mere use of names such as general legatees or residuary legatees should be followed, it seems apparent that the same reasoning which exempts expenses of administration ought likewise to exempt payment of debts, expenses of last sickness and funeral expenses; Yet, these deductions are permitted by the majority opinion: True, upon the ground

of acquiescence by the widow; Nevertheless, such ground of acquiescence necessarily contemplates a construction based upon the ascertainment of the distributable assets, instead of the gross estate. Furthermore, the majority opinion permits the widow, as a general legatee, to receive the additions and enhancement that accrues by reason of the administration of the estate and the expenses incurred in such administration; such as the receipts of interest, of dividends from stock and from crop proceeds during the course of administration extending some five years. Such rule of construction imposes no burden for the expenses incurred in securing such enhancement. The same rule, however, does not apply to the other general legatees to each of whom was awarded a specific sum of money. It would seem to be immaterial whether the testator used the word general legatee or residuary legatee in denominating his beneficiaries so long as he used the same yardstick with which to measure the amounts of benefits which, respectively, they should receive. The judgment of the trial court should be affirmed.

ROBINSON, J. (dissenting): The first two items of the will in question read thus:

"First: I direct the payment of the expenses of my last sickness and funeral and just debts that I may be owing.

"Second: I give, devise and bequeath to my wife, Annie B. Murphy, one-third of my estate, both real and personal."

The question is on the estate devised to the widow. The will does not give to her any specified money or property. It merely gives to her a part or portion of the estate. If the will had devised to the widow a cash sum of money or any specified property, that would have constituted a disposal of the money or property within the meaning of the code. (Section 5722). Then the other property of the estate would be resorted to for the payment of debts in the order provided by statute: (1) Property not disposed of by the will. (2) Property which is devised or bequeathed to a residuary legatee. (3) Property which is not specifically devised or bequeathed.

Now, as I think, a will should be construed in the simplest and most logical manner so that when a person is called to make a will and to leave this earth he should not have to wait till he can read all the whole decisions of this and other courts from the Atlantic to the Pacific. Everyone knows that a party can dispose of only so much of his estate

as remains after the payment of his debts and the cost of administration. Everyone knows that when a party gives, grants and devises to any person all his estate, it means all his estate subject to his disposal, and that a half of it is half of the estate, that a third of it is only a third of the estate. Hence I hold that the widow is clearly entitled to one-third of the net estate, including interest and rents collected on the same; that there is no error in the decision of the county court and the district court; and that the same should be affirmed.

On Rehearing

BIRDZELL, C. J. After reargument, a majority of the court remains of the opinion that the conclusion formerly reached is correct. This opinion is based upon the facts and circumstances relating to the property of the testator, the relation of the parties, the arrangement of the clauses, and the language of the will under consideration. In the petition for rehearing and upon the oral argument it was forcibly contended that the court had held in effect that a gift of one-third of the estate was a gift of one-third of the property, without regard to the debts or the expenses of administration. We do not so construe the holding. On the contrary, it is intimated in the original opinion that one-third would not necessarily be one-third of the gross estate, and authorities to this effect are cited. (In addition to the authorities therein cited, see *Blakeslee v. Pardee*, 76 Conn. 263, 56 Atl. 503; *Bell v. Raymond*, 20 Conn. 337; *Wilcox v. Beecher*, 27 Conn. 134; *Horsey v. Horsey's Ex'rs*, 1 Houst. (Del.) 438; *Walker v. Hill*, 73 N. H. 254, 60 Atl. 1017; *Martin v. Fry*, 17 Serg. & R. (Pa.) 426; *Fisk v. McNiel*, 1 How. (Miss.) 535; *In re McRae*, 179 Mich. 595, 146 N. W. 265.) We were of the opinion, however, that the will in question was ambiguous, and we are still of that opinion. In construing what the majority considers to be the ambiguous language of the will, we were brought to the conclusion that the expressed intention manifested was that the wife should take one-third of the property after the payment of the obligations mentioned in the immediately preceding paragraph, with the result that the one-third should be computed without taking into consideration the expenses of administration. These will, in effect, be borne ratably by her and the residuary legatees; whereas, under the distribution in the county court the entire expenses of administration were subtracted before the basis for determining her distributable portion was arrived at. Thus, so far as the

debts are concerned, we do not hold that they were not properly subtracted. Beyond this, we deem it unnecessary to enlarge upon what was said in the original opinion.

CHRISTIANSON and GRACE, JJ., concur.

BRONSON, J. (dissenting). In view of the majority opinion upon the rehearing, I do not deem it necessary to add to my dissenting opinion heretofore filed. I adhere to the conclusions stated in such dissenting.

ROBINSON, J., concurs.

ELLENDALE NATIONAL BANK, Appellant, v. WM. O. WENTZEL
and CLARA M. WENTZEL, Respondents.

(189 N. W. 634)

Appeal and error — acceptance of performance of decree below held waiver of error assigned thereon.

1. Plaintiff appealed from a certain judgment, cancelling a certain contract for the purchase of land. It is *held*, for reasons stated in the opinion, that plaintiff waived the errors assigned and upon which it relies.

Opinion filed July 14, 1922

An appeal from a judgment of the District court of Dickey county,
McKenna, J.

Judgment affirmed.

F. J. Graham, for appellant.

E. E. Cassels, for respondent.

GRACE, J. This is an appeal from a judgment of the district court of Dickey county, in plaintiff's favor, adjudging the cancellation of a

certain land contract. No lengthy statement of the facts is necessary. Such as are necessary to be stated are as follows:

On the 3d day of December, 1915, the plaintiff entered into a written contract for a deed with the defendants for the conveyance of the S. $\frac{1}{2}$ of section 21, township 130, range 62, in Dickey county, N. D., upon the terms and conditions stated therein. The purchase price stipulated to be paid was \$11,931. On December 3, 1920, there was found to be due upon the contract \$14,539.74, at which time a note was taken from Wm. O. Wentzel for that amount, bearing interest at the rate of 10 per cent. per annum. On March 22, 1922, there was due on the contract, including sums due for interest, taxes, and insurance, \$16,734.99.

The defendants being in default, this action was brought to cancel the contract. It may be observed also, that Wentzel filed on one of the quarters as a homestead, in 1883, and about two years subsequently purchased the other. He placed the land under cultivation, and erected buildings on it, which the testimony shows was worth approximately \$3,000. At one time there was a small mortgage of \$700 on the premises to one King. This was foreclosed. Plaintiff at this time held a third mortgage against the land. Some arrangement was made between Wentzel and the bank whereby the bank should take care of the mortgage that was foreclosed before the time of redemption expired; this arrangement is represented in part by the contract. It is wholly unnecessary to go further into detail in the matter.

The court, in its findings of fact, found that the defendants were in default, and made an order, granting the prayer of the plaintiff for the cancellation of the contract. It, however, specified in the order for judgment that defendant Wentzel, as tenant, should have the right to use and occupy the premises for the cropping season of 1922, on the following terms: That he should deliver to the plaintiff one-fourth of all the small grain, free of expense at the elevator; that he should pay rental for the corn and pasture land at the rate of \$2 per acre; that he should furnish plaintiff a good and sufficient bond in the sum of \$400 to insure the seeding of the crop, with two good sureties thereon, to be approved by the clerk of the district court of Dickey county; that he should surrender possession not later than November 1, 1922; that he should have until January 1, 1923, in which to find a purchaser for the premises, upon the terms and conditions to be specified in a written contract, which were to the effect that defendant would be entitled to the right to sell the land until the above specified time for the sum of \$16,734.99, together with

any additional taxes, and interest at the rate of 10 per cent. from March 22, 1922, to the date of the sale. The terms of sale to be \$4,000 cash; \$1,000 on or before a year from the date of the payment of the \$4,000, and the balance of the purchase price to be divided into five equal payments, drawing interest at the rate of 8 per cent. per annum, the defendant to receive all sums in excess of these amounts in case of sale. A written lease, specifying the terms of rental, and a written contract, setting forth the terms of sale, if any, were prepared, and were duly executed and acknowledged by the plaintiff prior to the entry of the judgment; these are now a part of this record. The judgment recites the execution and delivery to the defendant of the agreement with reference to the sale of the land (Exhibit 1) and the lease (Exhibit 2).

With the record in this condition, the plaintiff appeals, but complains only of that part of the judgment, providing for the execution and delivery of the lease and the agreement to sell. It would seem clear that, the plaintiff having complied with the order of the court and executed the lease and the agreement to sell, and there being no claim of fraud, duress, or mistake in any respect, asserted or established, it waived the right to complain of any error of the court in this respect, if there were error, and we do not think there was. The action is one in equity. The evidence fairly shows the land to be worth about \$80 per acre; that the improvements on the land are quite valuable; that defendant's equity is quite substantial. In these circumstances, and if plaintiff had not waived the error upon which it relies, nevertheless the trial court in the exercise of its equity powers was justified in decreeing the defendant the relief granted; the court could have given the defendant a year or longer in which to make redemption; it could have decreed him possession and use of the premises and the ownership of all crops raised thereon during that time; and under the evidence plaintiff would have no just ground of complaint.

The record contains no error. The judgment appealed from is affirmed. Respondents are entitled to their costs and disbursements on appeal.

BIRDZELL, C. J., and BRONSON and ROBINSON, JJ., concur.

CHRISTIANSON, J. (concurring). I concur in an affirmance. From the statement of facts contained in the opinion prepared by Mr. Justice

Grace it will be noted that the judgment appealed from (1) permitted the defendant Wentzel to occupy the premises and crop the same during the season of 1922; (2) permitted him to make a sale of the premises at any time prior to January 1, 1923, upon certain specified terms and conditions, and provided that in event he made such sale he should receive all sums in excess of the amount due to the plaintiff bank. This action was tried in March, 1922. Upon the trial, the principal officers of the plaintiff bank testified that in September, 1921, they had offered to adjust the matter substantially on the terms embodied in the judgment. That is, they testified that the bank made the proposition to the defendant that if he would convey the land to the bank it would rent him the land for the year 1922, and would also give him the right to sell the land at any time prior to January 1, 1923, and permit him to retain all which he might receive over and above the amount due the bank. When the trial was practically concluded the trial court asked the president of the bank the following question:

"Are you willing to renew the proposition that you made Mr. Wentzel, as you claim, last fall, lease him this land for this year, with the privilege of giving him anything that it may sell for, over and above the indebtedness, before January 1st, next?"

The president of the bank replied:

"So far as the plaintiff is concerned, we have no objection to renewing the offer as to the sale, but would not care to renew the offer as to renting. We would be willing that if the property can be sold, before January, 1923, by any one or ourselves for any more than due on the contract, with interest, up to that time, that Mr. Wentzel may have the excess, if any. We would be willing to list the land with any of the real estate agents, and fix the terms as to the amount of cash we would want down, say \$5,000 down, in case of sale, and the contract for the balance. We would want our pay out of it first, and Mr. Wentzel should receive any balance."

Upon this appeal little or no complaint is made of that portion of the judgment which authorized the defendant to remain in possession of and crop the premises during the season of 1922; the principal attack is made upon that portion of the judgment which gave the defendant permission to sell the premises up to January 1, 1923. In view of the statement made by the president of the bank it would seem that the trial court was justified in believing that the bank consented to the provisions in the judgment which it now assails.

HERMAN SCHWARTZ, Respondent, v. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURG, PA., a corporation, Appellant.

(189 N. W. 322)

Following *Wilkins vs. National Union Fire Insurance Company*, post 1295, 189 N. W. 317, the judgment appealed from is reversed and cause remanded.

Opinion filed March 21, 1922. Rehearing denied July 14, 1922.

Appeal from the District court of Morton county, *Lembke, J.*

Reversed and remanded.

Per Curiam.

Barnett & Richardson, for appellant.

Nuchols & Kelsch and *Jacobsen & Murray*, for respondent.

The fact that a juror has an opinion does not disqualify him, providing he states that he can disregard that opinion, and try the case on its merits. See *People v. Wolf*, (Cal.) 190 Pac. 22.

"The old theory that a juror's mind must be like a piece of blank paper, has happily gone into ancient history. It is clear that what this juror had was a mere newspaper impression and not a fixed opinion, and he could not have helped the situation by telling the extent to which he relied in everyday business upon newspaper reports." See *Moore v. City of Wichita*, 189 Pac. 372. Also see *Mainville v. State*, 179 N. W. 764.

Challenges for Cause, Acquaintance, Friendship. An expressed friendship for one of the parties was not ground for challenge of a juror for cause, where it appeared that he could and would try the case impartially although it would 'make it hard for him.' " *White v. Cowing*, (Mich.) 171 N. W. 450.

Opinion based on rumor or report. Disqualification. An opinion of a juror on the merits of a criminal charge, if based solely on rumor or report, does not of itself disqualify him, where his *voir dire* examination shows that he can return a fair and impartial verdict upon

the evidence adduced at the trial, under the instructions of the court." *Grammer v. State* (Neb.) 172 N. W. 41.

Qualification of a juror is one of law and fact, solely for the trial court to decide. See *Loy v. State*, (Wyo.) 185 Pac. 796.

Failure to examine a juror, waiver of qualification. See 24 Cyc. 321.

Paragraph three: "*A party waives any objection to the juror's qualifications or competency subsequently discovered, if he accepts the juror without examining him as to his qualifications.*"

PER CURIAM. This is an appeal from a judgment in favor of the plaintiff and against the defendant in the sum of \$547.77. The facts are substantially the same as those stated in the case of *Wilkins v. National Union Fire Insurance Co.* (N. D.) 189 N. W. 317, the only material difference being that they relate to drouth insurance held by this plaintiff. The errors assigned and argued in the brief are substantially the same throughout as those discussed in the *Wilkins Case*, decided concurrently herewith. For the reasons stated in the decision in *Wilkins v. National Union Fire Insurance Co.*, post 1295, 189 N. W. 317, the judgment appealed from is reversed, and the case remanded for a new trial.

BIRDZELL, ROBINSON, and CHRISTIANSON, JJ., and COOLEY and COFFEY, District Judges, concur.

GRACE, C. J., and BRONSON, J., disqualified, did not participate; COOLEY and COFFEY, District Judges, sitting in their stead.

DICK WILKINS, Respondent, v. NATIONAL UNION FIRE INSURANCE COMPANY, OF PITTSBURG, PA., a corporation.
Appellant.

(189 N. W. 317)

Jury — jurors who sat in other similar cases involving same facts, and who stated that their decision would be the same upon the same facts, held subject to challenge for cause.

1. Where most of the jurors called for the trial of a case had sat in from one to six similar cases brought by different policy holders against the same insurance company, and tried at the same term, in which the complaints were practically identical and the answers substantially the same, and the witnesses for the plaintiffs were generally the same, with the exception of the plaintiff in each case, and the witnesses for the defendant, were practically identical in all of the cases; and where such jurors stated upon their voir dire that they had made up their minds upon the conflicting questions of fact submitted in the previous cases, and that if the facts were the same, in the case upon trial, their decisions would necessarily be the same; that it would require additional evidence on the part of the defendant to overcome their opinions on such facts; that if the evidence was the same they would come to the same conclusion; that their minds were fixed and made up after hearing the evidence in the other cases, *Held*, that the defendant's challenge for cause should have been allowed under subd. 6, sec. 7616, Comp. Laws, 1913, providing that "Having an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or some of them," is ground of challenge for cause even tho the jurors stated, when interrogated by the Court, that they could try the case fairly and impartially on the evidence, and declared themselves to be free from bias or prejudice.

Accord and satisfaction — instruction as to accord held erroneous.

2. An instruction that if the jury believe an agreement of accord had been entered into whereby defendant had agreed to repay to plaintiff his premium, and an additional amount in case other policy holders received more than a repayment of their premium, plaintiff, before the accord was completely executed, might repudiate it, and sue upon the original obligation without rescinding the accord, was erroneous, it appearing that there was no issue raised by the pleadings as to any agreement by defendant to pay plaintiff any such additional amount, and that all testimony with reference thereto had been erroneously admitted over defendant's objection.

Accord and satisfaction — there may be accord of liquidated or disputed or unliquidated demand.

3. Under Sec. 5825, Comp. Laws, 1913, providing that an accord is an agreement to accept in extinction of an obligation something different from or less than that to which the person agreeing to accept is entitled, there may be an accord of either a liquidated or a disputed unliquidated demand.

Evidence — testimony as to conversation in defendant's absence with defendant's former agent held inadmissible as hearsay; testimony as to conversation with defendant's adjuster inadmissible, unless shown to be within scope of his authority; testimony as to conversation concerning other claims subsequent to alleged settlement held inadmissible.

4. Certain testimony held to have been erroneously admitted.

Witnesses — called to testify in number of cases at same term entitled to re-

ceive fee in particular case only for number of days actually in attendance before court for purpose of testifying in such case.

5. Under Sec. 3535, Comp. Laws, 1913, providing that witnesses are entitled to receive for each day's attendance before the District Court the sum of two dollars, a witness called to testify in a number of cases at the same term is entitled to receive in a particular case the statutory fee for only the number of days he was actually in attendance before the court for the purpose of testifying in that case.

Witnesses — from outside state entitled to mileage for distance actually travelled within the state.

6. Under Sec. 3535, Comp. Laws, 1913, providing that witnesses are entitled to receive for each mile actually travelled one way ten cents, witness coming from without the state is entitled to receive the statutory sum for the number of miles actually travelled within the state.

Witnesses — counsel for one of parties not entitled to witness fees, though called as witness.

7. An attorney appearing in a case before the Court as counsel for one of the parties, even tho he is called as a witness in said cause, is not entitled to witness fees.

Witnesses — plaintiff in one action where called as witness in other similar actions is entitled to witness fees.

8. A person called as a witness who is plaintiff in another similar action and is present in court awaiting trial of said action is entitled to witness fees for his actual attendance in court on account of the case in which he testifies, the same as any other witness.

Opinion filed March 21, 1922. Rehearing denied July 14, 1922

From a judgment of the District court of Morton county, *Lembke, J.*, defendant appeals.

Reversed and a new trial ordered.

Barnett & Richardson, for appellant.

Competency of jurors where the same question of fact is involved, and where one of the parties is the same in both cases.

In *Spear v. Spencer*, 1 G. Greene 534, it appeared that jurors who had rendered a verdict on an indictment were held incompetent to sit in an action of trespass against the same defendants, involving the same question in relation to the same subject matter, although they declared upon their voir dire that they had not formed or expressed an opinion.

In *Stephens v. State*, 53 N. J. L. 245, 21, Atl. 1038, on a prosecution

for embezzlement it was held to be good ground for challenge that a juror called in the case had sat in a previous trial of the defendant for one of the same series of embezzlements. See also *Apperson v. Logwood*, 12 Heisk (Tenn.) 262; *Mo. P. Ry. Co., v. Smith*, 60 Ark. 221, 29 S. W. 752; *Baker v. Harris*, 60 N. C. 277, involved an action for fraudulently removing a debtor, thereby damaging a creditor; and it was held that a juror who had sat in the case of another creditor against the same defendant for the same act of removal was subject to challenge. See also *Garthwaite v. Tatum*, 21 Ark. 335, 76 Am. Dec. 402; *Swarnes v. Sitton*, 58 Ill. 155.

Competency of jurors where the same question of fact is involved in both cases, and where both parties are different. *People v. Mol*, 137 Mich. 692; 100 N. W. 913, is the leading case on this subject.

In the last case cited *Mol* had been convicted of the charge of having corruptly accepted \$300 to vote, as an alderman, in favor of the city entering into a certain contract. Six of the men who sat as jurors on his trial had only a few days before assented to a verdict of guilty on the case of one *Ellen*. *Mol* exhausted his preemptory challenges, challenged these six jurors for cause and the trial court overruled the challenge. The Supreme Court held these six jurors were subject to challenge for cause. See *Stevens v. People*, 38 Mich. 739, *Smith v. Eames*, 4 Ill. 76, 36 Am. Dec. 515; *People v. Troy*, 96 Mich. 530, 56 N. W. 102.

"Due process of law" implies and requires trial by an impartial jury.

In *Cancemi v. the People*, 16 N. Y. 501, a juror upon the trial of an indictment, being challenged for principal cause, testified on his direct examination that he had formed an opinion and had expressed it; and, on his cross examination that he had no fixed opinion, which could not be removed by the evidence. Held, that the juror was disqualified. See also *Olive v. State*, 11 Neb. 1, 7 N. W. 444; *Curry v. The State*, 4 Neb. 545; *Carroll v. The State*, 5 Neb. 31; *People v. Bock*, 96, N. Y. 188; *Hayes v. Missouri*, 120 U. S. 68; *Reynolds v. U. S.*, 98 U. S. 145.

Nuchols & Kelsch, and *Jacobsen & Murray*, for respondents.

COOLEY, District Judge. This is an appeal from a judgment in favor of the plaintiff. The action is upon a policy of insurance in which the defendant undertook to insure the plaintiff "against loss or damage to crops, and against failure of crops from hail, or any other cause, except fire, floods, and winter-kill, to the amount of \$1,617.00" during the year

1917. The complaint alleges the making of the contract to the effect above stated, the plaintiff's ownership and the value of the crops per acre; that the plaintiff had sustained loss and damage within the risk assumed by the defendant; that he had fulfilled the conditions of the policy on his part; that the value of the crops harvested, computed according to the terms of the policy, was \$804, and that the loss and damage by reason of hail, drought, and hot winds, computed according to the terms of the policy, was \$813, proof of which loss was duly furnished to the defendant; that thereafter the defendant sent an adjuster, who adjusted plaintiff's loss at \$813; that he falsely and fraudulently represented to the plaintiff that the defendant company was bankrupt and unable to pay more than the amount of premium previously paid by the plaintiff, \$161.70, and further represented that this was all the company was paying to any of its policy holders, but that if the company could not make settlement with all of its policy holders on this basis it would go through bankruptcy and the premiums would be consumed as expenses; that, believing and relying upon the representations so made by defendant's adjuster, the plaintiff signed the release, releasing the company from liability; that the adjuster falsely represented the release to be merely a receipt for the repayment of the \$161.70 premium; that the representations were false in fact, and known by the adjuster to be false; that the company was not in hard financial straits or bankrupt, but, on the contrary, was able to pay all losses, including plaintiff's; that, in fact, all the policy holders did not accept a return of their premium or settle on that basis; that the paper which the defendant induced the plaintiff to sign, and which was represented as a receipt for the return of the premium, was an adjustment adjusting plaintiff's loss in the sum of \$161.70 and releasing the defendant from further liability; that most of the policy holders of the defendant received 100 per cent. of their loss.

The answer admits the insurance contract; admits the payment of \$161.70 to the plaintiff; admits that it was not bankrupt, and that certain of its policy holders did not accept a return of their premiums in settlement; and alleges that the papers signed by the plaintiff evidence the adjustment and settlement of his loss, and a release of the defendant from further liability.

As an affirmative defense it is alleged that the plaintiff represented at the time of the application that his crops were all a good stand and in good condition, and had not been damaged prior thereto; that it was agreed that if the statements regarding the condition of the crop were

untrue the policy, at the election of the defendants, should become null and void. Breach of this condition is alleged, in that the plaintiff's crops were materially, seriously, and noticeably injured by drought and other causes, and were not of a good stand when the application was made; that upon learning these facts later, defendant denied liability, but offered to return the premium, which offer was accepted. The defendant further relies upon certain provisions of the policy which declared it to be void on account of alleged misrepresentations, fraud, concealment, or false swearing, and on account of willful misrepresentations in the application. It also pleads the settlement on the basis of the payment of \$161.70, as an adjustment of the plaintiff's disputed and unliquidated claim.

At the term of court in which this action was tried there were 40 actions of similar character upon the calendar, each one brought by a different policy holder against the same defendant. The complaints in all were practically identical and the answers substantially the same. The witnesses called by the plaintiff to establish their case were generally the same, with the exception of the plaintiff himself in each case, and the witnesses for the defendant were practically identical in all of the cases. Thirty-one of the cases were tried, and of the 31 cases, 26 were tried before jurors, one or more of whom had sat in the trial of some of the other cases of similar character. The defendant challenged such jurors for cause, and objected to their sitting. The trial court overruled the objections and challenges, and such ruling constitutes one of the principal assignments of error on this appeal. Other facts necessary to be noticed will be stated at an appropriate place in the opinion.

The defendant objected to certain items of cost taxed by the plaintiff in each case, and the clerk, upon retaxation, sustained some of the defendant's objections. The district court declined to make further changes. This matter is likewise here for review, and the facts concerning the costs will be stated at the end of the opinion.

The examination of the jurors upon their voir dire is in the record, and it may be briefly stated as follows: Jurors were called who had sat in from one to as many as 6 of the previous similar cases tried at the same term. They stated that they had made up their minds upon the conflicting questions of fact submitted in the previous cases, and that if the facts were the same in the case upon trial, their decision would necessarily be the same; that it would require additional evidence on the part of the defendant to overcome their opinions on such facts; that if

the evidence were the same they would come to the same conclusion; that their minds were fixed and made up after hearing the evidence in the other cases. One juror said there was no way he knew of that the defendant could win this lawsuit. Notwithstanding this examination, by way of foundation for challenges, however, the jurors generally testified in response to questions from the court that if they were selected, they could act fairly as to both parties, and try the case fairly and impartially on the evidence. They also declared themselves to be free from bias or prejudice, whereupon the challenges in each instance were overruled.

It is contended that prejudicial error was committed in overruling the challenges made under the general circumstances stated above. It is said that where the evidence adduced on the voir dire shows that the condition of a juror's mind is not open, and that he is in fact prejudiced, at least hypothetically, as to the issues of fact in the case, an absolute disqualification arises, notwithstanding his declaration of absence of bias and willingness and ability to try the case fairly and impartially on the evidence. We are of the opinion that the jurors who had sat in the previous cases were disqualified. Section 7616 of the Compiled Laws of North Dakota for the year 1913 recognizes as grounds of challenge for cause the fact that a juror has been a witness or juror on a previous trial between the same parties for the same cause of action; also that he has an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or some of them.

It is argued by respondent that the grounds for challenge enumerated in the section above cited are exclusive, and that, inasmuch as the parties are not the same in this action as in the previous trials in which some of these jurors had participated and the cause of action not the same, they are not disqualified. This portion of the statute (§ 4) renders a juror incompetent on the substantial ground that he has previously been compelled to form an opinion on the facts in dispute, as would necessarily be the case if the parties and cause of action were the same. But this is not all of the statute. It likewise renders incompetent one who may have an unqualified opinion or belief as to the merits founded upon a knowledge of some of the material facts. Paragraph 6. This statute does not concern itself with the source of the juror's knowledge, but we think it clearly implies that a knowledge gained from any reliable source which has been crystalized into an unqualified opinion or belief as to the merits of the case disqualifies a juror. Did the jurors have such knowledge of material facts in the instant case as would lead them to an un-

qualified opinion or belief as to the merits? They said on their voir dire that if the evidence were the same as in previous cases, their verdict would necessarily be the same. This means, and can only mean, that they would come to the same conclusion on disputed facts where the same evidence would be adduced to prove them. In this way the defendant's case was at least partially prejudged, as a reference to the issues and the record will readily disclose.

It was contended by the defendant that the crops were not in the condition represented at the time the application was taken. To prove this, it relied chiefly upon the testimony of one Roberts, of the United States Weather Bureau, and of some farmers in the neighborhood. This testimony, being general in character, would necessarily be substantially the same in the various cases. Again, the facts with reference to the representation that were authorized to be made in securing settlements under the various policies are extracted from conferences that were had between certain representatives of the defendant and other persons whose interests were not the same. The testimony concerning the negotiations at these conferences was not harmonious, but was sharply conflicting. A juror adopting the defendant's version of the facts transpiring at these conferences might well adopt the defendant's view of all the facts and arrive at a verdict in its favor. On the other hand, if the juror had adopted the plaintiff's version, he would be likely to accept his views as to the remaining facts. Such facts as those referred to here are identical in the various cases, and are provable by the same witnesses. Basically the issues in these cases turn upon questions of credibility, and the facts are so similar in all of the cases that no juror could determine one of them without passing upon the credibility of most of the witnesses for the defendant. Thus a juror who had previously gained sufficient knowledge of the material facts to form an unqualified opinion or belief as to the merits of a previous action, which depended in a measure upon the same facts as those about to be presented, is disqualified within ¶ 6 of § 7616 of the Compiled Laws. It must be assumed that his knowledge of material facts would operate upon his mind to the same effect in all cases in which those facts were material. It is the clear purpose of the statute to insure against a suitor's having to overcome an obstacle of this sort in submitting his case to a jury. The current of authority, independent of statute, seems to be to like effect. See note 68 L. R. A. 673. It follows from what has been said that a new trial must be had.

In view of the new trial we deem it proper to discuss questions presented by other assignments which are likely to arise upon the new trial. It is not alleged in the complaint in this action that it was agreed between the plaintiff and the defendant's adjuster that if the defendant company paid more to other policy holders than a return of their premium he also would receive more. The court, however, permitted testimony to go in over objection of the defendant to prove such an agreement. This testimony was not within the issues, and the objections were sufficiently specific; hence it should have been excluded.

For the same reasons certain testimony as to the amount paid to other policy holders upon settlement of their claims should have been excluded.

The trial court also instructed the jury to the effect that if they believed an agreement of accord had been entered into whereby the defendant had undertaken to repay to the plaintiff his premium, and an additional amount in case other policy holders received more than a repayment of their premium, the plaintiff, before the accord was completely executed, might repudiate it, and sue upon the original obligation for any balance owing him, without rescinding the original accord. This instruction is likewise not within the issues by reason of the absence of allegations in the complaint of such an accord. In *Lehde v. National Union Fire Insurance Co.* (N. D.) 180 N. W. 56, where the complaint was similar to that in the instant case, it seems that the evidence concerning the additional agreement to pay more than the premium in settlement of the disputed liability went in without objection—in fact the defendant and appellant largely relied upon this evidence as the basis for the errors assigned upon appeal, and for purpose of that appeal it was considered as properly in the case. Owing to the character of the complaint in this action, we would be content to point out the error in the reception of evidence and the instruction of the court relating to accord and satisfaction, were it not for the fact that a number of appeals are contingent upon the decision in this case, in all of which the pleadings and record may not be the same in this respect as in the instant case. Furthermore, counsel for the respondents have specifically asked a reconsideration of the principle applied in the case of *Lehde v. National Union Fire Insurance Co.*, supra, with reference to accord and satisfaction. In view of this situation it is perhaps well to set the matter at rest.

Counsel argued that, inasmuch as the defendant was contesting the right of the plaintiff to recover anything by reason of the alleged mis-

representation as to the condition of the crop at the time the application was taken, there is nothing upon which an accord could operate. They say if their position were established, the plaintiff had "nothing coming whatsoever." We quote from the brief:

"With this sort of a situation in mind, the parties meet, and the plaintiff agrees to accept a certain sum in settlement, and as much more as others, similarly situated, might thereafter receive. No legal basis exists for the court or counsel to state that under such a settlement the plaintiff was agreeing to settle for less than he was entitled to receive. Under the defendant's contention he was getting 100 per cent. more than he should have received. There is therefore no legal basis whatsoever in the proof for any claim for an unexecuted accord or satisfaction."

The error in this contention lies in the assumption that it is impossible to have an accord and satisfaction of a disputed or unliquidated demand. Such is not the law. On the contrary, unliquidated demands form a peculiarly appropriate subject-matter for accord and satisfaction.

"A claim for damages arising from the commission of a tort being generally of an unliquidated nature and almost invariably disputed, not only as to amount, but also as to liability in fact, forms an ideal subject-matter for an accord and satisfaction, and that such a claim may be compromised and settled by an accord and satisfaction seems to be universally admitted." 1 R. C. L. 179

Under our statute, therefore, § 5825, Compiled Laws of 1913, there may be an accord of either a liquidated or a disputed unliquidated demand. Section 5826, Compiled Laws of 1913, states that the parties to an accord are bound to execute it, but it expressly provides that an unexecuted accord does not extinguish the obligation. Since the principal obligation is neither released nor suspended by the executory accord, an action may be maintained upon it subject to whatever defense or counterclaim the defendant may have.

Certain testimony of the plaintiff was received concerning a conversation had in the absence of the defendant between him and one who had been, but was at the time of the conversation no longer, an agent of the defendant company, regarding the false representations alleged to have been made in procuring the settlement. The admission of this testimony over defendant's objection was error. Whatever plaintiff said was merely self-serving, and whatever the other party to the conversation said could not have been binding upon the defendant.

The testimony of the witness Peterson with reference to a conver-

sation had between him and the defendant's adjuster, regarding what took place at a conference between the witness, such adjuster, and officer of the company, and others, concerning the claims in suit, was also erroneously admitted. It was not in any way binding upon the defendant, for the reason that any admissions the adjuster might have made at the time of the conversation were not shown to have been within the scope of his authority.

Testimony of a witness for plaintiff was also admitted concerning a conversation had between the witness and representatives of the defendant company long subsequent to the settlement of the claims in suit respecting the future action of the company in procuring the settlement of entirely different and distinct policy claims, in no way connected with the claims in suit. This testimony was immaterial and irrelevant, having no bearing whatever upon the legal rights of either party. The defendants objection should have been sustained, and the admission of such testimony was highly prejudicial to the defendant.

Upon the question of costs little need be said. The plaintiff adhered to a cumulative principle. To illustrate: The witness Nason was a material witness for the plaintiff in each of a number of cases. In each case the attendance item embraced the date of trial for that particular case and the number of days he had been present previous to that time awaiting the trial. Approximately 43 days were consumed in the trial of these drought insurance cases, and during this time Nason testified in various cases at the rate of approximately a case per day. Under the cumulative principle sought to be applied by the plaintiff in taxing costs this witness' attendance during the 43 days aggregated 500 days. Under the statute, § 3535, witnesses are entitled to a per diem stipend for each day's attendance before the district court. They are entitled to the statutory fee for each day they are actually in attendance before the court for the purpose of testifying in a particular case; not for a purely fictitious attendance. Attendance is not governed by the number of cases pending in which the particular person may be required as a witness. We express no opinion as to the right to tax attendance in each of two or more cases where the witness may testify in all on the same day.

It is claimed the mileage fees cannot be taxed for mileage of witnesses called from outside the judicial district. Our attention has not been called to any statute that restricts the right to tax as costs the mileage a witness has necessarily traveled within the state, and § 3535, Compiled Laws of 1913, which authorizes mileage to be taxed, does not take into ac-

count the boundaries of judicial districts; hence actual mileage within the state may be taxed.

Items taxing witness fees for attorneys who otherwise appeared in the cases are objected to. We think these objections were properly sustained. Attorneys otherwise in attendance should not claim witness fees and thus enhance the costs of litigation.

Another objection relates to costs taxed on account of attendance of persons as witnesses who were plaintiffs, in other actions of similar character, and who were present in court awaiting the cases in which they were interested respectively. Any such witness is clearly entitled to witness fees for his actual attendance on account of the case in which he testifies the same as any other witness, but no more, and no fees for the time he is in attendance as a party.

Judgment reversed, and cause remanded for a new trial. The appellant will recover costs.

BIRDZELL, ROBINSON, and CHRISTIANSON, JJ., and COFFEY, District Judge, concur.

GRACE, C. J., and BRONSON, J., disqualified, did not participate; COOLEY and COFFEY, District Judges, sitting in their stead.

AMENIA & SHARON LAND COMPANY, a corporation, Respondent, v. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, a corporation, Appellant.

(189 N. W. 343)

Negligence — automobile driver held negligent; automobile driver's negligence not imputable to occupants; negligence of railroad in approaching crossing held for jury.

Five actions were brought and tried together to recover damages against defendant railroad company for alleged negligence resulting in a collision upon a crossing, know as McCarty's crossing, four miles south of Detroit, Minnesota. Those injured in the collision were riding in a

one-seated Buick roadster. As it was going over the crossing it was struck by an engine pulling a freight train. It is *held*:

1. For reasons stated in the opinions, the judgments in favor of the driver of the car and of the owner who entrusted it to his care, should be reversed.

2. For reasons stated, the judgments as to the remaining plaintiffs, who were passengers in the car, are affirmed.

Opinion filed June 9, 1922. Rehearing denied July 18, 1922

Appeals from judgments of the District court of Cass county; *Cole, J.*

Reversed as to plaintiffs A. E. Cure and Amenia & Sharon Land Company; affirmed as to remaining plaintiffs.

Young, Conmy & Young, for appellant.

Outside of the limits of cities, villages, and towns, no rate of speed of a railroad train; however great, is evidence of negligence. *Railroad Co. v. Grablin*, 38 Neb. 90, 56 N. W. 796 and 57 N. W. 552; *Railroad Co. v. Hansen* (Neb.), 66 N. W. 1105.

But the failure of a railroad company to ring a bell or sound a whistle when approaching a crossing is simply evidence which tends to prove negligence on the part of the railroad company. It does not necessarily demand an inference of negligence. *Railroad Co. v. Metcalf*, 44 Neb. 848, 63 N. W. 51.

"This court had already held that running a passenger train at a rate of speed shown by the record to have been the speed being made by the train in this case, not within any city limits, was not negligence." *Omaha & R. V. R. Co. v. Talbot*, 48 Neb. 627, 67 N. W. 599; *Jordan v. Osborne, et al.*, 133 N. W. 32; *Liverett v. Nashville C. & K. Ry.* 65 So. 55.

"It is for the legislature, not for the courts, to say that the defendant shall change its train schedule, and this is what holding the defendant negligent on the ground of excessive speed would amount to." 145 N. W. 1088; *State v. Philadelphia B. & W. R. Co.*, 87 Atl. 496 (Md.)

Where the speed of the train is great, care in giving warning of the approach of the train commensurate with the danger must be observed. *Railroad Co. v. Goetz's Adm'x.* 79 Ky. 442, 42 Am. Rep. 227; *Parkerson v. L. & N. R. Co.*, 80 S. W. 468.

This being in effect a country crossing, the statute applies." *Louisville & N. R. Co. v. Molloy's Adm'x.* 91 S. W. 687.

"When the company and its agents conform to such legislative directions they are within the protection of the law." *New York L. E. & W. R. Co. v. Leaman*, 23 Atl. 692-3.

"Where the whistle on an engine is sounded when the train is from a quarter to half a mile from a country grade crossing, so that it can be heard there, and the track can be seen for a distance of about 400 feet at a point 800 feet from the crossing, and 74 feet from the crossing it can be seen for 990 feet, it is not negligence to run a train at the rate of 50 miles an hour over such crossing." *Newhard v. Pennsylvania R. Co.* 26 Atl. 105 (Pa.)

"The duty of an automobile driver approaching a crossing with view of track obstructed is to look and listen before going on the track, and as soon as seeing and hearing are reasonably possible; to keep a lookout from there on such as an ordinarily cautious person would but for some sufficient diversion of his attention; to have his machine under such control that on discovering a train he, acting as a person of ordinary skill and prudence, can stop in time; to determine, acting as a person of ordinary care, on discovering a train, whether he can safely pass or should wait—all this, regardless of the train running at excessive speed and without signal." * * * "Driver of automobile struck at a dangerous crossing, with which he was familiar, by train approaching at excessive speed and without warning signal, held, guilty of contributory negligence, as a matter of law, in not observing after passing structures obstructing his view, or not having machine under control, or in taking chance of crossing ahead of train." *Corbett v. Hines. Director General of Railroads*, 180 N. W. 690.

The following cases deal specifically with about this situation and hold there was contributory negligence as a matter of law. *Central R. R. v. Barnett* (Ala.) 44 So. 392; *Aurelius v. Ry.* 49 N. E. 857; *Schufelt v. Ry. Co.* (Mich.), 55 N. W. 1013; *Tucker v. Ry. Co.* (Mich.), 80 N. W. 984; *Jobe v. Memphis Ry.* (Miss.), 15 So. 129; *Kelsey v. Ry. Co.* (Mo.), 30 S. W. 339; *Cleveland Ry. Co. v. Elliott*, 82 Ohio St. 340; *Glum v. Harris*, 37 Atl. 515; *Dehoff v. Ry. Co.*, 78 Atl. 104; *Schneider v. Ry. Co.* (Wis.), 75 N. W. 169; *B. & M. Ry. v. McGrath*, 179 Fed. 323.

"Relative to contributory negligence, a passenger in an automobile struck by an engine at a crossing could not rely on the driver, but had to look for approaching of the engine." *Kirby v. Kansas City, K. V. & W. Ry. Co.* (Kan.), 186 Pac. 746.

"Where a husband and wife, traveling together in a conveyance which

the former is driving, are injured in a collision on a railroad crossing, the court cannot properly instruct that, if the wife relied on her husband to look and listen and to exercise reasonable care, she was relieved from so doing herself, since she was bound to the same degree of care as her husband." *Willfong v. Railway Co.*, 116 Iowa, 548, 90 N. W. 358.

"The rule that the driver's negligence may not be imputed to the plaintiff should have no application to this case. Such rule is only applicable to cases where the relation of master and servant or principal and agent does not exist, or where the passenger is seated away from the driver by an enclosure, and is without opportunity to discover danger and to inform the driver of it. It is no less the duty of the passenger, where he has the opportunity to do so, than of the driver, to learn of danger, and avoid it if practicable." *Rebillard v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 216 Fed. 505-6.

Fowler, Green & Wattam, for respondent.

Wigmore Ev. 664; 2 *Elliot Ev.* 969; *Cinadar v. Detroit, G. H. & M. Co.*, 159 N. W., at p. 315 (Mich.); *Kaufmann v. C. M. & St. P. Ry., Co.*, 159 N. W. 552 (Wis.); *Zenner v. G. N. Ry. Co.*, 159 N. W. 1087 (Minn.); *Cotton v. Ry. Co.*, 109 N. W. 835 (Minn.)

"Statutory precautions imposed upon railway companies for the protection of travelers at crossings do not furnish the only standard of care or caution, but are cumulative merely, and do not exclude a liability on the part of the railway company for failing to take such other and further precautions as may be reasonably necessary under all the surrounding circumstances." *Thompson on Negligence*, Vol. 2, § 1555.

"The statutory provisions of the state regulating the ringing of the bell and blowing of the whistle on approaching a public crossing are not the sole measure of the duty of a railroad company to protect persons and property at public crossing. Nor do regulations embodied in ordinances passed by city councils under statutory authority, regulating the speed of trains and the giving of signals at public crossings within city limits, constitute the sole criteria of the care to be used by such corporations in the management of their trains. The common law obligation resting upon such corporations to use proper care in the operation of their trains to protect persons and property is not diminished by such statutory provisions or ordinances." *Coulter v. G. N. Ry. Co.*, 5 N. D. 568 (Quotation from syllabus); *Wilson v. Ry. Co.*, 142 N. W. 59 (Iowa). See especially *Yinyon v. C. & N. W. Ry. Co.*, 92 N. W. 40 (Iowa), and cases cited.

"Railroad men are not entitled to more credit, as a matter of law, because of their knowledge and experience as such on the question as to the speed at which a railroad train was run, in an action for damages for a personal injury by being run over by such a train, though the fact of their possessing such knowledge and experience might properly be considered by the jury in determining what weight should be given their testimony" *Louisville & St. L. Consol. R. Co., v. Gobin*, 52 Ill. App. 565.

"The rate of speed, though not regulated by law, may be considered with other facts tending to establish negligence." *Artz v. Railroad Co.*, 44 Iowa 285.

While it is not necessarily negligent to run a train at the usual rate, or at 40 miles an hour, it is negligent to maintain the usual rate of speed without observing the usual precautions and danger signals to warn the public of its approach."

"While the general rule is that no rate of speed by a railroad train in the open country is negligence per se, it is not less true that a railroad company running its trains across streets and highways must operate them with due regard to the rights and safety of the public at points where these avenues of travel and commerce intersect * * * this duty is emphasized where the crossing is made in surroundings which obscure the view or are of such a character as to render the ordinary signals less noticeable or less effective." *Wilson v. C. M. & St. P. Ry. Co.*, 142 N. W. 54 (Iowa).

"Travelers may, within reasonable limit, act upon the assumption that due care will be exercised in the management of trains and giving of crossing signals." *Jenkins v. Minneapolis and St. L. R. Co.*, 145 N. W. 40 (Minn.)

"Automobilists approaching a crossing have a right, if the contrary does not appear, to assume that the railroad employees will give the customary warning and will not run at a speed in excess of that allowed by ordinance." *Barrett v. C. M. & St. Ry., Co.*, 175 N. W. 950 (Iowa); *Edwards v. G. N. Ry. Co.*, 42 N. D. 154; *Wilson v. C. M. & St. P. Ry. Co.*, 142, N. W. 59 (Iowa); *Pendroy v. G. N. Ry. Co.*, 17 N. D. 433. See also *Stone v. N. P. Ry. Co.*, 29 N. D. 480; *Hauff v. S. D. Central Ry. Co.*, 147 N. W. 986 (S. D.); *Wallenburg v. Ry. Co.*, 126 N. W. 289 (Neb.); *Green v. Ry. Co.*, 69 Pac. 694 (Calif.) See also *Barrett v. Ry. Co.*, (Iowa) 175 N. W. 950.

ROBINSON, J. At a point about 4 miles south from Detroit, Minn., the Soo Railway crosses a highway; it is known as McCarty's crossing. There on a pleasant summer afternoon of June 22d, at 4 p. m., a freight railway train of 22 cars, going north at a speed of 25 miles an hour, collided with the rear end of a Forty-Five Buick roadster going east on the highway at a speed of 20 miles an hour—30 feet per second. The mobile was badly demolished. Mrs. Cure, a lady of 42 years, was killed, and each of her four children sustained injuries. Mr. Cure, the grandfather of the children, who had assumed the place of the father, was the driver of the Buick, and he escaped serious injury. The Buick had but one seat, sufficient for only two or three persons. Mr. Cure sat on the driver's side, which was the left end of the short seat. One girl sat on his right, holding a baby on her lap. On her right the mother sat, holding on her lap another child, and the boy of 11 years stood on the running board, holding onto the wind shield. They were out on a family picnic, and were going to Detroit for supplies. For a considerable distance before reaching the crossing the road was parallel to the railway track and at a distance of about 200 feet. Approaching the crossing the road made a gradual turn to the east. When the car was within 60 or 70 feet of the crossing it was seen by a brakeman. The boy was seen with a foot lifted as if about to jump from the car. The alarm was given. The engineer applied the emergency brakes. The boy called to his grandpa, and the collision was immediate. The parties injured assert that the negligence of the railway company was the direct and proximate cause of the accident. The company assert that the proximate cause was the negligence of the plaintiffs. Of course it is possible for an accident to happen without the fault or neglect of either party. But, certain it is, the railway train had the right of way. It did not have to stop, or even slow up, at a country road crossing. It was under obligations to blow the whistle at a whistling post set a quarter of a mile from the crossing. It is certain the whistle was duly blown. The engineer testifies that at the post he did sound the whistle two longs and two shorts, and he pushed the button which set in motion a continuous ringing of the automatic bell. His testimony is well corroborated by two brakemen. The whistling and the ringing was in accordance with duty and confirmed habit. The affirmative testimony in support of it far outweighs the negative testimony against it. Trainmen are anxious to save life and to avoid accidents. That is shown by the heroic conduct of the engineer, Mr.

Haygarth, who risked his life in rushing forward and catching the little girl, who was hanging onto the pilot beam, and hanging onto her till the train stopped. In all probability there was not one of the train crew who would not have risked his own life to save any of the children. Though in the railway service, "a man's a man for a' that."

And now for the negligence of the plaintiffs, Mr. Cure was an expert driver and speeder. He had in hand a new Buick Forty-Five roadster. He knew well how to use it. He went onto the crossing at a speed of 20 miles an hour, 30 feet per second. In one-fourth of a second more of leeway he would have made the crossing, and made Detroit before the freight train. As it was, the engine barely struck the hind end of the car, which was laden with six persons. The car was made for only two persons. By reason of the fact that Mr. Cure was cramped, the action to his hands his feet, and his mind were impeded. So the chances are that he lost a quarter of a second. The boy on the running board saw the fast approaching train in time to jump off, but he concluded that his fast speeding car would make the crossing, and of course there was danger in jumping off. The plaintiffs were guilty of negligence in piling into and overcrowding the car and thereby hampering the driver and obstructing his vision and hearing. They were negligent in not bringing the car to a full stop or looking both ways before crossing the track. By law when two trains approach a railway crossing each train must stop so that one cannot run into the other. But no railway train is required to stop or even slow up at country highway crossings. Before attempting to cross a railway track it is the duty of every pedestrian and every person to stop or look out for the cars. If he fails he is guilty of negligence, and must suffer the consequences. In cases of this kind and in thousands of other cases the children may suffer, and must suffer, from the neglect of those who control them. The owners of the roadster must suffer from the negligence of the person to whom they intrusted their car.

And now for the verdict, so far as material:

Q. 5. Did defendant, in view of all the circumstances and surrounding facts, exercise due and reasonable care as far as blowing the whistle? A. No.

Q. 6. Did defendant exercise reasonable care so far as ringing the bell is concerned? A. No.

Q. 7. Did defendant exercise due and reasonable care in speed of the train. A. No.

Q. 8. Was such failure the proximate cause of the accident? A. Yes.

Q. 12. Did Mr. Cure exercise reasonable and ordinary care and diligence in the manner in which and the speed at which he approached and drove onto the crossing? A. Yes.

Q. 14. What damages, not exceeding \$7,500, have the children of Mary Cure sustained by reason of the death of the mother? A. \$7,500.

The verdict is clearly the result of sympathy, pity, and commiseration and of little regard for the rights of the big corporation. It is not sustained by the evidence. It is clear the engineer did blow the whistle and ring the bell, and there was no lack of care in speeding the train. It is also clear that the proximate cause, the direct cause, of the injury was the failure of the plaintiffs to stop and listen and look both ways before driving onto the railway track. There was manifest negligence in speeding the car up to and onto the track at the rate of 20 miles an hour. The speed was such that the boy who stood on the running board and saw the fast approaching train was afraid to jump off. He must have thought that the speed of his car would take him safely across, or that the speed was such that it would be more dangerous for him to jump off than to remain on the car. Had the roadster been driven at 10 or 12 miles an hour the boy would not have hesitated to jump off, and possibly Mr. Cure would not have hesitated to apply the brakes and stop his car. But going at a speed of 20 miles an hour there was more danger in trying to stop the car than in speeding across the track in front of the approaching train.

It was error for the court to submit to the jury question 7, concerning reasonable care in the speeding of the train.

It was error to submit question 5, concerning reasonable care in the blowing of the whistle. There was no real dispute concerning the whistling.

It was error to submit question 6, concerning reasonable care in the ringing of the bell. *The question should have been, Was the bell rung continuously;* and, if not, then did the failure to ring it cause the accident? When a locomotive is about to start and when it moves at a slow speed through towns, the bell ringing is a matter of great importance, because it can be distinctly heard. But when a locomotive pulls 22 freight cars, 25 miles an hour, the loud, heavy, and continuous noise of the locomotive and the cars drown the sound of a bell. When a railway freight train moves at the usual speed, it is commonly heard

at a distance of one-half a mile. It is heard by people in their homes, hotels and rooms, and beds, but the sound of a bell is never heard. The bell is heard only by those who are near to a slow moving train; hence it is certain that the accident was not caused by any failure to ring the bell. It was caused by recklessly running the Buick roadster onto the railway track in front of a fast moving train.

The above was written as the opinion of the court. Mr. Justice Christianson concurs by a special opinion. The other three judges hold in part to the contrary. Hence the decision of the court is that the judgment be reversed as to the car driver, A. E. Cure, and the owner of the car, Amenias & Sharon Land Company, and that as to the other three plaintiffs it is affirmed.

GRACE, J. (Dissenting in part and concurring in part). This is an appeal from five judgments of the district court of Cass county, wherein a judgment was entered in each case in favor of the plaintiff and against the defendant. It is stipulated that the same evidence and exhibits may be considered as the record in all cases.

The cases grew out of a railroad crossing accident. The crossing is located a short distance south of Detroit, Minn., and is known as McCarty's crossing. The damages claimed is for compensation for injuries there received to persons or property. All the cases were consolidated for trial, and are likewise here consolidated and are briefed together. The basis of the action is negligence on the part of the defendant in failing to give proper signals while approaching and running their train over the above crossing. The defendant denied negligence, and alleged contributory negligence. As the accident occurred in Minnesota, the law of that state, with reference to giving of proper signals on approaching railroad crossings, is applicable and governs. The pleadings are largely similar in each case.

These are the material facts: On the 22d day of June, 1920, A. E. Cure, then resident of Amenias, Cass county, and his daughter-in-law, Mary E. Cure, and her four children, Harold, Madeline, Helen, and Clayton, whose respective ages, in the order named, are 11, 9, 7, and 2 years, were driving along a public highway, a short distance south of Detroit, Minn. The conveyance in which they were riding was an automobile, a Buick roadster; it was driven by A. E. Cure; it was owned by the Amenias-Sharon Land Company. Cure was then, and for 11 years had been, the superintendent of that company, and for 7 years prior

thereto was assistant superintendent. The car at that time had on it a winter top, with glass in sides of doors. The door on the right side was off, and the glass on the left-hand door was halfway down, and the wind shield was open. It had but one straight seat. Cure was driving, and sitting on the left side of the car; Helen Cure sat next to him, with Clayton on her lap; Mary Cure, the mother sat on the right side of the seat, with Madeline in her lap; Harold was standing on the right running board, holding onto the side of the wind shield.

The car was being driven northward toward Detroit; the highway, upon which it was being driven extended substantially parallel with the railroad until a point about 100 feet from the crossing was reached, where it turned eastward, and passed over the railroad tracks. On the railroad about 906 feet south of the crossing there was a cut through which the railroad extended. At its entrance it was about 7 feet in depth, increasing to about 15. Commencing at a point 20 feet from the crossing, and extending southward for a distance of 90 or 100 feet on the right of way, there were brush and trees which completely obscured the sight of the railroad from persons riding in an automobile along the highway at that point, except if the automobile were going very slow or were stopped, there were perhaps certain points where one could see through them. There was more or less brush and timber along the right of way from the north end of the cut to the crossing, except there was a space of about 250 feet where there was not much brush or trees, and the railroad track could be seen from the highway for that distance.

Kohler, a liveryman of Detroit, had driven over the McCarty crossing between 100 and 150 times a year. Three days after the accident he with Mr. Greene drove two different times, in an automobile, over the same road driven by Cure on the day of the accident; they started at the top of the hill on the road south of the crossing, and drove northward until they had driven over the crossing. He testified, in substance, that until the bottom of the hill was reached, nothing could be seen; then for 250 feet the track could be seen, and the rest of the way was all brush until the crossing was reached. He testified that for 90 or 100 feet from the crossing there extended heavy brush and trees, which commenced about 20 feet from the crossing; that while driving along there he could not see through the heavy brush and timber, and that, at that place, a train could not be seen while approaching from the south; that he would be practically on the track before he could see the train, or within 10 or 12 feet of it.

Prior to the time of the accident, Cure had made two or three trips over the crossing; he knew the crossing was there, but did not know all the conditions surrounding it; the highway was not very good; he was traveling on it northward towards the crossing, and at a point on the highway about 200 feet south of the crossing he looked southward, but saw no train. At this point he could see the mouth of the cut; he looked again at 75 feet from the crossing, but he could not see through the brush; he was traveling then at the rate of about 15 or 20 miles per hour; when he turned eastward to go over the track, he was traveling at the rate of 10 to 15 miles per hour; he never shut off the engine, and did not hear any bell or whistle. As he drove along he was listening. After he had looked at the point 75 feet from the crossing where he could not see southward on account of the brush and trees, he then looked northward. In that direction, there was a hill which commenced within 50 feet, or little in excess thereof, from the crossing. The cut through this hill was 12 or 14 feet deep. A train from the north could not be seen by a driver until he was 25 or 30 feet from the railroad track.

Harold Cure, who was riding on the running board, as they approached the crossing looked southward, then northward, and then southward, and discovered the freight train, which was right on them and called to Cure and told him, "There is the train." When about 200 feet from the crossing, Mary Cure looked to see if the train was coming.

The testimony of Haygarth, the engineer, Blackburn, the fireman, and Erickson, one of the brakemen, is to the effect that the engine sounded the usual crossing whistle of two long and two short blasts at the whistling post. The testimony of the engineer and this brakeman shows that just after the whistle was sounded the automatic bell ringer was turned on. None of the brakemen were riding in the cupola of the caboose. The head brakeman was sitting beside the fireman. The testimony of Mrs. Spike, Mrs. Mary Sigsmith, Mrs. George Diamond, and Miss Thomas, witnesses for defendant, show that the whistle was blown at the whistling post; three of them testified that they heard the whistle for Griffith's crossing, which is a mile south of McCarty's crossing; they had been picking strawberries in the vicinity of the latter crossing, and that at the time when they heard the whistle of the engine for the whistling post they were a short distance east of the crossing. Mrs. Baunell and Miss Emily Diamond, plaintiff's witnesses, were also picking strawberries in the same vicinity, and at the time the car went by were sitting on a log, which was about 180 feet west and between

1,500 and 1,600 feet south of the crossing. Very soon after the automobile went by, they heard the whistle sounded. The four ladies above mentioned, who were defendant's witnesses, gave no testimony that they heard the bell ring, and none that they heard any whistle sounded other than as above stated. The ladies who testified for plaintiff said, in effect, that they did not hear any other whistle of the engine than that to which they testified, and that they did not hear the bell ring.

Immediately after Harold had called to Cure, the automobile went onto the railroad track, and was struck by the engine and train. Mary Cure was killed; Madeline and Helen and A. E. Cure, their grandfather, were injured; Harold escaped uninjured; the automobile was badly damaged.

The injured were taken to the hospital at Detroit; Dr. Larson of that city attended them professionally. He found that Mr. Cure had a gash about seven inches in length, extending backward and over the right side of his head; that the skin was opened so that the skull could be seen; he had bruises about his face, chest, and shoulder; he complained of pain in his legs; he had some skin bruises; one hand was bruised and the skin torn; he was in the hospital from the 22d of June until the 13th of July; he complained of pain constantly while in the hospital and of pain when he left, about the shoulders and neck. Madeline had a cut about two or three inches long over the right eyebrow, extending to the bone. She had swelling with a slight bruise on the scalp on the back part of the skull; she was unconscious for about a week. The second week she had periods of stupor; would scream on being disturbed; she had slight bruises on one limb; she suffered pain; she was in the hospital the same length of time as her grandfather. When she left the hospital she was able to sit up and walk around a little; her mental condition was fairly good. Helen had a gash on the back of her skull and on top, and a broken right collar bone; some bruises on the back and legs, and was unconscious the first two or three days; she had trouble with her abdomen, and the first night passed some blood from her bowels; she passed no blood after the first night, indicating no serious internal injury. She suffered very much pain and continued to so suffer for about 10 days; she was in the hospital the same length of time as her grandfather and Madeline. Her condition was fairly good when she left the hospital; she complained of pain in walking, which Dr. Larson testified was evidently due to the bruises in her hip and possibly her knee; and that when she walked she limped.

Their hospital, special nurse, and physician's bills aggregated \$635.60, and were paid by A. E. Cure; the cost of repairing the automobile was \$1,090.50. There is also testimony in the record that the difference between the value of the automobile at the time of the accident and a new one of that kind was about \$1,200.

Stanley Cure was the husband of Mary Cure, and had deserted her in July, 1919. His father testified that he did not know where he was, and had not seen or heard of him since that time, though he had made efforts to trace and find him.

The pleadings in the cases are largely similar. They are of that character usual in actions of negligence. The complaint, in addition to the allegations, with reference to negligence, sets forth § 8175 of the General Statutes of Minnesota for the year 1913, which in substance provides that, where a death is caused by the wrongful act or omission of any person or corporation, the personal representative of the deceased may maintain an action if the deceased might have maintained one, if he were living, for an injury caused from the same act or omission. Plaintiffs also pleaded § 5001, Rev. Laws of the state of Minnesota for the year 1905, which, in substance, provides for the sounding of the whistle and the ringing of the bell upon locomotives at the distance of 80 rods from railroad crossings, and for the continuation thereof at intervals until the locomotive and train attached have completely passed over the crossing.

The answer, in addition to a general denial and certain admission of matters stated in the complaint, not necessary to mention, alleged that A. E. Cure and Mary Cure were engaged in a common enterprise, in operating and directing the operation of the automobile. It is further alleged that the collision resulting in death of Mary Cure and other injuries and damages was caused by the negligence of A. E. Cure, and contributory negligence of Mary Cure.

The cases were tried to the court and a jury, and at the conclusion of them, defendant demanded a special verdict in each case. The court in compliance prepared such special verdicts.

The special verdicts in the cases of Dakota Trust Company and of A. E. Cure follow. It is unnecessary to set out the others, as they are very similar in form.

Question 1: Is the plaintiff a corporation duly organized and existing under and by virtue of the laws of the state of North Dakota, with its principal place of business at Fargo, N. D., and duly authorized

by the laws of the state of North Dakota to act as administrator of the estate of deceased persons; and was said plaintiff, on the 11th day of September, 1920, duly appointed and qualified, and ever since said date has it been the duly appointed, qualified, and acting administrator of the estate of Mary Cure, deceased? Answer: Yes.

Question 2: Was the defendant, on the 22d day of June, 1920, a corporation organized and existing under and by virtue of the laws of the state of North Dakota, and was it at said date engaged in the operation of a commercial railroad within the state of Minnesota, near the city of Detroit, carrying passengers and freight thereon for hire? Answer: Yes.

Question 3: Did the General Statutes of Minnesota, on the 22d day of June, 1920, provide as follows: "When death is caused by the wrongful act or omission of any person or corporation, the personal representative of the deceased may maintain an action therefor, if he might have maintained an action if he lived for an injury caused by the same act or omission. The action may be commenced within two years after the act or omission. The damages therein cannot exceed \$7,500 and shall be for the exclusive benefit of the surviving spouse and the next of kin to be distributed to them in the same proportion as personal property of persons dying intestate, but funeral expenses and any demand for the support of the decedent to be allowed by the probate court shall first be deducted and paid?" Answer: Yes.

Question 4: Was Mary Cure, on the 22d day of June, 1920, while riding in an automobile across a public crossing on the railway of defendant near Detroit, Minn., struck by a train of said defendant and killed by reason of being so struck? Answer: Yes.

Question 5: Did the defendant railway company, in view of all the surrounding facts and circumstances, exercise due and reasonable care so far as the blowing of the whistle is concerned as the train approached and passed over the crossing? Answer: No.

Question 6: Did the defendant railway company, in view of all the surrounding facts and circumstances, exercise due and reasonable care so far as the ringing of the bell is concerned as the train approached and passed over the crossing? Answer: No.

Question 7: Did the defendant railway company, in view of all the surrounding facts and circumstances, exercise due and reasonable care so far as the speed of the train is concerned as it approached and passed over the crossing? Answer: No.

Question 8: If you answer either question 5, 6, or 7 No, then was

such failure to use due and reasonable care on the part of the defendant railway company the proximate cause of the accident? Answer: Yes.

Question 9: Were the deceased and one A. E. Cure engaged in a common enterprise at the time and place of the accident aforesaid? Answer: No.

Question 10: Did Mary Cure exercise reasonable and ordinary care and diligence as the automobile approached and passed up and onto the crossing? Answer: Yes.

Question 11: If you answered the last question Yes, then this question need not be answered; but, if you answered the last question No, then did such want of ordinary care on the part of Mary Cure contribute to cause the accident? Answer: ———.

Question 12: Did A. E. Cure exercise reasonable and ordinary care and diligence in the manner in which and the speed at which he approached said crossing and drove the automobile up and onto said crossing? Answer: Yes.

Question 13: If you answered the last question Yes, then this question need not be answered; but if you answered the last question No, then was such want of ordinary care on the part of A. E. Cure the proximate cause of the accident? Answer: ———.

Question 14: What amount of damages, if any, not exceeding \$7,500, have the children of said deceased, namely, Harold, Madeline, Helen, and Clayton Cure sustained by reason of the death of their mother, Mary Cure? Answer: \$7,500.

Dated March 23, 1921.

Wm. J. Doyle, Foreman.

The special verdict in the case of A. E. Cure is as follows:

Question 1: Was the defendant, on the 22d day of June, 1920, a corporation organized and existing under and by virtue of the laws of the state of North Dakota, and was it at said date engaged in the operation of a commercial railroad within the state of Minnesota near the city of Detroit, carrying passengers and freight thereon for hire? Answer: Yes.

Question 2: Was the plaintiff on the 22d day of June, 1920, while riding in an automobile across a public crossing over the tracks of defendant near Detroit, Minn., injured by being struck by a train of said defendant? Answer: Yes.

Question 3: Did the defendant railway company, in view of all the surrounding facts and circumstances, exercise due and reasonable care so far as the blowing of the whistle is concerned as the train approached and passed over the crossing? Answer: No.

Question 4: Did the defendant railway company, in view of all the surrounding facts and circumstances, exercise due and reasonable care so far as the ringing of the bell is concerned as the train approached and passed over the crossing? Answer: No.

Question 5: Did the defendant railway company, in view of all the surrounding facts and circumstances, exercise due and reasonable care so far as the speed of the train is concerned as it approached and passed over the crossing? Answer: No.

Question 6: If you answered either question 3, 4, or 5 No, then was such failure to use due and reasonable care on the part of the defendant railway company, the proximate cause of the accident? Answer Yes.

Question 7: Did the plaintiff A. E. Cure exercise due and reasonable care and diligence in the manner in which and the speed at which he approached said crossing and drove the automobile up and onto said crossing? Answer: Yes.

Question 8: What damages, if any, not exceeding \$2,900 has the plaintiff A. E. Cure sustained by reason of the injuries received in the collision on June 22, 1920? Answer: \$1,200.

Dated March 23, 1921.

Wm. J. Doyle, Foreman.

The defendant submitted to the court additional questions in each case, which it requested to be incorporated into the special verdict, which the court refused to do. These questions were the same in the Dakota Trust Company case, and in that of Helen and Madeline, and are as follows:

(1) Was the engine whistle blown for this crossing at least 80 rods away from it?

(2) Was the bell rung on the engine at intervals or constantly as it approached and passed over the crossing?

(3) If Mary Cure had diligently looked could she have seen the approaching train in time to have the automobile stopped before it got on the track?

(4) If Mary Cure had listened could she have heard the approaching train in time to have the automobile stopped before it got on the track?

(5) Would an ordinary prudent person situated as was Mary Cure have requested the driver of the automobile to go slower as the car approached and went over the railroad crossing?

(6) Would an ordinary prudent person situated as was Mary Cure have requested the driver of the automobile to stop and look as the car approached and went over the railroad crossing?

(7) Was the driver of the automobile guilty of any lack of care in the manner or in the speed at which he approached the crossing?

(8) If you answer question No. 7 Yes, was this lack of care the proximate cause of the accident?

(9) Was the collision at the crossing between the automobile and the train an accident for which no one in particular was to blame?

(10) Was the whistle blown at intervals as the engine approached and passed over the crossing?

In the case of A. E. Cure and the Amenias-Sharon Land Co., the additional questions submitted are substantially the same and are as follows:

(1) Could A. E. Cure have seen the approaching train in time to stop his car if he had diligently used his eyesight?

(2) Could A. E. Cure have heard the approaching train in time to have stopped his car if he had diligently used his sense of hearing?

(3) Was A. E. Cure in the exercise of ordinary care in the manner in which and the speed at which he drove his car up and onto the crossing?

(4) At what speed did the automobile approach the crossing?

(5) At what speed did the automobile go over the crossing?

(6) Could A. E. Cure have seen or heard the train in time to stop and avoid the accident if he had reduced the speed of the car?

(7) Could A. E. Cure have seen or heard the train in time to stop and avoid the accident if he had reduced the speed of the car and lessened the noise made by the car as it traveled along?

(8) Was the engine whistle blown for this crossing at least 80 rods away from it?

(9) Was the bell rung on the engine at intervals or constantly as it approached and passed over the crossing?

(10) Was the collision at the crossing between the automobile and the train an accident for which no one in particular was to blame?

(11) Was the whistle blown at intervals as the engine approached and passed over the crossing?

There being five cases consolidated for trial and the proceedings at

the trial, including the attention of the attorneys having been directed for a time to one of the cases, then to another and then another, back and forth as occasion might require, the oscillation of the instructions back and forth among the different cases renders it difficult to give an intelligent analysis of the errors complained of, of which the defendant has assigned more than 100. To attempt to discuss them would lead to an opinion in length which, when printed, would perhaps occupy one-half the space of an ordinary law report. Most of them are without merit, and but few need any extended discussion. A few assignments of error dealing with what may be claimed as the cardinal errors arranged in systematic order and properly argued can easily be imagined to be of great service to the court in affording it an opportunity to intelligently comprehend error, if there be such, in the trial of the case; but endless assignments, many of which are trivial, or which, on the merest inspection, appear to have no semblance of merit, should not be returned as a part of the record here, as such practice serves only to confuse the court, and prevent an intelligent analysis of such errors as may have a semblance of real merit.

The real object of the trials was to ascertain whether the defendant was negligent in the operation and conduct of its train at the time and place under consideration, and whether that negligence was the proximate cause of the injuries which ensued, and the damages suffered thereby. There are other questions, it is true, such as the contributory negligence, if any, of A. E. Cure, the imputation of his negligence, if any, to Mary Cure, and still others of like importance; and to properly present these and the larger questions in the trials below, and here on appeal, is the manifest duty of all parties. The administration of justice is at all times sufficiently difficult, but that difficulty is enhanced and confusion increased where many matters of no material consequence are made the basis of error, and which in reality are wholly insufficient to support a decision if such were the basis of it. Perhaps between 30 and 40 of the errors assigned relate to the alleged erroneous, or admission or exclusion of, evidence; some relate to refusal of the court to direct verdicts in defendant's favor, and others to the insufficiency of the evidence to sustain the verdicts. A large number relate to alleged errors in the charge of the court or in the refusal to give certain instructions requested by the defendant; others to the contention that A. E. Cure was negligent and that his negligence was the proximate cause of the injuries; others that Cure's negligence was imputed to Mary Cure; and still others

based upon the contention and there was no showing of negligence of defendant proximately causing the injury.

We have considered all of the assignments of error, but discussion here will relate and be confined to those which have been argued. We will consider the assignments in the order above mentioned.

Under the eighth assignment of error, certain questions were asked one of the plaintiff's witnesses, relative to the speed of the train; the witness did not testify to the speed of the train in miles, either actually or approximately, but stated that it appeared to be going very fast. Timely objection was interposed to this evidence, which was promptly overruled by the court, and a motion to strike it from the record denied. In view of the whole of the evidence as to the speed of the train, and of the entire situation and attendant circumstances, just prior to the time of the occurrence of the injury, we are not prepared to say that the defendant was prejudiced by the admission of such evidence. It is true that the engineer, fireman, and one of the brakeman testified that the speed of the train at that time was about 25 miles per hour. The jury, however, are not bound entirely by that evidence. Their evidence does not show that they were doing otherwise than estimating the speed of the train. True it is, they were experienced in the operation of trains, and this was a circumstance which the jury could take into consideration, but because they were railway employes does not necessarily as a matter of law entitle their testimony to greater credit than that of other competent witnesses. To say that the train is going very fast is a relative expression. It does not necessarily mean that a train was going 50 or 60 miles per hour. Such an expression is not altogether incongruous to an express statement that the speed was 25 miles per hour; and, further, we think this evidence, in the circumstances of this case, would not be wholly valueless because it did not fix the speed in miles per hours.

Cure looked back when he was within 200 feet of the crossing, which is 906 feet from the cut; he saw no train and heard no whistle nor bell; his car was new, it is fully described in the evidence. It would seem that, if the train was at all near at the time Cure was 200 feet from the crossing, he would have noticed or heard it, yet at the speed he traveled from there to the crossing, which could not have consumed but a short space of time, he was met at the crossing by the train, so that the train must have been traveling at quite rapid speed to travel the distance it must have traveled from the time Cure looked for it, and neither saw nor heard it, until about the time of the collision. We do not think the

admission of Cure's evidence in this respect in any event forms the basis of prejudicial error. It had some probative force, and we do not think it was improper to permit such testimony to be considered by the jury, together with all other evidence relative to the speed of the train. However, if the speed of the train was no more than 25 miles per hour, in the condition surrounding this crossing, the obstruction of the view of it from either discretion—which we will more fully describe in discussing defendant's negligence—it cannot be said as a matter of law that, that rate of speed was not negligent.

The accident occurred at 4:45 in the afternoon. It was brought out, on cross-examination, from one of defendant's witnesses, that a passenger train following this freight was due in Detroit at 5:21. The evidence shows that the freight which caused the injury was behind time. Such testimony in some degree, however slight, might have some tendency to show that the speed of the train was quite rapid. We do not think that it was reversible error to exclude defendant's offer to prove that, under the rules of the company, a freight train was only required to be in the clear five minutes before the passenger was due to arrive at the passing point. Assuming that is the record of the company, no freight crew can absolutely tell whether they can reach the point of passing, so as to have those five minutes, for many things might occur to delay their arrival at the point of passing. These are matters which they perhaps take into consideration, and if everything were working well, they would perhaps make as good speed as they could during that time so as to allow for any loss of time which might be necessitated by the happening of events which they could not anticipate.

We cannot take space to discuss other alleged errors in the admission or exclusion of evidence. We are satisfied there was no prejudicial reversible error in this respect.

The contention of defendant that the court erred in its refusal to direct verdicts in favor of the defendant needs no discussion. The court could not say, as a matter of law, that there was not substantial evidence tending to establish defendant's negligence.

It is now proper to consider the alleged errors in the court's charge. The defendant contends that, though the cases were submitted for special verdict, the court charged the jury as though the case was being submitted for general verdicts, and that it told the jury in detail what the result of their findings would mean, and, further, that it repeatedly referred to negligence and contributory negligence, while neither is men-

tioned in the special verdicts. It is clear that the charge is not general in its nature, but was well within the rule laid down in the case of *Nygaard v. Northern Pacific Ry. Co.* (N. D.) 178 N. W. 961. The defendant's contention that the words "negligence" and "contributory negligence" were not used in the special verdicts is without merit. The slightest examination of the questions shows that they include both of those terms. Those exact words were not used, but expressions which included their substance were. In our opinion the court's instructions did not tell the jury what the result of the findings would mean, and the objection to them in that respect is without merit.

The following part of the charge is complained of and assigned as error:

"In determining your answer to question 10 in the case of the Dakota Trust Company I charge you that with reference to the deceased, Mary Cure, there is no evidence in this case that she was engaged in operating the automobile in question with A. E. Cure as a joint adventure or enterprise, and that her situation was that of a passenger and guest merely. The care required of her was the care which would be exercised by an ordinarily prudent person riding as a passenger under such circumstances. A passenger in a vehicle is not held to the same degree of watchfulness as the driver. The primary duty of caring for the safety of the vehicle and passengers rests upon the driver, and, unless the danger is obvious or is known to the passenger, the latter may rely upon the assumption that the driver will exercise proper care and caution in approaching a place of danger, unless he or she knows the driver to be incompetent or has reason to believe that he is not performing his duty by looking for trains, and such facts are proven by the evidence. A passenger is not necessarily guilty of contributory negligence if he or she fails to look and listen. The test is as to what a reasonably prudent person should have done under the circumstances, taking into consideration her knowledge of the skill and experience of the driver, and all the other surrounding facts and circumstances of the case. You may also take into consideration in determining your answer to this question whether or not if the deceased, Mary Cure, had attempted to look and listen for an approaching train with the view of herself helping to anticipate or discover any possible danger, and thereby, for the time being, exercised no control over the minor children in the car, she would or not have rather increased than diminished the danger by the possibility of diverting the attention of the driver, A. E. Cure, from the control and

operation of the car, and from his diligence and care in controlling and operating his automobile as he approached the railway crossing."

It is clear that A. E. and Mary Cure were not engaged in a joint adventure in the operation of the automobile. The former, and he alone, was operating it, and had full control over and charge of it; she was merely a passenger in the car, and was justified in relying on the presumption that the driver would use proper care and precaution in approaching a place of danger unless she knew or ought to have known otherwise. If there were evidence that he was an incompetent or a careless and indifferent driver, and she knew it, there might be some ground for defendant's contention, but there is no such showing. The evidence shows she exercised that degree of care which in the circumstances of this case an ordinary prudent person, riding as a passenger, would exercise. It was her duty, as a mother, to look after her children then in the car, and certainly she was not required to look and listen for the train, and she had a right to believe that the driver would use due care, and she was not required to do more than has already been stated to be her principal duty. We are clear that the instruction contains no prejudicial error.

The following part of the charge given in the A. E. Cure case is assigned as error:

"In the matter of speed embodied in question 5, I further charge you that with reference to the rate of speed at which a train travels, you are told that it cannot be said as a matter of law that any particular rate of speed is excessive. Ordinarily a railroad company has the right to operate its trains as fast as it desires to do so, but in operating them at a high rate of speed they are required to give such signals as will enable a person using the highway to avoid collision by the exercise of ordinary care, and if the character of the crossing is such that, when the signals given are considered, one attempting to use the crossing cannot do so safely by the use of ordinary care and avoid collision with a train coming at the speed adopted, then such speed for that point would be excessive."

And, further, the following part of the charge relating to question 4 in the A. E. Cure case may be considered in connection with that just above mentioned:

"In this connection your attention has just been called to the statute of the state of Minnesota, which provides that an engineer on a locomotive shall ring the bell or sound the whistle on the locomotive, or cause the same to be rung or sounded, at least 80 rods from a road crossing

on the same level, and to continue the ringing as hereinbefore stated in reference to your answer to question 3; and, if you find that the engineer failed to comply with the statute in that respect, then that would be a fact and circumstance for you to consider so far as the ringing of the bell is concerned, along with all the other evidence in the case, in determining whether or not the defendant was guilty of negligence."

Also the following part of the charge relative to question 5:

"You will take into consideration in determining your answer to such question all of the testimony in connection therewith as to the speed, given on the part of both the plaintiff and defendant; the conditions of the railroad as to the view of an approaching train being possible and observable from the highway upon which plaintiff, Cure, was approaching, the distance at which a train could be seen from the railroad track from the different points of view as he approached; the matter of cuts; if there appear to have been any cuts; the condition of the weather and atmosphere; the possibility or probability of the whistle being heard at the distance at which it was to be blown by the requirement of the statute, and as to its being heard if blown afterwards, taking into consideration the physical surrounding such as the condition of the track being in the clear or obstructed, any timber or any other obstruction as to sound or sight, and all of the other facts and circumstances in connection therewith that have been testified to in the case, and from them determine whether or not, under all of the facts and circumstances as stated, the speed of the train, whatever that speed may have been, was an excessive speed in view of the conditions and surrounding circumstances of the line of approach of the plaintiff in his automobile, and if you find that in view of all the facts and circumstances, the speed was excessive at the time and place, and under the conditions existing, then your answer should be No; otherwise Yes."

We think there was no reversible error in the instructions above set forth; they were confined to certain questions, and in part instructed that any particular rate of speed could not be said, as a matter of law, to be excessive, but when trains are being operated at a high rate of speed, such signals are required to be given as will enable a person of ordinary care, using the highways, to avoid collision with them. The instructions in full are well confined to the particular questions of the special verdicts.

We think there is no real merit in defendant's contention that the negligence of A. E. Cure was the proximate cause of the injuries. In other words, that he was guilty of contributory negligence to such a de-

gree that the injury was caused by his and not defendant's negligence. Furthermore, it is well settled in this jurisdiction that the question of contributory negligence is one of fact for the jury, and not one of law for the court. *Coulter v. G. N. Ry. Co.*, 5 N. D. 568, 67 N. W. 1046; *Pendroy v. G. N. Ry. Co.*, 17 N. D. 433, 117 N. W. 531; *Hollinshead v. Mpls. S. St. M. Ry. Co.*, 20 N. D. 642, 127 N. W. 993; *Edwards v. G. N. Ry. Co.*, 42 N. D. 154, 171 N. W. 873.

The jury has specifically found that the defendant, in view of all the surrounding facts and circumstances, did not use due and reasonable care relating to the sounding of the whistle, the ringing of the bell and the speed at which the train was operated, as it approached and passed over the crossing. It further specifically found that A. E. Cure exercised reasonable and ordinary care and diligence in the manner in which, and the speed at which he approached the crossing and drove the automobile up and onto the crossing. It also further found that the defendant's failure to use such due and reasonable care was the proximate cause of the accident. The determination of the jury in this respect, we think, disposes of these questions, and its verdict should stand, where, as in these cases there is substantial evidence to support them.

It is proper at this point to advert briefly to the question of defendant's negligence. There is evidence that the whistle was sounded at the whistling post, and that immediately thereafter the automatic bell ringer was set. There is evidence on behalf of the plaintiffs to the effect that after the whistle was sounded to the south from where the witnesses then were, they did not hear the whistle again sounded, nor did they hear the bell ring. There is no testimony on behalf of defendant that the whistle sounded after the time at the whistling post. There is testimony on behalf of defendant that the bell ringer was set just after the whistle was sounded at the whistling post. A witness for the defendant testified:

Q. You, I believe, testified the bell was ringing. A. Yes, sir; the bell was ringing.

This witness had not testified as the question indicates, but had testified to the effect that the engineer had turned on the bell ringer, after he had sounded the whistle at the whistling post.

A witness for defendant was asked the following question:

Q. State whether or not the bell was ringing as the train passed over the crossing? A. The bell was ringing.

It was for the jury to say under all the evidence whether or not

defendant failed to use reasonable care relative to the giving of proper signals for the crossing.

Section 5001, Revised Laws of Minnesota of 1905, provides as follows:

"Every engineer, driving a locomotive on any railway, who shall fail to ring the bell or sound the whistle upon such locomotive, or cause the same to be rung or sounded, at least eighty rods from any place where such railway crosses a traveled road or street, on the same level (except in cities) or to continue the ringing of such bell or sounding of such whistle at intervals until such locomotive and the train thereto attached shall have completely crossed such road or street, shall be guilty of a misdemeanor."

It will thus be seen that it is not sufficient, under the provisions of that statute, to simply sound the whistle or ring the bell 80 rods from the crossing. It is manifestly the intent of that statute that where a crossing is dangerous, the whistle should be blown or the bell rung until the crossing is passed. The evidence in this case clearly shows that the crossing is dangerous. On one side of the crossing, within 50 feet of it, is a hill, though which there is a deep cut, where the railroad is situated; 906 feet in the opposite direction is another deep cut and a large hill; along the right of way on the side of the railway where the highway is situated and where 100 feet and to within 20 feet of the crossing are thick brush and trees; there is more or less brush all the way from the cut farthest away from the crossing with the exception of 250 feet. There is no competent evidence to show that the whistle was sounded after it left the whistling post, and unless the fact that there is evidence showing that the automatic bell ringer was set, and that presumptively the bell rang from that time onward until the crossing was passed, there is no evidence showing that the bell was rung. The testimony of the witnesses who were in the vicinity of the crossing that they did not hear the whistle blown nor the bell rung other than as they had stated is not necessarily what is termed negative evidence. If they were situated at a given instant of time where they could hear the whistle blown and the bell rung, and we think the evidence so shows, and if they did not hear them, the evidence is rather in the nature of affirmative proof that the whistle was not sounded nor the bell rung after leaving the whistling post.

The above statute has been several times construed by the Supreme Court of Minnesota to mean that either the whistle must be sounded or the bell rung, as the engine approaches dangerous crossings. In other

words, these decisions plainly hold that it is not sufficient to sound the whistle to ring the bell 80 rods from the crossing, but that the whistle must be sounded or the bell rung intermittently or at intervals as the engine and train approaches and passes over the crossing. *Hendrickson v. G. N. Ry. Co.*, 49 Minn. 245, 51 N. W. 1044, 16 L. R. A. 261, 32 Am. St. Rep. 540; *Heininger v. G. N. Ry. Co.*, 59 Minn. 462, 61 N. W. 558; *Newstrom v. St. Paul & Duluth Ry. Co.*, 61 Minn. 79, 63 N. W. 253; *Hohl v. Chicago, Milwaukee & St. Paul Ry. Co.*, 61 Minn. 325, 63 N. W. 742, 52 Am. St. Rep. 598; *Libaire v. Minneapolis & St. Louis Ry. Co.*, 113 Minn. 520, 130 N. W. 8; 4 Am. & Eng. (1st ed.) 919, subd. 15.

The statutory provisions, which require the ringing of the bell and the blowing of the whistle on approaching a public crossing are not necessarily the sole measure of the duty of the railway company to protect persons and property at such crossings. *Coulter v. G. N. Ry. Co.*, 5 N. D. 568, 67 N. W. 1046; *Wilson v. Railway Co.*, 161 Iowa, 191, 142 N. W. 59; *Kinyon v. C. C. N. W. Ry. Co.*, 118 Iowa, 349, 92 N. W. 40, 96 Am. St. Rep. 382. If the view of the crossing is obstructed by various objects, such as buildings, hills, trees, brush, or other growth, the giving of the statutory signals at the given distance should not be held as an exercise of due care on the part of the railway company in protecting life and property endangered at such crossings. On the other hand, it should use every caution to protect against the injury and destruction of lives and property at such crossings. Indeed, it may be a matter of grave doubt whether, in any event, the defendant can show it is not negligent, and that its negligence is not the proximate cause of the injury, where a crossing is so extremely dangerous as to be a continual menace to the lives of travelers on the highway, who must use such crossing.

The instructions requested by defendant were properly refused. There is but one of them that needs any discussion; is it as follows:

"You are instructed under the statute of the state of Minnesota which controls here any recovery which may be had goes to the surviving husband and children of Mary Cure, and is distributed one-third to the husband and two-thirds to the children. The proof here shows no recovery can be had in behalf of the surviving husband; therefore, any verdict you may return cannot be in excess of \$5,000."

The statute referred to is § 8175, General Statutes of Minnesota, which provides that the damages in an action for death by a wrongful act or omission cannot exceed \$7,500, and shall be for the exclusive benefit of the surviving spouse and next of kin, to be distributed to them

in the same proportion as person property of persons dying intestate. The Supreme Court of Minnesota, however, has held, in substance, that the damage recovered in such action is no part of the estate of the deceased, and that the probate court does not have jurisdiction to make distribution of the amount recovered as if the same were the personal property of one dying intestate; that the cause of action is one given to the personal representative of the deceased, and that it might have been given to any other person or public officer in trust for the widow and next of kin, or directly to one of them in trust for all. It has been held that the distribution thereof rests exclusively with the district court in which recovery is had. *Aho v. Republic Ore & Steel Co.*, 104 Minn. 332, 116 N. W. 590, *Mary Mayer v. Hannah Mayer*, 106 Minn. 484, 119 N. W. 217, *State ex rel. Scannell v. District Court of Ramsey County*, 114 Minn. 364, 131 N. W. 381. *In re Riccomi's Estate*, 185 Cal. 458, 197 Pac. 97, 14 A. L. R. 509. See notes 14 A. L. R. 509.

We think the full amount of the damages, not exceeding \$7,500, could be recovered where there is evidence to warrant a recovery to that extent, even though, as in this case, the surviving husband may not be entitled to any share thereof. In any such recovery the distribution of the damages recovered is left entirely to the district court, and in this case it can and perhaps would distribute the whole amount to the children as damages suffered by them. They not only had a pecuniary interest in the continuance of the life of their mother, who had in reality become the head of the family, but by her death they lost her daily services, attention, devotion, association, and care, and in this case these are proper elements of damages.

It is strenuously contended by defendant that it was negligence to have the number in the automobile which were in it. They are referred to as people, which is incorrect; there were two people, A. E. Cure and Mary Cure in the car; the others were children, and were sitting therein in the position hereinbefore stated. Taking into consideration their ages and the way they were seated in the car, and further, that there is no evidence tending to show that the driver was crowded or inconvenienced, nor obstructed thereby in driving the car, it cannot be said as a matter of law that the number who occupied the car constituted negligence. That question, as well as all questions of negligence or contributory negligence, were for the jury to decide, and in this respect it found adversely to the defendant.

The damages returned by the verdicts of the jury in the various

cases are as follows: The Dakota Trust Company case, \$7,500; A. E. Cure, \$1,200; Helen Cure, \$2,700; Madeline Cure, \$2,166; Amenia-Sharon Land Co., \$1,090.53. We think the evidence is sufficient to show that these sums are not in reality more than compensatory damages. The injuries were severe and painful; the expense on account of physicians, hospital, and nurse bills was large; the mother was taken from her children at the very time and thenceforth when they most urgently needed her care, services, and attention. The evidence clearly shows that the damages to the automobile equal or exceed that returned in the special verdict in that case. Each verdict is well sustained by the evidence.

BRONSON, J., concurs.

BIRDZELL, J. In these cases there are two questions which, to the writer, seem controlling: First, was there any evidence of negligence on the part of the defendants which may be said to have been the proximate cause of the injuries sustained? Second, under the evidence, was there a question of fact for the jury as to the existence of contributory negligence? The first question I regard as being a close one, but I am not prepared to say that, in view of all of the circumstances, which are fully set forth in the opinion of Mr. Chief Justice Grace, there was not substantial evidence from which the jury might find, as they did find, that the defendant did not use due care in approaching the crossing. I therefore concur in the principal opinion in its holding upon this question, as well as upon the other questions affecting the judgments, aside from the question of contributory negligence.

With reference to the manner in which the driver, A. E. Cure, approached the crossing, he testified as follows:

"Q. Approximately how fast were you traveling in your car coming along the road there? A. I presume about 15 to 20 miles an hour.

* * *

"Q. Could you see any train, or was there any train? A. I saw no train whatever; and then as we drove along and as we started to turn to go up on the grade I looked again, and I was listening, and I looked, and I saw nothing but a bunch of brush there; then as we drove along I looked north to see if there was any train, and at that time we were getting pretty close to the track, but there was no train coming from the north; then Harold says, 'There is a train,' and I looked, and the train was right

on us; we was right on the track, and the train was right on us. * * *

"Q. Did you hear any noise to indicate that a train was coming until Harold said, 'Here's the train'? A. I did not.

"Q. About how far, Mr. Cure, from the crossing was the last point at which you could see the track, about how far south? A. I presume about 200 feet. * * *

"Q. At what point did you last look back at the track, Mr. Cure? A. Last?

"Q. Yes. A. I presume about 200 feet.

"Q. While you were running parallel to the track? A. Yes."

On cross-examination he testified:

"Q. How many times had you been over this road in the summer of 1920? A. Do you mean this road where the accident occurred?

"Q. Yes, and before the accident? A. Three times, I believe.

"Q. How many times had you been over it in the summer of 1919? A. I think it was only once; I think we went that way only once. * * *

"Q. You knew the crossing was there? A. Yes; I knew there was a crossing there.

"Q. And you had made at least four round trips over that crossing? A. No; I had made two, and this one would be the third trip.

Q. Round trips? A. Round trips. * * *

"Q. You have testified you looked when you were about 200 feet from the crossing? A. Yes. * * *

"Q. Do you mean to testify this was the only point where you could see the track between where you left the cut and the railroad crossing?

A. That is the only point you could see the track, I believe.

"Q. Well, you don't know that at all, do you; you don't know that as a fact, do you? A. Yes; I believe I do.

"Q. You say you were driving along there that day about 15 or 20 miles an hour? A. I presume so. * * *

"Q. You didn't stop your car at any time and look back, or look up the track or towards the track, did you? A. No; I did not.

"Q. You just kept on going at about the same rate of speed, didn't you? A. Yes. * * *

"Q. As you turned the corner there to go up on the track, I believe you already said you looked right into the brush there? A. Yes; I looked into brush there on the corner.

"Q. Could you see the track to the south at that time? A. At that time: no, sir.

"Q. Do you know whether or not you could see the train looking at that point? A. I don't believe that I could.

"Q. You don't know that as a matter of fact, do you? A. Yes; I think, I know I couldn't see a train at that point. * * *

"Q. Did you ever stop at that point and look up the track for the train? A. No, sir.

"Q. This point was about how far from the crossing? A. Only about 175 feet.

"Q. And when you got near the crossing, say at a distance of 90 feet, do you know whether or not you could see the track to the south? A. No; we could not.

"Q. Sure you couldn't? A. I am sure I couldn't at that distance.

"Q. And from the time you looked there as you turned the corner you never looked again to the south until Harold called as you testified? A. No; I did not.

"Q. So you run that 175 feet without looking to the south until Harold called you; that is right, is it? A. Yes, sir.

"Q. Was your machine in good shape that day? A. Yes, sir.

"Q. Brakes working in good shape? A. Yes, sir.

"Q. It takes quite a long time to stop a machine running from 15 to 20 miles an hour, does it? A. Well, it would take 30 or 40 feet, probably 50.

"Q. And you knew that at the time you went up on that track, you knew that you couldn't stop your machine when running 15 to 20 miles an hour in less than 30 feet and possibly 50 feet; is that right? A. Yes.

"Q. With one's car running at 15 miles an hour say, you think it would take 30 feet to stop it on that road? A. Yes.

"Q. With one's car running at 10 miles an hour, how long would it take to stop that car on that road? A. Well, it would take a little less time.

"Q. How many feet approximately in your judgment? A. Thirty feet, probably. * * *

"Q. Would it take more than 10 feet to stop a car going at a speed of 10 miles an hour at that place and up that embankment with the emergency brake? A. No; it probably wouldn't.

"Q. Well, what distance could you stop in? A. Well, probably about 15 feet."

On redirect examination, he testified:

"Q. Just one thing more, Mr. Cure; you have spoken all the way

through here about your going along at the rate of 15 or 20 miles an hour; what was the fact after you turned the curve and started to go up the hill as to how fast you were going?

"Mr. Conmy: That is objected to as leading and suggestive. The witness has testified at least a dozen times as to the speed, and testified his continuous speed was 15 to 20 miles an hour, and we object to any further leading examination.

"The Court: The objection is overruled.

"A. About 10 or 15 miles per hour.

Cross-examination by Mr. Conmy:

"Q. Didn't you tell me, Mr. Cure, at least three times, at least three different times, that you continued about the same speed of 15 to 20 miles an hour all the time up to the time the accident occurred? A. I didn't intend to.

"Q. Well, didn't you tell me that three different times? A. I don't remember that I did.

"Q. You don't remember that? A. No, sir.

"Q. You want to testify now you were going about 15 miles an hour? A. From the time I turned the curve to go up the hill 15—10 to 15 miles an hour."

It would seem that a fair construction of this testimony is that the driver, as he approached the track, after turning, continued at approximately the same rate of speed or possibly a little slower than he had been driving while he was running parallel with the railroad track; that he was somewhat familiar with the crossing, and knew that he could not see a train approaching, on account of the obstruction to his vision, until he would be quite close to the track; and that he did not have his car under such control that he would be able to stop it if he should see a train coming, before he was upon the track. This being true, I am of the opinion that he was necessarily guilty of contributory negligence.

While it is settled law in this jurisdiction that a driver of an automobile is not ordinarily required to stop, look, and listen before crossing a railroad track (*Pendroy v. Great Northern Ry. Co.*, 17 N. D. 433, 117 N. W. 531), the driver may nevertheless be guilty of contributory negligence if he approaches, disregarding dangers that he could readily avoid by the exercise of caution. The driver of an automobile, knowing that he is approaching a railroad crossing, must be held to a realization that a train, if in the vicinity, necessarily has the right of way; and where the view of the track is obscured, as it was in the instant case, the driver's

knowledge of possible danger places upon him the duty of approaching the place of danger with greater caution than he would be required to exercise if his view were unobstructed. It seems to me impossible and inconsistent with reason to say or to find that a driver approaching a railroad crossing at a rate of speed in excess of 10 miles per hour, without stopping or slackening his speed sufficiently to determine the approach of a train, which, owing to obstructions, he could not see before reaching the danger zone, was exercising reasonable care for his own safety and the safety of those who were accompanying him.

"The tendency of the law," says Berry on Automobiles (3d ed.) § 682, p. 660, "is to exact greater care of those crossing railroad tracks as the consequences of a collision with a train become more serious. On account of the great danger, not only to the occupants of the automobile, but to the passengers on the train, likely to result from a collision between a train and an automobile, the care exacted of a motorist is correspondingly great."

The same author quotes from the opinion in *New York Central & H. Ry. Co. v. Maidment*, 168 Fed. 21, 93 C. C. A. 413, 21 L. R. A. (N. S.) 794, as follows:

"With the coming into use of the automobile, new questions as to reciprocal rights and duties of the public and that vehicle have and will continue to arise. At no place are these relations more important than at the grade crossings of railroads. The main consideration hitherto with reference to such crossings has been the danger to those crossing. A ponderous, swiftly moving locomotive, followed by a heavy train, is subjected to slight danger by a crossing foot passenger, or a span of horses and a vehicle; but, when the passing vehicle is a ponderous steel structure, it threatens, not only the safety of its own occupants, but also those on the colliding train. And when to the perfect control of such a machine is added the factor of high speed, the temptation to dash over a track at terrific speed makes the automobile, unless carefully controlled, a new and grave element of crossing danger. On the other hand, when properly controlled, this powerful machine possesses capabilities contributing to safety. When a driver of horses attempts to make a crossing and is suddenly confronted by a train, difficulties face him to which the automobile is not subject. He cannot drive close to the track, or stop there, without the risk of his horse frightening, shying, or overturning his vehicle. He cannot well leave his horse standing, and if he goes forward to the track to get an unobstructed view and look for coming trains, he

might have to lead his horse or team with him. These precautions the automobile driver can take, carefully and deliberately, and without the nervousness communicated by a frightened horse. It will thus be seen an automobile driver has the opportunity, if the situation is one of uncertainty, to settle that uncertainty on the side of safety, with less inconvenience, no danger, and more surely than the driver of a horse. Such being the case, the law both from the standpoint of his own safety and the menace his machine is to the safety of others, should, in meeting these new conditions, rigidly hold the automobile driver to such reasonable care and precaution as go to his own safety and that of the traveling public. If the law demands such care, and those crossing make such care, and not chance, their protection, the possibilities of automobile crossing accidents will be minimized."

See, also, *Corbett v. Hines* (Iowa) 180 N. W. 690; *Pogue v. Great Northern Ry. Co.*, 127 Minn. 79, 148 N. W. 889; *Cathcart v. Oregon-Wash. R. & Nav. Co.*, 86 Or. 250, 168 Pac. 308.

I am of the opinion further that the contributory negligence of the driver is not imputed to the other occupants of the car. *Thomas v. Ill. Cent. Ry. Co.*, 169 Iowa, 337, 151 N. W. 387; *Howe v. Cent. Ver. Ry. Co.*, 91 Vt. 485; 101 Atl. 45; *Berry on Automobiles* (3d. ed.) § 502.

For the foregoing reasons I concur in the opinion of Mr. Chief Justice Grace and in the order of affirmance, affirming the judgments in the cases of *Dakota Trust Co. v. Mpls., St. P. & S. St. M. Ry. Co.*, *Helen Cure v. Mpls., St. P. & S. St. M. Ry. Co.*, *Madeline Cure v. Mpls., St. P. & S. St. M. Ry. Co.* In the cases of *A. E. Cure v. Mpls., St. P. & S. St. M. Ry. Co.* and *Amenia & Sharon Land Co. v. Mpls, St. P. & S. St. M. Ry. Co.* I concur in the order of reversal and dismissal.

CHRISTIANSON, J. The grounds of negligence set forth in the complaint in this case are that—

"As the automobile in which plaintiff was riding reached said public crossing defendant carelessly and negligently ran one of its locomotives with a train of cars attached across said road at said crossing at a great, dangerous, and negligent rate of speed, and without a warning of any kind, and without ringing the bell or sounding the whistle upon said locomotive, or causing the same to be rung or sounded within 80 rods from such crossing, and failed to continue the ringing of such bell and the sounding of such whistle at intervals until said locomotive and the train

thereto attached had completely crossed said road, in violation of § 5001 of the Revised Laws of the state of Minnesota for the year 1905, and the amendments to the revisions of said act and in violation of other laws of the state of Minnesota, and in spite of the fact that said crossing was, as defendant well knew, a dangerous crossing, and one of which passengers upon the public highways had no view until they were almost upon the same, and without a proper and careful lookout being kept by the engineer of said train."

Section 5001, Revised Laws of Minnesota for 1905, reads as follows:

"Every engineer, driving a locomotive on any railway, who shall fail to ring the bell or sound the whistle upon such locomotive, or cause the same to be rung or sounded, at least eighty rods from any place where such railway crosses a traveled road or street, on the same level (except in cities), or to continue the ringing of such bell or sounding of whistle at intervals until such locomotive and the train thereto attached shall have completely crossed such road or street, shall be guilty of a misdemeanor."

The answer puts in issue the allegations of the complaint, and also alleges as an affirmative defense that the injuries sustained were occasioned by the negligence of the driver of the automobile, and that the various parties injured were guilty of contributory negligence.

The case was submitted to the jury for a special verdict, and the judgment appealed from rests upon the special verdict, which is set forth in the opinion prepared by the Chief Justice. As appears from such verdict, plaintiff's recovery purports to be based upon the negligence of the defendant (1) in operating the train at an excessive rate of speed, and (2) in failing to give proper signals. It will be noted that the special verdict does not find whether the defendant did or did not violate the Minnesota statute mentioned in the complaint, nor does the verdict find the rate of speed at which the train was being operated. It will be noted further that the defendant requested that specific questions be submitted as to, whether the signals required by the laws of Minnesota to be given by a train approaching a crossing had or had not been given. It seems to me that these questions were proper, and should have been submitted; for one of the grounds of negligence alleged in the complaint was violation of the Minnesota statute. The trial court, however, refused to submit such questions. The trial court further instructed the jury that the failure to give the statutory signals "would be a fact and circumstance" for the jury to consider, "along with all the other evidence in the case, in determining whether or not the defendant

was guilty of negligence." There was positive and convincing evidence on the part of the defendant tending to show that the statutory signals were given, and the findings of the jury are not inconsistent with the fact that such signals were given. A special verdict will be construed most strongly against the party upon whom rests the burden of proof. Silence in respect to a controverted material fact not specially found or necessarily included in the verdict is equivalent to an express finding against such party. Clementson on Special Verdicts, pp. 267, 268. The positive testimony of the trainmen is to the effect that at the time of the collision the train was traveling at a rate of speed of from 20 to 25 miles an hour. There is no evidence that it was traveling at any greater speed, nor is there any evidence tending to show that the rate of speed at which the train was traveling was an unusual one. Hence, so far as the special verdict in this case is concerned, we have this situation: It must be assumed that the railway company gave the statutory signals, and that the train was being operated at a rate of speed at which such trains are usually being operated. Under the circumstances I fail to see wherein the verdict justifies the rendition of judgment against the defendant.

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ABSTRACTS OF TITLE.

1. In this state an abstracter is liable for any and all damages proximately caused to any person by reason of any error, deficiency or mistake in any abstract or certificate of title made or issued by him. *Morin v. Divide Co. Abs. Co.*, 214.
2. An abstracter is not called on for professional opinions as to any of the matters relating to a title. It is not for him to determine the validity or invalidity of instruments of record. It is his duty to set forth the facts relating to the title as shown by the records. *Morin v. Divide Co. Abs. Co.*, 214.
3. Where an abstracter relies upon his own books, and fails to examine the books of records transcribed from another county and by law given the force and effect of original records in the county where filed, and in so doing overlooks and fails to show on the abstract an instrument shown in such transcribed records, and which instrument affects the title to the land covered by the abstract, he is liable for a breach of his obligations as an abstracter, even though the instrument was not recordable in the county wherein it was originally recorded. *Morin v. Divide Co. Abs. Co.*, 214.
4. It is *held*, under the evidence in this case, that the damages sustained by the plaintiff consists of the moneys paid by him for the land and a certain mortgage, and moneys expended in defending litigation assailing the title, together with interest on such items. But that on such sum the defendant is entitled to credit for certain moneys received by the plaintiff upon such mortgage. *Morin v. Divide Co. Abs. Co.*, 214.

ACCORD AND SATISFACTION

1. An instruction that if the jury believe an agreement of accord had been entered into whereby defendant had agreed to repay to plaintiff his premium, and an additional amount in case other policy holders received more than a repayment of their premium, plaintiff, before the accord was completely executed, might repudiate it, and sue upon the original obligation without rescinding the accord, was erroneous, it appearing that there was no issue raised by the pleadings as to any agreement by defendant to pay plaintiff any such additional amount, and that all testimony with reference thereto

had been erroneously admitted over defendant's objection. *Wilkins v. Nat. Union Fire Ins. Co.*, 1296.

2. Under Sec. 5825, Comp. Laws, 1913, providing that an accord is an agreement to accept in extinction of an obligation something different from or less than that to which the person agreeing to accept is entitled, there may be an accord of either a liquidated or a disputed unliquidated demand. *Wilkins v. Nat. Union Fire Ins. Co.*, 1226.

ADMINISTRATORS.

See Executors and Administrators.

AGRICULTURE.

1. In an action brought by the holder of a thresher's lien for the conversion of certain grain covered by the lien, it is *held* that there is sufficient evidence from which the jury could infer that the lien claimant was the owner or lessee of the threshing machine. *Hiam v. Andrews Grain Co.*, 250.
2. § 6855, C. L. 1913, relating to thresher's liens does not require that such lien shall show that the parties agreed on a certain price per bushel for threshing the grain upon which a lien is claimed; and such lien if otherwise sufficient, is not rendered invalid because it shows that the parties, instead of a certain rate per bushel, agreed that the thresher should be paid so much per hour for the time employed in threshing. *Hiam v. Andrews Grain Co.*, 251.
3. Under § 6857 of the Compiled Laws of 1913, which gives the farm laborer a lien for his wages, a laborer is not given a lien for the value of the use of his own horses and machinery. *Lee v. Lee*, 971.
4. Where a farm laborer performs services for which he is to be compensated under an entire contract, embracing both his wages and the value of the use of his horses and machinery, is, under the statute, § 6857, entitled to a lien for his reasonable wages. *Lee v. Lee*, 971.

APPEAL AND ERROR.

1. The record transmitted to this court on appeal cannot be impeached, changed or altered by affidavit or other evidence of matters dehors the record. Such record imports verity, and is conclusive evidence of the proceedings had in the lower court. If the record is incomplete or incorrect, amendment or correction must be sought by appropriate proceedings, and not by impeachment on the hearing in this court. *Hufford v. Flynn*, 33.

2. Section 7952, C. L. 1913, which authorizes service by mail when the person making the service and the person on whom it is to be made reside in different places, between which there is a regular communication by mail, does not authorize service of a notice of appeal by mail where the party serving it and the party upon whom it is to be served reside in the same city. *Garske v. Hann*, 42.
3. Where, in connection with the above error in submitting the case for a special verdict, no instructions are given as to the measure of damages, and where the plaintiff's attorney is shown to have made improper appeals to the jury, and the jury, upon conflicting evidence as to the character and permanency of plaintiff injury, assessed damages at \$4,500, the record does not give the assurance that the defendant has had a fair trial, and a new trial is awarded. *Daniels v. Payne*, 61.
4. For reasons stated in the opinion, the plaintiff's motion in this court, to dismiss the appeal, is denied. *Bank v. Tudor*, 200.
5. An order dissolving an order enjoining statutory proceedings for the foreclosure of a land contract is appealable. *Rourke v. Hoover Grain Co.*, 247.
6. Where an action is tried on the theory that an instrument in suit has been introduced in evidence, it will be so considered on appeal, although, in fact, it was not formally introduced. *Hiam v. Andrews Grain Co.*, 251.
7. An application to the Supreme Court for an order allowing and fixing a supersedeas bond on appeal from an order denying an application for a change of venue will be denied where it appears that a similar application is pending before the District Court, which has neither refused nor neglected to act. *Langer v. Courier News*, 280.
8. Certain rulings on the admission of evidence examined and, for reasons stated in the opinion, held to be non-prejudicial. *Worlitz v. Miller*, 335.
9. While the giving of an erroneous instruction ordinarily raises a presumption of prejudice, yet a case will not be reversed by reason thereof, where it is clear from the record that the complaining party could not have been prejudiced thereby. *Worlitz v. Miller*, 335.
10. Certain instructions given in this case examined and for reasons stated in the opinion held to be non-prejudicial. *Worlitz v. Miller*, 335.
11. This is an action for a grave assault and battery. Defendant appeals from a judgment for \$1,500 with interest and costs. While he alleges error in the conduct of a juror and in the charge of the trial court, he does not bring any evidence before the court. The verdict and the judgment is presumed to be in all respects just and right-

eous. As the code provides, the court must in every stage of an action disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect. *Cohn v. Wyngarden*, 344.

12. The plaintiff, the State of North Dakota, made application for an order to restrain the sheriff from selling a certain automobile at an execution sale on the ground that an action had been brought and was then pending for the forfeiture of said automobile, under the State Prohibition Laws, (chap. 97 Laws 1921), and that all claims relating to said automobile were properly triable in such forfeiture action. The trial court denied the application for a restraining order, but in its order provided that the execution sale should be subject to all the rights and equities of the State; that such rights and equities were to be determined in the forfeiture action; that any purchaser at the execution sale should take such automobile subject to the rights of the State as they might finally be determined in such forfeiture action; that said automobile should remain in the possession of the said sheriff to abide the final determination of the rights of the State in said action; and that at the time of, and before making, such execution sale, the sheriff should read such order of the court and announce that said sale was being made subject to the provisions thereof. *Held*, that the plaintiff was in no event prejudiced by such order. *State v. One Buick Auto*, 348.
13. When on appeal from an order denying an injunction to restrain an execution sale, it appears that the proceedings were not stayed pending appeal, and that before the appeal was submitted the execution sale has been held in accordance with the directions of the execution and the provisions of the order appealed from, the question as to whether the sale should or should not have been restrained becomes a moot one, and the appeal is subject to dismissal. *State v. One Buick Auto*, 348.
14. It is the duty of the lower court, on the remand of a case, to comply with the mandate of the appellate court and obey the directions therein. Hence, where the Supreme Court directs that a judgment be modified in certain particulars, and, as thus modified, affirmed, it is the duty of the court below to modify the original judgment as, and only as, directed; and it has no power to make other modifications or changes in such judgment. It is *held* that in the instant case the trial court correctly interpreted and carried out the mandate of the appellate court. *State ex rel. Wehe v. Frazier*, 381.
15. Defendant claims there is conflicting testimony with reference to the proper application of a certain sum of money, in the amount \$1,710.00, which he claims he ordered to be applied on the note. The judgment has been directed to be modified, plaintiff having

- consented, so that any benefit he would have received if the money had been applied on the note, instead of otherwise, viz: on an account, is secured to him and a new trial is therefore unnecessary. For reasons stated in the opinion, nothing would be gained by a new trial. *Edgeley Co-op. Grain Co. v. Spitzer*, 406.
16. Thereafter, plaintiff made a motion for a new trial which was denied and an order to that effect entered, and in this it is *held* there was no error. *Kasbo Const. Co. v. Minto School Dist.*, 423.
 17. A direct action to vacate such void judgment, (when entertained by the trial court without objection), instead of a motion or other proceeding therefor, may be upheld. *Citizens State Bank v. Smeland*, 468.
 18. That the findings of the trial court determining that the dwelling did not become unoccupied for a period of ten days are presumed correct and will not be reversed if there be evidence substantially supporting. *Palmeter v. Williamsburgh City Fire Ins. Co.*, 530.
 19. For reasons stated in the opinion the case is remanded for a determination of the amount due to the defendant, Hodge, from the plaintiff. *Hassen v. Salem, et al*, 592.
 20. An application for a change of venue on the ground that an impartial trial cannot be had in the county where the action is pending is addressed to the sound, judicial discretion of the trial court, and the ruling made by the trial court will not be disturbed unless an abuse of discretion appears. In this it is *held* that the trial court did not abuse its discretion in denying a motion for a change of venue. *Langer v. Courier News*, 678.
 21. Certain motions by plaintiff for dismissal of the appeal considered and for reasons stated in the opinion are denied. *Kennelly v. N. P. Ry. Co.*, 685.
 22. In an action to foreclose a chattel mortgage which covered, among other property, crops to be later grown on land occupied by the mortgagors, where the mortgagors were not personally served and where the complaint showed that the owner of the land, who was made a party defendant, claimed an interest in the crop, the latter answered, setting up a lease made with one of the mortgagors subsequent to the date of the mortgage and with the knowledge of the mortgagee. The lease reserved to the lessor title to the crop as security for the stipulated cash rental and advances. The answer further denied that a legal seizure had been made under the warrant issued in the action, alleged a conversion by the plaintiffs and damages incident hereto, but concluded with a prayer for relief that defendant be decreed to be an owner and entitled to possession. The mortgagor abandoned the premises before the crops were harvested and the defendant, with the plaintiff's acquiescence, caused

the grain to be harvested and threshed at defendant's expense.

It is *held*:

The evidence shows that the grain in controversy was converted by the plaintiffs and it fails to show a legal seizure thereof by the sheriff. *State Bank v. Nelson, et. al.*, 702.

23. In the absence of a settled case containing the evidence, the facts found by the trial court must be accepted as true; the presumption obtains that the evidence supports the material facts alleged in the complaint and that the findings are supported by the evidence and, further, that additional matters covered by the findings and not embraced in the issues formed by the pleadings were properly determined by action of the parties at the trial. *Ryan v. Bresmith*, 710.
24. In the absence of a settled case, the Supreme Court may determine whether the conclusions of law are warranted by the findings of fact and may review error appearing affirmatively in the judgment roll. *Ryan v. Bresmith*, 710.
25. In the absence of a settled case, findings of fact, conclusions of law and a judgment providing for the strict foreclosure of a contract for a deed and determining that the vendor shall retain payments made upon the contract as liquidated damages in compensation for use and occupancy, or for rental value of the land, pursuant to an express stipulation in the contract, and that the vendor shall receive one-half of the grain crop, produced during the year of litigation, are not erroneous, *Ryan v. Bresmith*, 710.
26. Certain rulings relating to amendment of the complaint, the examination of witnesses, and the admission and rejection of evidence considered, and, for reasons stated in the opinion, *held* proper, or non-prejudicial. *Asch v. Washburn Lignite Coal Co.*, 735.
28. In such action, the findings of the trial court are presumed to be correct unless clearly opposed to the preponderance of the evidence. *McCormick v. Union Farmers' State Bank*, 834.
27. An action, instituted for purposes of declaring a deosit or payment of moneys to constitute a preference pursuant to the Federal Bankruptcy Act, and, as such, tried in the District Court without a jury, is not triable, upon appeal, de novo in the Supreme Court. *McCormick v. Union Farmers' State Bank*, 834.
29. For reasons stated in the opinion, it is *held*, that the trial court did not commit error in its findings and conclusions. *McCormick v. Union Farmers' State Bank*, 835.
30. That there is no basis for an assignment of error predicated upon alleged prejudicial remarks of plaintiff's counsel in his argument to the jury. *Howlett v. Stockyards Nat. Bank*, 933.

31. An order setting aside a stipulation for dismissal of an action is appealable under subdivision 4, Sec. 7841, C. L. 1913, as an order which "involves the merits of an action or some part thereof." *Lilly v. Haynes Co-op. Coal Mining Co.*, 937.
32. Section 7418, Comp. Laws 1913, provides that the court may change the place of trial of a civil action: * * * (2) "When there is reason to believe that an impartial trial cannot be had" in the county in which the action was brought; and (3) "When the convenience of witnesses and the ends of justice would be promoted by the change." In this action the defendant asked for a change of venue on both of these grounds. The plaintiff objected to the sufficiency of the moving affidavits, coupled with a request that in event the objection was overruled, that he be afforded an opportunity to submit counter-affidavits. The trial court, in effect, sustained the objection on the ground that he could not "agree with counsel for the defendant that he cannot have a fair and impartial trial" in Hettinger County. It is *held* that the trial court erred in holding that the showing made was insufficient to require the granting of the application for a change of the place of trial, and the order denying such application is therefore reversed, and the trial court directed to hear the motion anew, and afford both parties reasonable opportunity to present such additional showing as they may desire to present. *Lilly v. Haynes Co-op. Coal Mining Co.*, 937.
34. That the plaintiff is entitled to a new trial as to all of the defendant's contract of indemnity for the payment of the note to the bank by former parties interested therein and, concerning their wealth, is prejudicial error. *First Nat. Bank v. Davidson*, 944.
34. That the plaintiff is entitled to a new trial, as to all of the defendants by reason of prejudicial error in the record. *First Nat. Bank v. Davidson*, 945.
35. For reasons stated in the opinion, it is *held* the court did not err in directing the jury to return a verdict of dismissal of the action, which result was in effect the same as if a motion had been properly made at the close of all the evidence for a dismissal of the action on the ground that there was no evidence to sustain plaintiff's cause of action; though the reason for the directing of the verdict was based on an erroneous motion of the court, the result arrived at was right. *Bruffarts v. Ober et al.*, 997.
36. A party who asserts error on appeal must show the existence thereof clearly and affirmatively from the record itself. *Halstead v. Mo. Slope Land and Inv. Co.*, 1001.
37. All doubtful interpretation will be resolved in favor of the validity of the action of the trial court, and where, on any reasonable contingency in the state of the record, the decision below might have

- been valid such contingency will be presumed. *Halstead v. Mo. Slope Land & Inv. Co.*, 1001.
38. In the instant case it is *held* that a judgment rendered, after the filing of the remittitur in the district court, upon a motion based on all proceedings formerly had in the action is not shown to be erroneous by the record presented on appeal. *Halstead v. Mo. Slope Land & Inv. Co.*, 1001.
 39. No error can be predicated on the denial of a motion for a directed verdict made at the close of plaintiff's case, unless such motion is renewed at the close of all the evidence. *Lofthouse v. Galesburg State Bank*, 1019.
 40. Errors assigned upon instructions, given and refused, and upon rulings on the admission of evidence, are considered found to be non-prejudicial. *Lofthouse v. Galesburg State Bank*, 1019.
 41. Chap. 2, Laws 1919, providing for the certification of questions of law to the Supreme Court is applicable, and intended to be invoked only where in a pending cause, at issue, it becomes apparent that the determination of the cause will depend principally or wholly upon the construction of the law applicable thereto, and such construction or interpretation is in doubt and vital, or of great moment in the cause. *Malherek v. City of Fargo*, 1109.
 42. Questions of law certified to the Supreme Court under chap. 2, Laws 1919, must not involve an examination of the transcript of the evidence and a determination whether the evidence is sufficient to establish either a cause of action or some ultimate fact required to be established by a party to the action. In other words, the question of law certified "must be clearly stated and not involve question of fact, or those of mixed law and fact. It must be distinctly stated so that it can be determined by the Supreme Court, without regard to other issues of law or fact." *Malherek v. City of Fargo*, 1109.
 43. An order overruling a demurrer to one of several counterclaims is an appealable order. *Ripley v. McCutcheon*, 1130.
 44. Certain assignments of error predicated upon instructions given to the jury and rulings made in the admission and exclusion of evidence examined, and for reasons stated in the opinion *held* to be non-prejudicial. *Morton v. Woolery et. al.*, 1132.
 45. Where a taxpayer has sought to enjoin the assessment, levy and collection of taxes for a Special School District, and the determination that the organization of such Special School District was illegal and void, and where the plaintiff has appealed from a judgment dismissing the action without securing a stay of the temporary injunctive order issued, whereby, pursuant to statutory law, the assessment and levy of such school taxes have been made, and the

collection of the same perhaps effected, it is *held*, that the restraint of the assessment, levy, and collection of such taxes has become moot and that the determination of the legality of the organization of the Special School District can not be made, and, if made, may be ineffectual. *Sayre v. Village of Alsen*, 1138.

46. Defendant appeals from a judgment on a verdict for \$646.26. It claims that the verdict is for an excess of \$277.49. The appeal is on two grounds: (1) Error of law in sustaining objections to the offer of resolutions directing the managers of the corporation to make certain charges against the plaintiff. (2) Error in permitting inadvertently a paper with some figures on it to go to the jury room. *Held*, that the record shows no prejudicial error. *Finseth v. Bismarck Motor Co.*, 1176.
47. For reasons stated in the opinion, it is *held* that questions presented on this appeal relative to relief by injunction have become moot, the acts sought to be restrained having been completed. *Lorentzen v. Stiles, et al.*, 1201.
48. For reasons stated in the opinion it is *held* that the petitioners not in fact being parties to this action, were not entitled to appeal from the judgment therein. *State v. Grubb*, 1212.
49. For reasons stated in the opinion, it is *held* that error is not available to defendant, on account of certain alleged prejudicial remarks of plaintiff's counsel to the jury. *Hurley v. C. M. St. P. Ry. Co.*, 1251.
50. Plaintiff appealed from a certain judgment, cancelling a certain contract for the purchase of land. It is *held*, for reasons stated in the opinion, that plaintiff waived the errors assigned and upon which it relies. *Ellendale Nat. Bank v. Wentzel*, 1290.

ASSIGNMENTS.

1. This is an action by the assignee of a lease and bond for the payment of rent and there is no claim that the judgment is for more than the sum due. *Held*, that as the assignee of a contract to pay money the plaintiff has a right to maintain the action. *Gardner v. Stangebye*, 513.

ASSOCIATIONS.

1. A voluntary unincorporated association may receive a lease running to its trustees.

Where the second story of a building was constructed by an unincorporated association, at its expense, upon the land and building of another, with understanding that it should possess an ownership and dominion thereover, and where such association went into possession upon completion of the second story and has since remained in possession, paid the taxes, and kept up the insurance, and where,

pursuant to a misconception of the association's rights, a lease for 20 years with the privilege of renewal for an additional 20 years was made as the evidence of its right, and thereafter, the law being amended so as to permit a 99 year lease, a 99 year lease was made dating from the original occupancy, pursuant to the agreement of the parties but was never delivered or has been lost, it is *held*, for reasons stated in the opinion, that the judgment of the trial court, directing the holder of the legal title to execute such 99 year lease was proper. *Piper v. Taylor*, 967.

ATTACHMENT.

1. Where, on a motion for dissolution of an attachment, the existence of the grounds of the attachment is properly denied by the defendant, the burden is placed upon plaintiff to show the existence of such grounds; and where he fails to sustain such burden, the attachment should be dissolved. *Peterson v. Ogland*, 443.

AUCTIONS AND AUCTIONEERS.

1. Where one was hired at a stated consideration to clerk an auction sale, with the agreement that the bank, of which he was the cashier, would take all paper at 95c on the dollar, and where, at the public auction held, a purchaser bought and received certain property without making settlement in accordance with the terms advertised for the sale, it is *held*, for reasons stated in the opinion, that the clerk was acting under a contract of employment and that the evidence failed to show any breach of duty, whether impliedly assumed or expressly contracted, by such clerk. *Posey v. Stutsman County Bank*, 1099.

BAIL.

1. In Cass County defendant was accused of carrying concealed weapons and bound over to the District Court. His wife borrowed and deposited in Court \$1,400 as bail for his appearance at the November Term of Court. But when his case was called he was in the state's prison at Stillwater and his appearance was impossible. He was civilly dead. Hence the court erred in denying a motion to undo the forfeiture of his bail. Order reversed. *State v. Williams*, 1259.

BANKS AND BANKING.

1. A National Bank receiving for custody, care and collection a note and mortgage of its customer and thereafter forwarding the same for collection is acting *intra vires* and liable for breach of its duty. *Brandenburg v. Bank*, 176.

2. A National Bank receiving the proceeds of a customer's note and mortgage with authority to pay out the same upon a first mortgage lien upon real estate is acting *intra vires* and liable for breach of of its duty. *Brandenburg v. Bank*, 176.
3. Where a president of a National Bank, pretending to act as such, fraudulently and deceitfully made representations to the customer of the bank concerning the character of a pretended first mortgage lien and thereby occasioned the proceeds realized upon a note belonging to the bank's customer to be paid and invested in a worthless mortgage the bank is liable for the fraud and deceit practised although it received no benefit, and its officer's acts were *ultra vires*. *Brandenburg v. Bank*, 176.
4. Where a person makes a deposit in a bank for the specific purpose of meeting certain checks to be thereafter issued, the bank on accepting the deposit becomes bound by the conditions imposed, and if the money so deposited is misapplied it can be recovered as a trust deposit. *Morton v. Woolery, et. al.*, 1132.
5. Where the cashier of a banking institution at the direction of the directors thereof, subscribed for stock in another corporation, an electric light company, and who at their direction placed \$500 in the bank to the credit of the electric company, which was checked out by it, and where it further appears that the purchase of the stock in the electric company was for the purpose of enabling the bank to procure electric light in the bank, it is *held* that such purchase was not a violation of § 5187 C. L., an amended by chap. 54 of the Session Laws of 1915, prohibiting banking institutions from investing in the stock of other corporations. *Farmers State Bank v. Richter*, 1233.

BANKING.

See Banks and Banking.

BASTARDS.

1. On an appeal by the defendant from a judgment rendered against him in a bastardy proceeding and from an order denying a new trial, it is *held* that the verdict has substantial support in the evidence. *State v. Fuchs*, 730.
2. In a bastardy proceeding, the principal question to be determined is whether the accused is the father of the child involved; and ordinarily, the exact day on which the child was begotten is not material except as it bears on such principal question. *State v. Fuchs*, 730.

3. For reasons stated in the opinion, error predicated upon a ruling made in cross examination of the complaining witness is held to be nonprejudicial *State v. Fuchs*, 730.

BILLS AND NOTES.

1. This is an action on a promissory note. The defense was want of consideration. The case was tried to a jury. No motion for a directed verdict was made by either party. The jury returned a verdict in favor of the defendant. Thereafter the plaintiff moved in the alternative for judgment notwithstanding the verdict or for a new trial. The trial court ordered judgment notwithstanding the verdict in plaintiff's favor. The evidence is examined and it is *held* that the verdict in favor of the defendant was not supported by the evidence and that the trial court was correct in setting the verdict aside and in ordering judgment notwithstanding the verdict. *Merchants' State Bank v. Streeper*, 583.
2. In an action upon a promissory note, where the defense asserted was that the note was given to a bank purely for its accommodation to cover up temporarily overdrafts of a publishing company, of which the defendants were directors, to pass an examination by the federal examiner, without any consideration, and upon the understanding that the note become a part of the bank's assets and should not be a legal binding obligation upon the defendants, and, where, further as to one of the defendants, the defense was asserted that the note was signed and handed by such defendant to the plaintiff upon the express agreement that it should not take effect until certain conditions were first performed, it is *held*:
That the evidence establishes, as a matter of law, that the note became a part of the assets of the bank. *First Nat. Bank v. Davidson*, 944.
3. That the questions whether there existed a consideration for the note and whether the note was given as an accommodation to the publishing company, were for the jury. *First Nat. Bank v. Davidson*, 944.
4. That directors, who with full understanding assume a duty and responsibility for their company to take up its overdraft, the payments of which is its legal duty, and, who sign a note, in response to this duty and responsibility which serves as an accommodation to their company and the fulfillment of its duty, are liable to a holder for value of such note. *First Nat. Bank v. Davidson*, 944.
5. That the failure to perform the conditions precedent to the delivery of the note was properly a defense for the defendant who pleaded such failure. *First Nat. Bank v. Davidson*, 944.

6. In an action by plaintiff to recover on a promissory note, given for a tractor, wherein it claims that it purchased the note in the ordinary course of business before maturity for value and without notice, there is evidence of defendant's dissatisfaction with the tractor, prior to the time of the purchase of the note, which dissatisfaction was manifested in the presence of the President of the plaintiff bank who negotiated the purchase of the note. *State Bank v. Sukut*, 987.
7. It is *held*, that the evidence was of such character that it was for the jury to determine from it, and all the evidence whether the plaintiff acted in good faith in the purchase of the note and whether it purchased it in the manner claimed by it. *State Bank v. Sukut*, 988.

BOUNTIES.

1. The Returned Soldiers' Fund is a public fund: The moneys therein public moneys. *Bauernfeind v. Nestos*, 1218.
2. The Industrial Commission has no authority, to bargain by contract, their statutory discretion so as to legally bind its further exercise by them or their successors, or so as to inhibit the control of the legislature thereover. *Bauernfeind v. Nestos*, 1218.

BROKERS.

1. In a stipulated action to determine interest payable under a real-estate contract, it is *held*, for reasons stated in the opinion, that interest should be computed from the date stated in the original contract, and that the preliminary decree entered for a strict foreclosure, in the event of default, was proper. *Amidon v. Walters*, 56.
2. In an action by a broker to recover commissions earned under an express contract for the sale of real property, it appeared that the broker negotiated a contract for the sale which departed somewhat from the listing agreement. The evidence was conflicting as to whether the defendant accepted the contract as a substantial fulfillment of the agency or upon condition that the agent would reduce his commission to make up the difference between the value of a contract conforming to the listing agreement and that actually negotiated. It is *held*:

Following a prior decision in the same case, a question of fact is presented upon such conflicting evidence. *Paulson v. Reeds*, 90.

3. Where an owner signed a contract for the sale of land negotiated by a broker with knowledge that it did not conform to the listing agreement, and without terminating the agency or modifying the agreement relating to commissions, the broker is entitled to recover the stipulated commission. *Paulson v. Reeds*, 90.

CARRIERS.

1. It is the duty of a carrier, as an incident to its business of transporting livestock, when it tenders facilities and utilities for the reception of cattle preparatory to shipment, to furnish the same in a suitable and reasonably safe condition. *Booke et al. v. Payne*, 435.
2. Where a carrier maintains stockyards and also a plot of ground upon which cattle are customarily held preparatory to shipment and, where prospective shippers are directed by the carrier to feed, water and hold their cattle upon such plot of ground preparatory to and while waiting shipment by reason of occupancy of the stockyards, and where, while there, 60 head of cattle wander through unprotected openings in small banks of an artificial reservoir there maintained by the carrier, and off steep banks into an open space of thin ice and deep water, occasioning the loss of 44 head, it is *held* that the carrier's breach of duty and the shippers contributory negligence were questions of fact for the jury. *Booke et. al. v. Payne*, 436.
3. A railway company owes a duty, not only to passengers but also to those who come to meet incoming or accompany departing passengers, to keep its station platform reasonably clear and free from obstacles by which such persons are liable to be injured. *Daugherty v. Davis*, 883.
4. A person engaged in the business of transporting passengers and baggage between two depots situated upon two different lines of railway in the same village and who has been so engaged for a considerable period of time with the knowledge and acquiescence of carrier is an invitee upon the station premises and the carrier owes him a duty to use reasonable care for his safety. *Daugherty v. Davis*, 883.
5. In the instant case it is *held* that the implied invitation extended by the carrier to the person engaged in such transportation business extended not only to the particular premises where his bus was generally placed near the depot platform, but also to the waiting rooms in the depot and to the station platform. *Daugherty v. Davis*, 883.
6. The sufficiency of the evidence is such, that the questions of negligence and the proximate cause of plaintiff's injuries were questions of fact for the jury. *Hurley v. C. M. St. P. Ry. Co.* 1251.

CONVERSION.

1. Where there is no mandatory direction to sell real property and no duty imposed upon the executor requiring sale, no equitable conversion is effected. *In re Murphy's Will*, 1267.

CAUSE OF ACTION.

1. This action is to recover damages against the defendant for his negligence in keeping a loaded revolver where it was kept and where he knew it was accessible to the Clements boy who was known to him to be careless and reckless. A second cause of action is based on failure of defendant to comply with the Workmen's Compensation Fund, chap. 162 of the Session Laws of 1919. The plaintiff was required at the trial to elect on which cause of action he relied and elected to rely on the first. *Olson v. Hemsley*, 779.

CERTIORARI.

1. Where a magistrate is acting within his statutory authority and there exists otherwise a remedy available, a writ of certiorari will not issue. *Martin v. Ludowese*, 342.

CHATTEL MORTGAGES.

1. The plaintiff sues to foreclose a chattel mortgage for \$1500 and interest. Defendants answer that the mortgage has been fully paid and the Stanton Bank claims certain mortgage liens, which this Court holds to be superior to that of the plaintiff. As the pleadings and the evidence did not fairly present the question of payment, the trial court failed to consider it, leaving defendants to bring an action for an accounting. Hence, this court does not attempt to determine that question. It remands the case that the pleadings may be amended and the question of payment determined on further evidence, and on amended pleadings. *State Bank v. Winmill*, 44.
2. In an action for the conversion of grain, upon which the plaintiff claimed a mortgage lien, the trial court directed a verdict for the defendants. The evidence is examined and it is *held* that no error was committed in directing the verdict. *Am. State Bank v. Dayton*, 353.
3. For the conversion of a Case engine plaintiffs bring this action and recover a judgment for \$400 and costs. The plaintiffs claim under a chattel mortgage. Defendant claims under an attachment which was levied prior to the filing of the mortgage. The attachment was for a debt which existed prior to the execution of the mortgage. Hence the lumber company is not a subsequent creditor in good faith and its claim does not take precedence over the mortgage. *Moens et. al. v. Kilzer Lumber Co.*, 420.
4. In this case the trial court dismissed both the plaintiff's action and a counterclaim by Norlid, the appellant, against the bank for the alleged conversion of some grain. *Held*, that there is no evidence

to sustain the counterclaim and the judgment is affirmed. *State Bank v. Sorlien & Norlid*, 487.

5. Where issue is taken upon allegations of fact constituting a conversion and evidence is introduced upon such issue, without objection and an appropriate measure of damages established, such judgment may be entered for the defendant as is consistent with the pleading and proof. *State Bank v. Nelson*, et. al. 703.
6. Under the record in this case, the issues relating to conversion are not restricted by the prayer for relief in the answer. *State Bank v. Nelson* et. al. 703.
7. The evidence clearly shows that the defendant's advances exceeded the full value of the mortgagor's interest in the crop and hence that the defendant had a superior right thereto. *State Bank v. Nelson* et. al., 703.

COMMERCE.

1. The railroad tracks upon which deceased was working at the time of his death were used in the transportation of both interstate and intrastate commerce. *Held*, in the circumstances of this case and from the evidence that deceased was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. *Kennelly v. N. P. Ry. Co.*, 685.

COMPROMISE AND SETTLEMENT.

1. The district court has power to relieve a party from a stipulation of dismissal upon proper application and showing; but such court may not, in a summary manner upon motion, determine the validity of a compromise of the cause of action. The validity of such compromise should be tried and determined the same as any other defense presented in such action. *Lilly v. Haynes Co-op. Coal Mining Co.*, 937.
2. Plaintiff brought this action to recover \$1,600 claimed as rental, of a certain building for a term of four months. The facts were tried by a jury; it rendered a verdict in plaintiff's favor for the full amount. There is substantial evidence to sustain the verdict and the judgment. *Volker v. Nat. Tea. Co.*, 982.
3. In an action to recover damages for breach of an agreement to lease real property for a certain period of time and for deprivation of plaintiff's interest in certain personal property through alleged wrongful acts of the defendant, where the defendant claimed that the plaintiff had voluntarily surrendered his rights under the lease and had given a bill of sale for the personal property for an agreed consideration, it is *held*:

The evidence is sufficient to support the verdict in so far as it is based upon a rescission of the settlement on the ground of duress. *Hellemons v. Knudsvig*, 1167.

CONSTABLES.

See Sheriffs, etc.

CONSTITUTIONAL LAW.

1. In a criminal prosecution for the sale of intoxicating liquors, the defendant may not raise the question of the constitutionality of the Judicial Redistricting Act (Chap. 16, Laws of Regular Session, 1919), in which the county is made a part of a larger district than formerly obtained and in which provision is made for additional judges. *State v. Koonce*, 108.
2. There is no merit in a constitutional objection to the manner in which the court is constituted, where it appears that the court is presided over by the same judge who would be the district judge *de jure* if the constitutional objections were valid. *State v. Koonce*, 108.
3. Section 9645 of the Compiled Laws of 1913, which provides for the granting of a temporary injunction at the commencement of an action to abate a bawdyhouse nuisance, is not unconstitutional as depriving a person of life, liberty or property, without due process of law. *State ex rel. v. McCray*, 625.
4. Statutes should be construed, if possible, so as to be constitutional in their operation and if, where ordinary words are given their ordinary meaning, the statute may operate constitutionally whereas, if given a restricted meaning, it would operate unconstitutionally as to a portion of the subject matter affected, it must be *held* that the legislature intended the ordinary meaning to attach. *State ex rel. v. Wallace*, 803.
5. Courts are not concerned with the policy reflected in legislation or with the motives of the legislature. *State ex rel. v. Wallace*, 803.
6. In an action of injunction questioning the constitutionality of chap. 68, Laws 1915, which authorizes any city to annex certain adjacent territory by resolution of the city council, after hearing upon a protest being filed by property owners in the proposed extension, it is *held*:
 - (a) That the act is not subject to the constitutional objection that it is not uniform in its operation.
 - (b) That it is not special legislation.

- (c) That it does not deprive the people concerned in the territory affected of any constitutional right of local self-government.
- (d) That it does not delegate, contrary to constitutional provisions, a legislative power. *Waslien v. City of Hillsboro*, 1113.

CONTRACTS.

1. For the construction of a cement basement wall under the house of defendant on Eighth Street, in the City of Fargo, the jury found a verdict against him for \$243.44 and interest. *Held*, that the verdict is clearly right and the judgment is affirmed. *Johnson Const. Co. v. Hildreth*, 577.
2. Where the relations between parties are such that an offeree is under duty to notify the offerer that his proposal is rejected, the failure to communicate the rejection may result in legal assent to the terms of the offer. *Lechler v. Mont. Life Ins. Co.*, 645.
3. Where a building contract provides that the owner may take possession and proceed to complete the contract and where the owner did take possession of the construction and furnish labor and material pursuant to the contract, substantial compliance with the contract may occur through the action of both the contractor and the owner. *Dinnie v. Lakota Hotel Co.*, 657.
4. Where a jury found that the contractor had substantially performed the contract, and returned a verdict for the plaintiff less the cost of the labor and materials furnished by the owner and for other omissions and defects not exceeding \$570.00; and where contract price for the construction was \$28,800.00, it is *held* that the verdict as returned by the jury does not show as a matter of law failure to substantially perform. *Dinnie v. Lakota Hotel Co.*, 657.
5. Upon the circumstances of the record it is *held* that the failure of the architect to issue a final certificate did not preclude right of action by the contractor. *Dinnie v. Lakota Hotel Co.*, 657.
6. In the enforcement of a simple contract, it is necessary to allege consideration. *Ripley v. McCutcheon*, 1130.

CORPORATIONS.

1. In an action for accounting, the evidence is examined, and held to sustain a judgment in favor of the defendant for a dismissal of the action. *Meyer v. Hernet*, 355.
2. In an action for an accounting brought by two stockholders in a dissolved corporation against the directors as trustees, where it ap-

peared that the charter of the corporation had expired by limitation that without actual knowledge of this fact the business was conducted for more than three years in the same manner as before; that dividends were declared and paid from time to time; that upon discovery of the fact that the charter had expired, and that the directors were liable as trustees under § 4567 of the Comp. Laws for 1913, three of the directors, to avoid the expense and sacrifice incident to liquidation, agreed to and did form a new corporation under substantially the same name; that, without notice to the plaintiff stockholders, they caused the assets to be appraised and purchased by the new corporation; that the stock of the new corporation was allotted to stockholders in the old, other than the plaintiffs; and that the defendants caused to be deposited in payment for plaintiffs' stock par value, plus 6 per cent. interest from the date of last dividend, which plaintiffs refused to accept—it is *held*:

Under § 4567 of the Comp. Laws of North Dakota for 1913 the defendant directors became trustees for the stockholders of all the assets of the dissolved corporation. *Langer v. Fargo Merc. Co.*, 545.

3. Where a corporate business is conducted for a period of time after the expiration of the charter without knowledge of that fact, and dividends are declared and distributed in the usual course, such dividends are the property of the stockholders, and are not, by operation of law, applied on liquidation claims to reduce the *res* of the trust. *Langer v. Fargo Merc. Co.*, 545.
4. Good will attaches to a corporate business to the same extent as to a partnership business and upon dissolution the trustees must account to the stockholders for its value. *Langer v. Fargo Merc. Co.*, 545.
5. Where the charter of a corporation expires after a long period of prosperity in the conduct of its business, and where for a period of years prior to its termination dividends had been earned and paid greatly in excess of a reasonable rate of interest on the capital invested, the good will has a substantial value, capable of being measured in money. *Langer v. Fargo Merc. Co.*, 546.
6. Where trustees, without notice to the stockholders or to the cestuis que trustent, appoint appraisers to appraise the assets in their hands, and where they dispose of the same for an inadequate consideration to a new corporation in which they are the principal stockholders, the transaction is voidable at the election of the stockholders not notified. *Langer v. Fargo Merc. Co.*, 546.
7. Where, after the termination of the charter, arrangements are made by the trustees whereby the business is continued without interruption by a new corporation, which reaps all of the benefits attaching

to the good will, a stockholder, whose liquidation claim has not been satisfied and who is excluded from the new corporation, may follow his property into such new corporation, or, at his option, recover a money judgment for the value of the interest in the old corporation as represented by a like interest in the new. *Langer v. Fargo Merc. Co.*, 546.

8. Where the good will is not accounted for by the trustees, and the court, in an action for accounting, is compelled to value it, it must be valued as "if it had been sold in the most advantageous manner and under such circumstances that it would have produced the largest sum for all of the parties interested." *Langer v. Fargo Merc. Co.*, 546.
9. Fees paid to a certified accountant will not be allowed as part of the costs, where his services were principally valuable to one of the parties, and where the facts gathered by him were at all times available to such party from the books which are not shown to have been complex. *Langer v. Fargo Merc. Co.*, 546.
10. In an action for the conversion of money, where the complaint alleges that the defendant wrongfully and fraudulently converted money which he had received while acting as manager for the plaintiff (a corporation), the defendant may show, under a general denial, that he properly disbursed such moneys in accordance with the directions of the officers of the plaintiff corporation. *Jamestown Gas Co. v. Ahearn*, 992.

COUNTIES.

1. Chap. 122, Session Laws of 1921, construed, concerning particular language, and, *held* to mean that the total amount of taxes levied for all purposes shall not exceed an amount equal to one-third of the total combined levies which were made for the years 1918, 1919, and 1920. *N. P. Ry. Co. v. Tucker*, 417.
2. In the printing of election supplies for a primary election the mandatory duty is not imposed upon the county auditor to secure competitive bids, pursuant to chap. 49, Laws of 1921. *Bismarck Tribune Co. v. Johnson*, 1042.
3. County commissioners must act as a board and through action taken at proper meetings. *State ex rel. v. Larson et. al.*, 1144.

COURTS.

1. This action involves the constitutionality of chap. 122, Laws, 1921. It is *held*:

Inasmuch as two of the judges of the Supreme Court are of the opinion that the act does not violate any provision of the state constitution, it cannot be said that the act is unconstitutional as violative of the state constitution in view of § 89 of the constitution as amended (Article XXV, p. 503, Laws 1919), which provides that in no case shall any legislative enactment or law of the State of North Dakota be declared unconstitutional unless at least four of the judges of the Supreme Court so decide. *Wilson v. City of Fargo*, 447.

CRIMINAL LAW.

1. In a proceeding for the exercise of the superintending control of the supreme court, where it appears that the defendant in a criminal action filed a double affidavit of prejudice against both the trial judge and the county and judicial subdivision, and thereupon the trial judge so disqualified, made an order transferring the criminal cause from Ward county to Ramsey county, without designating the judge who should preside at the trial in the transferred county, as the statute requires, and where, further, it appears upon the showing made at the hearing before the supreme court that a fair and impartial trial in Ramsey county, for either the state or the defendant, is doubtful, and where, further, under the peculiar circumstances surrounding the case involved, as stated in the opinion, it is appropriate that the superintending control of this court be exercised in the interests of justice, to the end that a speedy and early trial be had without remanding the case again to the judge so disqualified for the consideration of the entry of another proper order herein, subject, possibly, to another application to this court, it is *held* that the supreme court, under its superintending control, will designate, as required by statute, the county, and will direct the district judges in the judicial district to which the transfer of the cause has been ordered to designate the trial judge to preside at the trial of such criminal action. *Lowe v. Dist. Court*, 1.
2. For reasons stated in the opinion, it is *held*, that the court did not err in denying the defendant's motion for a new trial on the ground of newly discovered evidence. *State v. Koonce*, 108.
3. The defendant was arrested and duly charged by a written information filed in the District Court of McLean county, North Dakota, with the commission of the crime of murder in the first degree. After his arrest, and before the filing of the information, he made a written confession of guilt, admitting therein, that he killed Jacob Wolff, with whose murder he was charged by the information, and further admitting that he also killed Jacob Wolff's five children and Jacob Hofer, the hired chore boy. He states that Mrs. Wolff was killed by the discharge of a certain shot gun when

he was endeavoring to take the same away from Jacob Wolff. After the entry of his plea of guilty, the Court made and entered a judgment of conviction, and thereafter sentenced defendant to the state penitentiary at Bismarck, North Dakota, for the term of his natural life. *State v. Layer*, 366.

4. Thereafter defendant made a motion for a new trial and appealed from the judgment of conviction. The basis of the motion was that the written confession was procured from him by duress, coercion, intimidation, and fear, and that his plea of guilty was likewise procured, and that neither was voluntary. *State v. Layer*, 366.
5. An examination of the record discloses that no duress, coercion, or intimidation was exercised in procuring the confession, nor was such used towards him to procure his plea of guilty to the crime charged in the information and for these and other reasons stated in the opinion, it is *held* that the Court did not err in denying defendant motion for a new trial. *State v. Layer*, 367.
6. For reasons stated in the opinion the trial court did not err in making an order appointing special counsel to assist the state's attorney in the prosecution of this case. *State v. Stepp*, 566.
7. Where a defendant enters a plea of not guilty to a criminal information the issue framed by such plea remains until disposed of in some proper manner. Such plea is not deemed withdrawn because the defendant subsequently moves to quash the information on the ground that it does not state facts sufficient to constitute a public offense. *State v. Stepp*, 566.
8. Whether a new trial shall be granted on the ground of newly discovered evidence is primarily a question for the trial court. The function of the appellate court is merely to review the ruling of the trial court to ascertain whether in ruling as it did the trial court abused the sound, judicial discretion with which it is vested. In the instant case the appellate court, for reasons stated in the opinion, is unable to ascertain, upon the record before it, what the trial court actually found upon the controlling facts, and for that reason the order denying a new trial is set aside and the cause remanded with directions that the trial court hear and determine anew the motion for a new trial. *State v. Stepp*, 566.
9. The verdict of the jury, based upon substantial competent evidence, is binding on the court. Following *State v. Cray*, 31 N. D. 67, 153 N. W. 425. *State v. Ugland*, 841.

DAMAGES.

1. In this action two parties, H. and M., were asserting conflicting claims of ownership to a certain tract of land. During the pendency of litigation involving such claims, H., the one in possession, surrendered possession to M. pursuant to a written agreement, signed by M. and two sureties, wherein it was agreed that "in case the court shall decree the return of said land" to H., "they will return the same to" him "together with \$500.00 per year as damages for the use and occupancy of "the said premises. For reasons stated in the opinion it is *held* that, under the evidence in this case, the agreement between the parties was one for the payment of a rental, fixed by them, contingent upon the determination of the ownership of the premises; and not one for the payment of a penalty, or one whereby "the amount of damages to be paid or other compensation to be made for a breach of an obligation, is determined in anticipation thereof." *Halstead v. Mo. Slope Land & Inv. Co.*, 220.
2. Plaintiff brought an action under the Federal Employers' Liability Act to recover damages for the benefit of the widow of deceased and her two children. The evidence disclosed that one of the children was more than thirty years of age and was married, and was in no way dependent upon his father for support. It further shows that the other child, a boy of seventeen years of age, may have in part been dependent. The jury returned a verdict in favor of plaintiff for \$4,000, and apportioned the same as follows to the widow \$4,000. It is *held* that the verdict is sustained by the evidence. *Kennelly v. N. P. Ry. Co.*, 685.
3. A verdict for \$8000.00 is *held* not excessive. *Asch v. Washburn Lignite Coal Co.*, 736.
4. Plaintiff was a passenger, with a drover's pass, upon a certain freight train. Part of the train, for causes shown in the evidence, left the track; plaintiff was riding in the caboose which did not leave the track. He received certain injuries in the manner and of the nature shown by the evidence. The jury returned a verdict in his favor for damages in the sum of \$1,500.00; a judgment was entered on the verdict; it is *held* that the evidence is sufficient to sustain the verdict. *Hurley v. C. M. & St. P. Ry. Co.*, 1251.

DEEDS.

1. Real estate may be conveyed divided upon perpendicular or lateral lines. *Piper v. Taylor*, 967.

DEPOSITARIES.

1. Section 7 of chap. 147, Laws 1919 (Bank of North Dakota Act) and article 11 of chap. 42 of the Political Code (§§ 3315—3329 C. L. 1913) are construed, and it is *held*, that the powers of county commissioners to designate legal depositaries and to direct the placing of county funds upon time deposit were not repealed by said § 7. State ex rel. v. Larson et. al., 1144.
2. Section 3319 Comp. Laws 1913 construed, and it is *held*, that county commissioners have no authority to direct a time deposit of county funds for a longer period than one year. State ex rel. v. Larson et. al., 1144.
3. Where a former county treasurer, shortly before the expiration of his term of office, deposited approximately \$166,000.00 of county funds upon time deposit in various banks of the county, without the formal consent or direction of the county commissioners, and, where thereafter the county commissioners, by formal resolution, set apart \$50,000.00 of such moneys upon time deposit in a sinking fund, which amount, pursuant to certificates of deposit, did not become due for more than one year thereafter, it is *held*, that the disposition of such public moneys by the county treasurer was unauthorized and that the county commissioners had no authority to place public funds upon time deposit for a longer period than one year. State ex rel. v. Larson et. al., 1144.

DEPOSITIONS.

1. Where defendant makes a general appearance, he waives the legal right to object to the reception in evidence of depositions on the ground that notice to take depositions was served before the summons, that the interpreter taking the depositions was prejudiced, and that the depositions were taken on a legal holiday; Comp. Laws 1913, § 7890, providing that either party may commence taking testimony by depositions at any time after service upon or appearance of defendant. Kennelly v. N. P. Ry. Co., 686.

DISMISSAL.

1. In an action for conversion of wheat in 1909 where suit was instituted in January, 1914, and was not brought to trial until January, 1920, after a change of venue had been taken by the defendant, in December, 1918, from Ward County to Pierce County, it is *held*, for reasons stated in the opinion, that the trial court did not err in refusing to dismiss the action for failure to bring the same to trial within five years, pursuant to Section 7598 C. L. 1913. Burke v. Minnesota Elev. Co., 795.

DIVORCE.

1. In an action for divorce the defendant answered denying the existence of grounds alleged in the complaint and affirmatively pleaded grounds for divorce against the plaintiff, praying for divorce and permanent alimony. At the conclusion of the trial the court found the evidence of both parties insufficient and denied the divorce. In addition it found that the plaintiff owned property worth \$10,000; that he had failed and neglected to provide the defendant with the necessities of life and had neglected to pay the temporary alimony. It is *held*:

Under § 4401, C. L. 1913, where a divorce is denied, the court may award maintenance money to the wife. *Pulkrabek v. Pulkrabek*, 243.

2. An award of maintenance under § 4401, C. L. 1913, is not contingent upon the existence of grounds for divorce or upon the wife living apart from her husband without her fault, but the award may be made upon facts showing reasonable necessity for action on the part of the court. *Pulkrabek v. Pulkrabek*, 243.
3. Plaintiff was granted a decree of absolute divorce from defendant on the ground of his incurable insanity. The court in its decree made a division of defendant's property between them, giving to plaintiff all of it except property valued at about Twelve Thousand (\$12,000.00) Dollars, which it permitted to remain in defendant's name, and as his portion of the property.

From the decree plaintiff appeals and assigns error in that the court did not decree her all of the property. It is *held* for reasons stated in the opinion that the decree was proper and without error. *Ellefson v. Ellefson*, 415.

ELECTIONS.

1. This is an appeal from a judgment in a case of an election contest. The appellant has both complied with the judgment and received benefits under it. Hence the appeal is dismissed. *Gerrard v. Keller*, 271.
2. Section 988 of the Compiled Laws of 1913, which provides for rendering assistance to voters who declare to the judges of election that they cannot read or that owing to blindness or other physical disability they are unable to mark their ballots, is mandatory, and where one judge of election is shown to have accompanied a number of voters to the election booth where no such disability appeared or was declared, such votes, upon contest, cannot be regarded as legal. *Grubb v. Dewing*, 774.

3. The evidence sufficiently shows that the notice of contest was served within twenty days after the canvassing of the votes. *Drinkwater v. Nelson*, 871.
4. Chap. 121 of the Session Laws of 1919 which provides for the return and care of the ballots cast at an election for use in case of contest is construed and *held* to render the ballots admissible under ordinary rules of evidence in an election contest though election officers and the county judge, who is made the custodian may have omitted some duty. *Drinkwater v. Nelson*, 871.
5. Where the admissibility of ballots is objected to on the ground that the bundles show that the seals are broken and that they bear other evidences of having been disturbed, the trial court having an opportunity to inspect the bundles is in a more advantageous position to determine whether they had been tampered with than is an appellate court, and its ruling will not be reversed unless clearly erroneous. *Drinkwater v. Nelson*, 871.
6. The evidence in regard to individual votes excluded on the ground of nonresidence and alienage is examined and it is *held* to support the findings of the trial court to the extent of a difference of at least four votes in favor of the contestant. *Drinkwater v. Nelson*, 872.
7. Where two election contests are tried together, partly upon the same evidence, the separate notice of contest and the answers determine the issues, and evidence admitted in one contest which has no relation to the issues presented in the other cannot be considered in connection with the latter, and the denial of a motion made at the close of the contestant's case to amend the answer so as to broaden the issues is not error. *Drinkwater v. Nelson*, 872.

EMBEZZLEMENT.

1. To constitute the crime of embezzlement, the possession of the property appropriated must have been, by the owner or for or in his behalf, intrusted to the accused so that a relation of trust and confidence relative to the thing appropriated is created, and it must appear that the accused had access to or possession of the property embezzled by virtue of such relation of trust and confidence. *State v. Ugland*, 841.
2. The owner of grain hired accused on a monthly salary to assist in harvesting, threshing, caring for and transporting said grain to market. *Held*, that the possession of said grain, under such circumstances, remains in the owner thereof; and if accused having access to and custody of the grain, for such purposes, stealthily takes and carries away the same, or a portion thereof, without the

consent of the owner, and stealthily converts the same to his own use he takes it from the possession of the owner, and is properly informed against for the larceny thereof. *State v. Uglund*, 841.

ERROR.

There is no prejudicial reversible error of law in the record. *Volker v. Nat. Tea Co.*, 983.

ESTOPPEL.

1. This is an action for conversion of four cows. Plaintiff recovered a verdict in the sum of \$400.00. It is *held*:

That the plaintiff is not estopped to claim ownership. *Howlett v. Stockyards Nat'l Bank*, 933.

EVIDENCE.

1. The Supreme Court may take judicial notice of its determinations alleged in a complaint. *Burdick v. Merc. Co.*, 227.
2. That the trial court properly took judicial notice of the former case upon being requested and upon electing so to do. *Stead v. Manhart*, 537.
3. Testimony of the market value of hides in the Chicago market on a certain day, which is based upon current reports of a publishing company neither offered in evidence nor proved to be representative and trustworthy, is incompetent. *Schnitz Bros. v. Bolles & Rogers Co.*, 673.
4. Where market value is sought to be established, evidence of individual sales of hides upon dates anterior and posterior to the time of a tendered delivery is incompetent unless shown to be at a time sufficiently near and under conditions sufficiently similar to aid in the determination of the market value at the date of the tendered delivery. *Schnitz Bros. v. Bolles and Rogers Co.*, 673.
5. Where X-ray plates had been proved by a physician, it was competent for him to explain them to the jury in particulars that are not understood by laymen. *Asch v. Washburn Lignite Coal Co.*, 735.
6. It is proper to receive the opinions of medical experts as to the nature and extent of a personal injury. *Asch v. Washburn Lignite Coal Co.*, 735.
7. The injured person is a competent witness to testify to his feelings, pains and symptoms, as well as to all the characteristics of the

injury, so far as the same are perceptible to the senses, and do not require the exercise of scientific skill and knowledge. *Asch v. Washburn Lignite Coal Co.*, 735.

8. Opinion evidence as to the likelihood of error in the counting of ballots by election officials is inadmissible. *Drinkwater v. Nelson*, 872.
 9. The declarations of an alleged agent are not admissible against the alleged principal to prove the fact of agency or the extent or authority of the alleged agent. Before the acts and statements of the alleged agent can be shown against the principal, the agency must be proved *prima facie* by other evidence. *Clark v. Payne*, 911.
 10. Where agency has been shown, the declarations of the agent, made within the scope of his authority, are admissible. But declarations of an agent relating to matters wholly outside of the scope of his authority are not admissible. For reasons stated in the opinion it is *held* that declarations made by a station agent to the effect that a certain man was the foreman of a construction crew were inadmissible. *Clark v. Payne*, 911.
 11. A specific admission of fact upon which a liability may be predicated is admissible, though accompanied by an offer of compromise. *Gunther v. Baker*, 1071.
 12. The plaintiff brought action to recover the agreed rental of the garages, covering a period of five months, during which the defendant had use thereof.
- It is *held* that it was not error to receive plaintiff's evidence showing the mistake and oversight.
- It is further *held* that the reception of such evidence in the circumstances in this case, was not vulnerable to the objection that its effect was to vary the terms of a written instrument. *Lane v. Aldrich*, 1086.
 13. The evidence offered to prove the consideration for the agreed credit was admissible as against an objection based upon the parol evidence rule. *Heckenlaible v. Coe*, 1209.
 14. Testimony as to conversation in defendant's absence with defendant's former agent held inadmissible as hearsay; testimony as to conversation with defendant's adjuster inadmissible, unless shown to be within scope of his authority; testimony as to conversation concerning other claims subsequent to alleged settlement held inadmissible. *Wilkins v. Nat. Union Fire Ins. Co.*, 1296.

EXECUTION.

1. The doctrine of *caveat emptor* applies to the assignee of a purchaser

at an execution sale. *Burdick v. Merc. Co.*, 227.

2. In the absence of an express warranty or fraud the assignee of a sheriff's certificate upon execution sale of real property is not liable for the failure or partial failure of title thereafter resulting. *Burdick v. Merc. Co.*, 227.

EXECUTORS AND ADMINISTRATORS.

1. The plaintiff brings this action against the estate of her deceased father-in-law for six hundred twelve days board and lodging at \$1 a day. The jury found a verdict in favor of plaintiff on an express contract, and it is *held* that the verdict is well sustained by the evidence. *Krapp v. Krapp*, 760.
2. Section 8725 C. L. 1913 construed and held to permit an exemption of \$1500.00 to the surviving widow in addition to the absolute exemptions. *Charlson v. Charlson*, 851.
3. A testator by his will first directed the payment of the expenses of last sickness, funeral and just debts; second devised and bequeathed to his wife one-third of his estate; then made certain general bequests in specific amounts, and bequeathed the residue to a class of more remote relatives. A final report, account and petition for distribution was allowed and approved in County Court in which the basis for computing the amount of the provision for the widow was taken as the gross estate less all indebtedness and expenses of administration. The widow objected to the basis for the computation of her one-third being reduced by the expense of administration and claimed interest from the date of the decease. It is *held*:—

No objection having been made in the County Court to the deduction from the gross estate of the expenses of the last sickness, funeral and amount required to pay debts, and the testator's intention with respect to these items being in doubt, the decree of the County Court, in so far as these items are concerned, is not disturbed on appeal. *In re Murphy's Will*, 1267.

FACTS.

1. One Luigi Nardella was employed by the defendant railway company, in the capacity of section man. While so employed and while in the discharge of his duties in the defendant's railway yards at Mandan, and while engaged in cleaning ice and snow from a crossing where a street of the city crossed the railroad tracks, he was struck by certain cars of defendant which were propelled against him and so injured that he immediately died. *Kennelly v. N. P. Ry. Co.*, 685.

2. Plaintiff brought this action against defendant to recover damages for its alleged negligence in maintaining upon a certain school play ground certain apparatus such as troughs, chutes and heavy swings, which were used by the children while attending the school there conducted.

Plaintiff's son, a boy aged thirteen years and three months, while attending the school, and while playing upon said play grounds, was struck and killed by one of the heavy swings. *Anderson v. Fargo*, 722.

3. Plaintiff brought an action against defendant to recover damages for the death of his son, alleged to have been caused by the negligence of the defendant. Defendant operated a grocery and soft drink parlor at Walhalla, North Dakota, and in the conduct of the business he employed with others, Plaintiff's sons, Clifford Olson age 16 years, 6 months and 12 days, and another boy Herbert Clements, age 13 years and 3 months. The latter while about to cash a check from one of the money drawers in the store called Clifford Olson to assist him, and while the latter was doing so, the Clements boy took from the drawer a loaded revolver, placed there by the defendant, rested it upon the drawer and it was discharged, the bullet entering the abdomen of Clifford Olson, killing him. *Olson v. Hemsley*, 779.

FALSE IMPRISONMENT.

1. In an action for false imprisonment brought against three defendants as joint tort-feasors, the evidence is examined, and it is *held* insufficient to support a recovery against one of the defendants. *Mason v. Underwood, et. al.*, 122.
2. Where a verdict for \$4,000 was rendered in favor of the plaintiff who was illegally confined in jail for the period of approximately three hours, it is deemed to embrace punitive damages and to include a sum as punishment to the defendant who is not shown to have been responsible for the wrongful acts of the other two defendants, and the verdict cannot stand as against the remaining tort-feasors. *Mason v. Underwood, et. al.*, 122.
3. In an action for false imprisonment where it appears that the arrest was occasioned partly by acts of the plaintiff in refusing to permit the defendants to remove personal property belonging to one of them, evidence that one of the defendants was owner of the property is admissible for its bearing upon the degree of culpability of the defendant's conduct, though not as a justification of it. *Mason v. Underwood, et. al.*, 122.
4. In an action for false imprisonment, where it appears that the

arrest was occasioned partly by acts of the plaintiff in refusing to permit the defendants to remove personal property belonging to one of them, evidence that one of the defendants was the owner of the property is admissible for its bearing upon the degree of culpability of the defendant's conduct, though not as a justification of it, and its exclusion by the trial court was reversible error. *Mason v. Underwood, et. al.*, 130.

FRAUD.

1. In an action for damages alleged to have been sustained by reason of the transfer by the defendants of a note obtained from plaintiffs by fraud and false representations, upon which the transferee had recovered a judgment against the plaintiffs, it is *held*:
 - (a) The cause of action is not dependent upon the finality of the judgment against the plaintiffs nor upon its payment by them.
 - (b) Where plaintiffs have not actually sustained damages to the extent of paying a judgment previously obtained against them on account of defendants' wrongful act, but where the amount of such judgment furnishes a basis for the damages included in the verdict, the judgment rendered upon the verdict should not be absolute but contingent upon the plaintiffs' paying the judgment previously recovered against them.
 - (c) In an action for damages sustained by reason of defendants' transfer of a note obtained from plaintiffs by fraud, exemplary damages may be recovered under Comp. Laws 1913, § 7145. *Wuest v. Richmond*, 1081.

FRAUDS, STATUTES OF.

1. In an action for fraud and deceit by a National Bank concerning the negotiation and sale of a real estate mortgage, it is *held*, for reasons stated in the opinion, that the special verdict, favorable to the plaintiff, finds support in the evidence. *Brandenburg v. Bank*, 176.
2. A four-year lease, not reduced to writing, will not be binding under Comp. Laws 1913, § 5888, subd. 5. *Volker v. Nat. Tea Co.*, 983.
3. Section 5963 C. L. 1913 which provides that "no agreement for the sale of real property, or of an interest therein, is valid unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or his agent thereunto authorized

in writing; but this does not abridge the power of any court to compel the specific performance of any agreement for the sale of real property in case of part performance thereof," affects the validity of a contract, falling within the statute, and renders such contract wholly invalid; and specific performance thereof may not be compelled unless there has been sufficient part performance to take the contract out of the provisions of the statute. *Fried v. Lonski*, 1023.

4. Where a complaint alleges generally a contract for the sale of real property, without stating whether it was in writing or not, the above quoted statute of frauds is available as a defense under a general denial. *Fried v. Lonski*, 1023.
5. Where a mortgagee, knowing that the mortgaged premises are about to be transferred to a purchaser who has assumed and agreed to pay the mortgage debt, agrees that he will look wholly to the mortgage lien for payment, it is *held*:
 - (a) That the mortgagors become sureties for the payment of the mortgage debt.
 - (b) That it is the duty of the mortgagee to preserve and protect the mortgage lien.
 - (c) That the failure of the mortgagee to preserve and protect the mortgage lien was a defense to the liability of the mortgagors upon their note which evidences the mortgage debt.
 - (d) That § 7007 C. L. 1913 (§ 121 Neg. Inst. Law) requiring a renunciation to be in writing to exempt personal liability does not apply.
 - (e) That the consequent duty imposed upon the mortgagee, through his agreement, arises upon equitable considerations and is not within the statute of frauds. *Leach v. Nelson*, 1046.

FRAUDULENT CONVEYANCE.

1. Plaintiff's action is brought to procure a certain deed executed and delivered by the defendant, Andrew Person to his wife, Edla R. Person, declared fraudulent and void.

It is *held* that plaintiff has failed to establish as a fact that the conveyance was made with the intent to defraud the creditors. *Union Nat. Bank v. Person et. ux.*, 478.

GAMING.

1. In an action brought to recover on a promissory note in the sum of \$4,000.00, the defense of no consideration was pleaded and relied

upon. In that connection it was claimed the note was given for losses sustained in a gambling transaction to wit: the buying and selling of grain options. The evidence shows that the loss was occasioned by what is termed a "hedging" transaction, conducted by The Pomona Valley Farmers' Elevator Company, (of which the plaintiff is the successor and now the owner of the note) for the defendant and at his request. *Edgeley Co-op. Grain Co. v. Spitzer*, 406.

2. At the close of the testimony the Court directed a verdict in plaintiff's favor and it is *held* for reasons stated in the opinion that in this there was no error. *Edgeley Co-op. Grain Co. v. Spitzer*, 406.

GARNISHMENT.

1. Where a garnishee summons was served upon a garnishee alone on Jan. 8th, 1918, a disclosure by the garnishee made on Jan. 12th, 1918, and the summons and complaint filed in the District Court on Jan. 18th, 1918, and where, about two and one half years later, an affidavit for publication of the summons was filed upon the ground that the defendant was and had been a non resident, publication thereof had, and judgment, subsequently upon default, rendered against garnishee, it is *held* that the provisions of § 7383 C. L. 1913 requiring the publication of a summons within sixty days applies and the judgment is void. *Citizens State Bank v. Smeland*, 467.

GIFTS.

1. A gift is a transfer of personal property made voluntarily and without consideration. A verbal gift is not valid unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee. (§§ 5538-5539, C. L. 1913). *Ramsdell v. Warner*, 96.
2. Where W. the owner of certain strawstacks situated on his own premises, tells R. that R. may have as much of the straw as he wants provided it is removed from the premises within a specified time, and where R. does not remove any part of the straw or in any manner take possession thereof or exercise any dominion over it, title does not vest in R., so as to render W. liable for the value of the straw in an action brought by R. against W. charging the latter with having set fire to and destroyed the strawstacks. *Ramsdell v. Warner*, 96.

GUARDIAN AND WARD.

1. In an action brought by a guardian of certain minors for the purpose of securing a conveyance of an interest in lands to which one of the defendants, the mother of the wards, holds the legal title, and for general relief, where it appears that the estate of the wards, consisting of a two-thirds interest in an unimproved quarter section of land, had been sold in probate court; that, in lieu of the cash consideration, the purchaser had conveyed a quarter section of equal value to the mother of the wards, who, in turn, had executed a mortgage upon the land so conveyed to her representing the value of the estate of the wards in the quarter section sold; that, owing to disqualification of the guardian making the sale, a second guardian, the plaintiff, was appointed, who initiated proceedings in probate court to legalize the first sale, but refused to receive the mortgage and accumulated interest as representing the estate of the wards; that the mother remarried, and she, her husband and children, moved onto the land so deeded to her, and put improvements thereon equal or exceeding in value the original value of the land, and that the mother and her present husband maintained thereon a home for the wards—it is *held*, the evidence does not show any attempt to defeat the interests of the minors. *Huso v. Jasper*, 102.
2. In the circumstances disclosed, equity requires that the value of the estate of the minors in the unimproved quarter section sold, plus the accrued interest, be paid over to the present guardian in cash, and that the legal titles be quieted in accordance with the conveyances made. *Huso v. Jasper*, 103.

HABEAS CORPUS.

1. A person who has been placed on probation under a suspended sentence cannot be deprived of the liberty thus granted except in pursuance of the laws in such cases made and provided; and in case he is deprived of his liberty in violation of the rights and benefits thus conferred upon him, he may properly invoke the Writ of Habeas Corpus. *State ex rel. Vadnais v. Stair*, 472.
2. In case of his arrest and incarceration, such person may show on habeas corpus that the Board of Experts, the board under whose jurisdiction such persons are placed, have at no time found that he has violated any of the rules and regulations prescribed for probationers, but on the other hand have found that he did not violate such rules and regulations; that he has not, in fact, violated any of such rules and regulations; and that the Board of Experts have never terminated the probation. *State ex rel. Vadnais v. Stair* 472.

HIGHWAYS.

1. It is *held* that the evidence discloses that a certain road, to which reference is made in the opinion as "The old road," has become an established highway by right of prescription. *Hillsboro Nat. Bank v. Ackerman*, 1179.
2. All section lines, under the grant of congress of 1866, § 2477, Revised Statutes U. S. (U. S. Comp. Laws, § 4119) having been accepted by chap. 33, Laws of Dakota Territory 1871, became public highways from the time of the congressional grant. *Hillsboro Nat. Bank v. Ackerman*, 1179.

HOMESTEAD.

1. In determining the value of a homestead estate a prior existing mortgage executed by both husband and wife should not be deducted. *Bank v. Hallquist*, 263.
2. A mortgage executed by the husband alone covering land which constitutes the homestead estate is valid as to the excess in value above the homestead estate. *Bank v. Hallquist*, 263.

HUSBAND AND WIFE.

1. A complaint alleging the making of antenuptial and postnuptial agreements without disclosure of large property interests of the husband is *held*, for reasons stated in the opinion, to state a cause of action in equity to invalidate the same. *Charlson v. Charlson*, 851.
2. A complaint alleging fraudulent conspiracy and misrepresentation by the heirs of a deceased person concerning widow's rights in antenuptial and postnuptial agreements and the allowance of exemptions is *held*, for reasons stated in the opinion, to state a cause of action in equity for the allowance of her exemptions out of the estate. *Charlson v. Charlson*, 851.

INSTRUCTIONS.

Certain instructions of the court considered and *held* not to be prejudicial nor erroneous. *Kennelly v. N. P. Ry. Co.*, 685.

INSURANCE.

1. Sections 5, 9, and 11 of chapter 38, Session Laws of Special Session 1919 (the state hail insurance law), are construed, and it is *held*:—The insurance provided for in the law does not apply automatically. *Bossen v. Olsness*, 68.

2. Where an assessor had not classified land as tillable and had made no return to the county auditor as required by law, showing the number of cultivated acres, and where the owner had not made the affidavit required by § 6 of the hail insurance act, his risk is not covered and he is not entitled to recover indemnity upon an attempted compliance with the law in the month of July after loss has been sustained through hail. *Bossen v. Olsness*, 68.
3. The failure of a beneficial order to demand or secure from its insured member, an application for war permit and the payment or refusal of an extra war premium provided by its regulations for its members engaged in military service, and the reception of regular assessments and lodge dues while knowing that the insured member was in the service do not constitute, for reasons stated in the opinion, waiver or grounds of estoppel. *Olson v. A. O. U. W.*, 285.
4. The provisions in a beneficial certificate or insurance which limits the liability of the beneficial Order if the insured member shall engage in the occupation of a soldier in time of war, engage in military service in time of war, or, shall enter in the service of the United States army, state grounds of a status and not of causation as a test, where no provisions otherwise indicate. *Olson v. A. O. U. W.*, 285.
5. Where an applicant for life insurance was requested in the application therefor to name all causes for which she had consulted a physician in the last ten years, and to give the name and address of physician, the date of consultation, duration of disease and remaining effects, and where, in her answer, she omitted to name one instance when she consulted a physician; and further failed to state what, if any, disease she then had, as informed thereof by the physician, it is *held*, for reasons stated in the opinion, that her failure to do so was merely a representation and not a warranty, and did not, in the circumstances considered in the opinion, operate to void the policy. *Plotner v. N. W. Nat. Life Ins. Co.*, 295.
6. The policy of insurance contained a provision, in substance, that, after the expiration of one year from the date of issuance thereof, it would be incontestable for any reason except the nonpayment of premiums, as provided by the policy. It was not rescinded, nor any steps taken to contest the same, until after the expiration of the year. It is *held*, that, in these circumstances, there being no default in the payment of premium, that there is no defense to an action for the recovery of the amount specified in the policy. *Plotner v. N. W. Life Ins. Co.*, 295.

7. The defendant, an Accident Insurance Company, relied on a certain by-law, to avoid liability on a certain policy of insurance. It neither pleaded nor proved the by-law nor the substance thereof.
- It is *held*, that, if such by-law, in any circumstances, might constitute a defense, a prerequisite thereto would require it to be properly pleaded, and its contents established by competent evidence; and that not having been done, the defense in that regard, if any, is not available. *Weber v. Interstate Bus. Men's Acc. Asson.*, 309.
8. Where the insured, in an Accident Insurance Policy, commits suicide while so insane as not to comprehend the nature of the act nor the physical result which would flow from it, his death is caused by accidental means within the meaning of the policy insuring against bodily injury from external, violent and accidental means. *Weber v. Interstate Bus. Men's Acc. Asson.*, 309.
9. In an action involving loss sustained under a hail insurance policy, the evidence is examined, and it is *held* that the findings of the trial court have substantial support in the evidence. *Alliance Hail Ass'n. v. Platzer*, 330.
10. In an action upon a life insurance policy where the insured at the time of the application directed the soliciting agent to send the policy to be issued to a banker with whom the insured did business and the application contained a memorandum to send the policy to such banker, and, where the Insurance Company, acting upon the application, issued the policy and sent the same to such banker, who was its agent, with instructions, uncommunicated to the insured, to deliver only upon being satisfied after personal investigation concerning the good health of the insured, it is *held*, upon the record, that the question of delivery was one for the jury. *Fleckenstein v. Provident Ins. Co.*, 517.
11. Where an insurance policy is delivered pursuant to a stipulation in the application that it shall not take effect unless delivered to and received by the insured while in good health, and where the insured, a married man aged 24 years, was in apparent perfect health when the application was signed, Oct. 21st, and the policy issued, Oct. 30th, and so continued until the evening of Nov. 8th, the day when the policy was delivered, excepting that he complained of a headache in the evening of Nov. 6th and during the day of Nov. 7th, and where during the evening of Nov. 8th the insured stated to have a fever, on Nov. 9th had a high fever and was then partially confined in bed, and on the afternoon of Nov. 10th died through "broncho-pneumonia" following an attack of "influenza," and where the entire evidence concerning the good health of the insured subsequent to the issuance of the policy and until his death is dependent

solely upon lay testimony unaided by that of medical science, it is *held* that the question of the good health of the insured, when the policy was delivered, was for the jury. *Fleckenstein v. Provident Ins. Co.*, 517.

12. In an action upon a policy of fire insurance, where a farm dwelling and its contents were insured, it is *held*:

That the execution of a real estate mortgage upon the land did not change the title, interest, or possession of the insured. *Parmeter v. Williamsburgh City Fire Ins. Co.*, 530.

13. Action upon an insurance policy. The policy had lapsed for non-payment of the second premium. Agents of the insurance company solicited reinstatement and obtained the signature of the policy holder to a reinstatement blank, and a note for the premium, giving him assurance at the time that upon receipt of his application and note the policy would be reinstated by the company. Five weeks later the actuary returned the note to the agent who sent it, stating it could not be received in payment and suggesting that further attempts be made to secure payment of the premium partly in cash. The policy holder was not notified and the note was not returned to him. About six weeks later, the policy holder died. It is *held*:

An agent of an insurance company with authority to solicit applications for insurance is the agent of the company within § 6632, of the Comp. Laws of 1913 and not of the insured while soliciting an application for reinstatement. *Lechler v. Mont. Life Ins. Co.*, 644.,

14. A clause in an insurance policy to the effect that it cannot be altered by an agent or its provisions waived, except by written agreement of the company, is for the benefit of the company and may be waived by it. *Lechler v. Mont. Life Ins. Co.*, 645.

15. Where a policy holder is led honestly to believe that by conforming to certain requirements stated by an agent, his policy will be reinstated, and where he complies with the requirements and thereafter the company neglects to notify him that his reinstatement application is rejected, it waives the provisions of the policy under which its non-liability might otherwise be asserted. *Lechler v. Mont. Life Ins. Co.*, 645.

16. In construing § 23, chap. 77, Laws 1921, which provides that "the Commissioner of Insurance, with the approval and assistance of the Industrial Commission, shall have authority to negotiate or float a loan, if found to be advisable, whereby the state hail insurance fund can pay its obligations in cash," it is *held*, that the power conferred and duty imposed upon the officers named carry by implication the power to use such proper and lawful means as in their judgment are

necessary to accomplish the intended purpose. *State ex rel. v. Nestos et. al.*, 894.

17. In the instant case, wherein it is sought to restrain these officers and the State Treasurer from carrying out a certain contract made under the provisions of the statute above quoted, it is *held*, for reasons stated in the opinion, that the Commissioner of Insurance and the Industrial Commission in making such contract did not exceed the powers conferred upon them by such statute; and that the Commissioner of Insurance and the State Treasurer are not inhibited from performing any acts which they have agreed to perform under the contract. *State ex rel. v. Nestos, et. al.*, 895.

18. In an action for an accounting, where the plaintiff claimed credit for \$321.00 bonus under an agency contract, it is *held*:

The evidence shows that the consideration for the credit which had been agreed upon was that the plaintiff should continue his activity as an agent of the defendant for the remaining two months of the year and that this consideration had failed. *Heckenlaible v. Cook*, 1209.

INTEREST.

1. In such action, where the conversion of wheat occurred in 1909 and a jury, by its special verdict, allowed the market price therefor existing at the time of such conversion without any finding that the plaintiff was entitled to interest upon such amount from the date of conversion, it is *held*, for reasons stated in the opinion, that the trial court erred, in its order for judgment, permitting plaintiff to recover interest for over ten years upon the amount found by the jury. *Burke v. Minnekota Elev. Co.*, 795.
2. For reasons stated in the opinion it is *held* that the trial court erred in allowing interest on certain annual installments stipulated to be paid by the defendants under a written agreement in suit, and the judgment is modified by disallowing such items. *Halstead v. Mo. Slope Land & Inv. Co.*; 1001.

INTERPLEADER.

1. This is an appeal from an order of intervention which appears to be in all respects duly made. Under contracts with plaintiff Reinke, the bank and the intervenor claim the same money. The order of intervention in no manner determines the merits of the adverse claims. It simply permits the Insurance Company to pay the money into court and retire from a contest in which it has no interest. *Reinke v. Ellendale Nat. Bank*, 1105.

INTERSTATE COMMERCE.

See Commerce.

JOINT ADVENTURES.

1. In an action for an accounting, the evidence is examined and it is *held* that the judgment appealed from is properly supported. *Mullvain v. Hedden*, 580.

JUDGES.

1. Section 100 of the North Dakota Constitution provides: "In case a judge of the supreme court shall be in any way *interested* in a cause brought before said court, the remaining judges of said court shall call one of the district judges to sit with them on hearing of said cause." It is *held*, in construing this section, that a party litigant is not entitled to have one of the members of the supreme court adjudged disqualified, and to have the remaining members call a district judge to sit in his stead, on the ground that the member sought to be disqualified, in a former action between the same parties, has expressed an opinion, upon the record there presented, which bears upon the rights of the parties in this action. *Tuttle v. Tuttle*, 10.

JUDGMENT.

1. A judgment rendered by a court of general jurisdiction, having jurisdiction of the parties and the subject-matter, imports absolute verity. As long as it stands, it cannot be attacked collaterally by any of the parties thereto, or those in privity with them. *Tuttle v. Tuttle*, 10.
 2. As long as the former adjudication remains in force, the losing party cannot maintain an action against the successful party for obtaining the judgment by fraudulent and wrongful practices. *Tuttle v. Tuttle*, 10.
 3. In an action to recover for goods and labor furnished, where a cropper recovered against his farm owner in a former action the goods and labor furnished by him, and the owner in this action recovered for his goods and his labor furnished to the cropper, and where, in each action, in the former, the owner and, in the latter, the cropper, claimed an agreement to mutually offset their accounts for such goods and labor, which was disallowed by the jury upon the recovery allowed, it is *held*, for reasons stated in the opinion—
- That the trial court properly received oral testimony concerning the presentation of a specific item for hauling lumber in the former action. *Stead v. Manhart*, 536.

4. In May, 1921, the plaintiff obtained a default judgment for over \$1,500. This is an appeal from an order denying a motion to vacate the default. The order of this court is that the default be vacated and that defendant may serve his proposed answer, and that the lien of the judgment herein remain and may be enforced to the extent of any judgment recovered on a trial of the action. *Krein v. Row*, 1125.
5. The appellant's contention, with reference to the application of the principle of *res judicata*, for reasons stated in the opinion are sustained. *Hillsboro Nat. Bank v. Ackerman*, 1179.

JURY.

1. Where most of the jurors called for the trial of a case had sat in from one to six similar cases brought by different policy holders against the same insurance company, and tried at the same term, in which the complaints were practically identical and the answers substantially the same, and the witnesses for the plaintiffs were generally the same, with the exception of the plaintiff in each case, and the witnesses for the defendant, were practically identical in all of the cases; and where such jurors stated upon their voir dire that they had made up their minds upon the conflicting questions of fact submitted in the previous cases, and that if the facts were the same, in the case upon trial, their decisions would necessarily be the same; that it would require additional evidence on the part of the defendant to overcome their opinions on such facts; that if the evidence was the same they would come to the same conclusion; that their minds were fixed and made up after hearing the evidence in the other cases, *Held*, that the defendant's challenge for cause should have been allowed under subd. 6, sec. 7616, Comp. Laws, 1913, providing that "Having an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or some of them," is ground of challenge for cause even tho the jurors stated, when interrogated by the Court, that they could try the case fairly and impartially on the evidence and declared themselves to be free from bias or prejudice. *Wilkins v. Nat. Union Fire Ins. Co.*, 1295.

LABOR.

See Work and Labor.

LANDLORD AND TENANT.

1. Where a lease of a farm on shares contains a provision to the effect that title to and possession of all crops shall be in the lessor until the conditions of the lease have been complied with by the lessee

and a division made of the crop, such provision is effective without filing the contract as a chattel mortgage. An assignee of the tenant is presumed to be acquainted with the terms and stipulations of the lease, and acquires no greater rights than the tenant had to transfer. *Meyers v. Raisty*, 54.

2. Who were the actual parties to the lease, was a question of fact for the jury. *Valker v. Nat. Tea Co.*, 983.
4. Plaintiff leased land from the defendant. The lease contained a provision under which plaintiff might place improvements upon the land which he could remove at the termination of the lease or sell to the defendant at the cost of the materials used. Defendant sold the land to a third party who, in turn, sold to the plaintiff. Under contract between defendant and third party the latter was entitled to have a portion or all of the improvements made by the tenant, and when the latter purchased from the third party the value of the improvements entered into the consideration. It is *held*:
 On the defendant's admission that in the sale of the land to the third party he had agreed to pay for the house, certain fences, and a windmill at the price of the materials, plaintiff is entitled to an instructed verdict for the amount of the items not in dispute. *Gunter v. Baker*, 1071.
5. In tenant's action for the value of improvements, instructions submitting law question as to whether defendant had agreed to purchase buildings from plaintiff was error; charge on conversion and market value, where plaintiff had expressly waived the tort, was error; failure to charge on question whether defendant sold land to third party with all of plaintiff's improvements was error. *Gunter v. Baker*, 1071.

LIBEL AND SLANDER.

1. The defendant in answering a newspaper article published by the plaintiff of and concerning the defendant said *inter alia* that the plaintiff "tells falsehoods in that he says he does things in all fairness." *Held* that these words must be construed in connection with the subject to which they relate, and in light of the undisputed facts and circumstances, and that when so construed they are not libelous *per se*. *Leonard v. Roberge*, 638.

LIQUIDATED DAMAGES.

1. The following language appeared in a written contract for deed: "Either party hereto who shall fail or refuse (except for imperfect title) to comply with the provisions of this contract on his part to be performed shall forfeit or pay to the other party the sum of

\$2,000, which sum is hereby fixed and agreed upon as liquidated damages to be sustained by either party from failure or default on the part of the other." *Am. Loan & Inv. Co. v. Borass*, 1041.

MANDAMUS.

1. Plaintiff brought an action of mandamus to compel defendants to issue to it certain warrants drawn on the Geenal Funds of the City of Mandan, they having theretofore declined to issue such warrants, but offered to issue warrants drawn on the Special Street Lighting Fund, claiming that the proper one against which the warrants should be drawn.

The Court declined to issue the Writ of Mandamus and for reasons stated in the opinion, it is *held*, its refusal to do so was not error. *Mandan News v. Henke*, 402.

2. The Court did not err in granting judgment in favor of defendants. *Mandan News v. Henke*, 402.
3. A national bank acting as a legal depository, and depository of county funds, occupies a position quasi official in its character. *State ex rel. v. Larson, et. al.*, 1144.
4. Mandamus is an appropriate remedy against a former county treasurer and a bank, acting as a legal depository, to compel the payment of public funds placed upon time deposit. *State ex rel. v. Larson, et. al.*, 1144.
5. The county auditor, by reason of the connection of his duties, is a proper person to appear as relator in such proceedings. *State ex rel. v. Larson, et. al.*, 1144.

MARRIAGE.

1. Where it is sought to have a marriage annulled under subdivision 4, § 4368, Comp. Laws 1913, on the ground that the consent thereto was obtained by fraud, the complaint must set forth the facts showing such fraud as is contemplated by the statute; also the time and place where the marriage was celebrated and the date of the discovery of the alleged fraud. *Kawabata v. Kawabata*, 1160.

MASTER AND SERVANT.

1. In an action to recover damages for personal injuries, where the plaintiff, while employed by the defendant as a carpenter, was tra-

veling with his foreman on a speeder during a heavy snow storm, and where it appears that a gasoline can had blown off the speeder, and the plaintiff at the foreman's direction, had gone back a short distance to recover it, leaving the foreman in charge of the speeder, with a promise to wait for him; that the foreman, during plaintiff's absence, had undertaken some slight repair work on the speeder, allowing it meanwhile to drift with the wind, the plaintiff being struck by the speeder as he was returning with the can, it appearing that the foreman was unable to stop it by the use of the brakes when within a short distance of the plaintiff, as the brakes were clogged with snow and ice; and where the court submitted the case to the jury for a special verdict, it is *held*:

The record presents substantial evidence upon which to base a finding of negligence. *Daniels v. Payne*, 60.

2. The defendant interposed assumption of risk as a defense. The evidence disclosed that the risk was not an ordinary but an extraordinary one, and there is no evidence to show that deceased either knew of or appreciated it; it is *held* that the deceased did not assume the risk. *Kennelly v. N. P. Ry. Co.*, 685.
3. One in the general service of another may be transferred to the service of a third person so as to become the latter's servant with all the legal consequences of the new relation; but the relation is not changed, as a matter of law, merely because the servant is sent to do certain work for such third party who has made a bargain with the master for the performance of such service, even though the third party, under his arrangement with the master, pays wages directly to the servant for his services. In order to establish the relation of master and servant between the servant and such third person it must appear that the servant has expressly or by implication consented to the transfer of his services to the new master and to accept him as his master during the time of such service. *Asch v. Washburn Lignite Coal Co.*, 734.
4. A fireman on a locomotive who is injured by a collision between the locomotive and some cars placed on the track by a coal company may maintain a joint action against the railway company and the coal company if the collision was produced by the negligence of the railway company in operating the locomotive at an excessive rate of speed, concurring with the negligent act of the coal company in placing the cars on the track. *Asch v. Washburn Lignite Coal Co.*, 735.
5. For reasons stated in the opinion it is *held* that the defendant, The Washburn Lignite Coal Company, is not relieved from liability by virtue of the fellow servant doctrine. *Asch v. Washburn Lignite Coal Co.*, 736.

6. At the close of the plaintiff's case, defendant moved for a directed verdict in his favor, which motion was granted, and for reasons stated in the opinion it is *held* that this was reversible error. *Olson v. Hemsley*, 779.
7. In an action against a carrier and its conductor for negligence resulting in loss by fire, where some evidence was received to the effect that the conductor carried into an oil station a lighted lantern and a gasoline can with which to purchase and secure highest gasoline, it is *held*, for reasons stated in the opinion, that the evidence was insufficient, as a matter of law, to establish that such conductor was then acting within the scope of his employment or was seeking to purchase gasoline for railway purpose, and, further, that the questions of the conductor's negligence and the contributory negligence of the manager of the oil station were questions of fact for the jury. *National Petroleum Mutual Fire Ins. Co. v. Payne, et. al.*, 789.

MINERALS.

See Mines and Minerals.

MINES AND MINERALS.

1. The plaintiff brings this action to cancel a coal mining lease, but there is no showing of either a legal, an equitable or contractual cause for cancelling the lease. *Pearson v. Ellithorpe*, 332.

MORTGAGES.

1. Following *McCardia v. Billings*, 10 N. D. 373, 87 N. W. 1008, the rule of substantial compliance in the statutory notice of a mortgage foreclosure sale applies. *Kyllonen v. Acme Har. Mach. Co.*, 38.
2. A typographical error in the spelling of the name of the mortgagor in a published notice of foreclosure sale, does not render the foreclosure void where the notice correctly describes the mortgagee, the date of making and filing the mortgage, and the book and page where the same has been recorded, and where further, no prejudice is shown. *Kyllonen v. Acme Har. Mach. Co.* 38.
3. The dating of a mortgage foreclosure notice one day anterior to the time of filing for record the assignment of such mortgage, which time of filing is described in the notice does not render the foreclosure invalid where it appears that such dating is a mere clerical error. *Kyllonen v. Acme Har. Mach. Co.* 38.
4. Following *Shelly c. Mikkelsen*, 5 N. D. 22, 63 N. W. 210; *Henniges v. Paschke*, 9 N. D. 489; *Simonson v. Wenzel*, 27 N. D. 638, 147 N. W.

- 804, the recording acts in this state apply to executory contracts for the sale of land to mortgages, and to assignments of mortgages. *Rolette County Bank v. Hanlyn et. al.*, 72.
5. A purchaser of a note secured by a mortgage upon an equitable interest in land acquires an equitable interest in the mortgage; but, following *Heniges v. Paschke*, supra, upon failure to take and record an assignment of the security his claim is inferior to that of a subsequent purchaser of the land in good faith and for value without notice. *Rolette County Bank v. Hanlyn et. al.*, 72.
 6. This is an action to foreclose a first mortgage on real property. The buildings situated on the realty were injured by fire, and upon adjustment of the loss the plaintiff received a draft from the insurance company for the amount thereof; he did not retain it, but endorsed it over to the mortgagors upon their promise to expend the funds in repairing the buildings. A second mortgagee likewise collected the proceeds of another fire insurance policy and credited the same upon its mortgage, and thereafter upon foreclosure of its second mortgage, became the purchaser and eventually the owner of the premises through issuance of a sheriff's deed. It is *held*, for reasons stated in the opinion, that the amount of the draft received by the first mortgagee and by him turned over to the mortgagors should not be deducted from, or credited upon the amount due on the first mortgage. *Kruger v. Schultz*, 274.
 7. Where a mortgage is given by one in possession of realty under an agreement with a guardian of an estate to sell and to deliver title through a judicial sale, and, where, thereafter, pursuant to the agreement, a guardian's sale is held, and a guardian's deed is issued to one who is entitled to retain title as trustee of the mortgagor for advances made prior to the execution of the mortgage, it is *held* that the prior recording of the mortgage did not establish precedence, under the recording statutes, to the title and lien of the trustee. *Eynon v. Thompson, et. al.*, 390.
 8. In an action to determine adverse claims and to recover the value of of the use and occupation of certain premises wherein the plaintiff claims that he had an equitable interest in, and was entitled to conveyance of, the premises in suit by the defendant Hodge, by virtue of a certain arrangement and contract; that he has paid the full amount due the defendant, and has for some time been entitled to a conveyance of the premises, it is *held*:

That the plaintiff has an equitable interest in the premises and is entitled to conveyance by the defendant Hodge upon the payment of the amount due Hodge. *Hassen v. Salem et. al.*, 592.
 9. That findings of the trial court to the effect that the plaintiff has

paid Hodge the full amount due him and that no further sum is due to Hodge are not supported by, but are contrary to the weight of, the evidence. *Hassen v. Salem et. al.*, 592.

10. In an action to foreclose a real estate mortgage where it appeared that the land covered by it had been deeded by a father to his son with the understanding that the land was a gift; that the father had taken from the son and his wife the notes and mortgage in question for the purpose of preventing the grantees and mortgagors from losing their homestead through improvidence; that the mortgagee subsequently made a will reciting that he had advanced money or property to the mortgagor amounting, approximately, to \$5000.00, there being no showing that the advancement consisted of money or property other than the land so mortgaged; and that the son, prior to the conveyance to him, had long been in possession of the land paying taxes but no rent—it is *held*:

The notes and mortgage are not enforceable at the suit of the executor of the mortgagee. *Dexter v. Lichtenwalter*, 633.

11. The defendant bank brought an action against one M. L. Summerville, and attached the land which he had theretofore sold on written contract to one Dallmann, for which full settlement was made, according to the terms of the contract, and promissory notes secured by a mortgage on the land were taken for the balance for the purchase price. A certain mortgage against the land which was not assumed by Dallmann was foreclosed. The defendant bank claimed the right, by reason of the alleged attachment lien, to redeem from such foreclosure. The certificate of foreclosure was assigned to the plaintiff bank, and it refused to receive the redemption money deposited with the sheriff by the defendant bank. Later the sheriff issued to the latter a sheriff's deed. It is *held* that Summerville had no substantial interest in the land when attached; that he held the title thereof merely in trust for Dallmann; that the defendant bank was not in law a redemptioner; that the sheriff's deed issued to it was a nullity. *Citizens State Bank v. Kenmare Nat'l Bank*, 770.
12. Because of fraud, misrepresentation and want of consideration the trial court gave judgment cancelling two promissory notes and a mortgage made by the plaintiff to the defendant. *Held* that the judgment is in accord with convincing evidence. *Bragonier v. Stevenson*, 891.
13. In this case it is *held*:
 - (a) That when a party accepts redemption money he cannot deny the right to redeem and retain the money.

- (b) That when a party takes a lien on the land, with actual or constructive notice of a prior right, his mortgage is subsequent and subject to the prior right. *McCaull-Webster Elev. Co. v. Hoffman*, 1006.

MUNICIPAL CORPORATIONS.

1. A court of equity cannot properly interfere with, or in advance restrain, the discretion of a board of city commissioners, while such board, in the exercise of powers conferred by the charter or general laws, is considering a proposition as to whether certain streets and alleys in the city are to be paved. *Hufford v. Flynn*, 33.
2. In an action brought by certain tax-payers of the City of Hankinson to enjoin the officers of that city from proceeding further with the construction of certain waterworks, and sewer systems, it is *held*:

That the plaintiffs have the burden of proving the irregularities alleged in their complaint. *Jones v. Hankinson, City of*, 618.

3. That the evidence does not establish that the alleged protests were signed by the owners of a majority of the property liable to be specially assessed for the improvements. *Jones v. Hankinson, City of*, 618.
 4. That the evidence does not establish that the officers of the city acted fraudulently. *Jones v. Hankinson, City of*, 618.
 5. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The trial court sustained the demurrer, which for reasons stated in the opinion, we think, was not error. *Anderson v. Fargo*, 722.
 5. Certiorari to review proceedings to exclude territory from a city. Chap. 32 of the Session Laws of 1921 provides for the exclusion of territory upon petition showing the absence of municipal improvements and that the land is unplatted; but it is provided that, "where a sewer outlet extends upon or over said unplatted lands," it shall be the duty of the council to exclude the territory. It is *held*:
- A sewer outlet extending upon or over land within the proviso of the statute is that portion of a sewer which serves no other purpose than to connect the sewer system with the point of discharge. *Mogaard v. Robinson*, 859.
6. The evidence, including the resolution of the city council in disposing of the petition for exclusion, is examined and it is *held* that the portion of the sewer constructed upon the petitioner's land is used as an outlet extending upon and over the same within the proviso of the statute. *Mogaard v. Robinson*, 860.

7. The violation of a municipal ordinance penalizing the failure to properly fasten a horse upon a street, constitutes negligence per se. *LaPoint v. Hodgins Trans. Co.*, 1032.
8. Where a pedestrian traversing a sidewalk in a public street was injured through being bitten and knocked down by a horse stepping upon the sidewalk and, where such horse was a member of a team attached to a wagon left unattended and not fastened at all pursuant to the provisions of a municipal ordinance, it is *held*, for reasons stated in the opinion, that the question whether the violation of the ordinance proximately caused the injuries, was for the jury. *LaPoint v. Hodgins Trans. Co.*, 1032.

NEGLIGENCE.

1. Questions of negligence and proximate cause are generally questions of fact for the jury. They become questions of law only when the evidence is such that different minds cannot reasonably draw different conclusions either as to the facts or the deductions to be drawn from the facts. *Daugherty v. Davis*, 883.
2. To render one liable to another for damages from negligence, it must be shown that the damages proximately resulted from the negligence charged. *Clark v. Payne*, 912.
3. Where the minds of ordinary prudent men might reasonably draw different conclusions upon a statement of facts affecting the proximate cause of an injury, the question is properly for the consideration of the jury. *LaPoint v. Hodgins Trans. Co.* 1032.
4. Five actions were brought and tried together to recover damages against defendant railroad company for alleged negligence resulting in a collision upon a crossing, known as McCarty's crossing, four miles south of Detroit, Minnesota. Those injured in the collision were riding in a one-seated Buick roadster. As it was going over the crossing it was struck by an engine pulling a freight train. It is *held*:
 - (a) For reasons stated in the opinions, the judgments in favor of the driver of the car and of the owner who entrusted it to his care, should be reversed.
 - (b) For reasons stated, the judgments as to the remaining plaintiffs, who were passengers in the car, are affirmed. *Amenia & Sharon Land Co. v. Mpls. St. P. & S. Ste. M. Ry. Co.*, 1306.

NEWSPAPERS.

1. § 5 of chap. 187 of the Laws of 1919, as amended by an initiated measure approved at the general election in 1920, requires the pub-

lication in the elected official newspaper of special assessment notices in cities in which such official newspapers are published. State ex rel. Truax v. Smart, 326.

NEW TRIAL.

1. Where there is a motion for a new trial, rulings of the trial court which constitute proper grounds for a new trial under the statute must be presented upon such motion; otherwise they will be deemed waived. *Larson v. Friis*, 507.
2. That the court did not err in denying a motion for a new trial on the ground of newly discovered evidence. *Howlett v. Stockyards Nat. Bank*, 933.
3. Where, during the course of a trial, amendments to an answer have been tendered and, in part, have been allowed by the trial court for the purposes of receiving evidence, and thereafter the trial court erroneously determines that the proposed amendment allowed constitutes no defense, a new trial will be ordered. *Leach v. Nelson*, 1046.

NOTES.

See Bills and Notes.

NUISANCE.

1. A human habitation is not a nuisance per se and, to be a nuisance, it must have become inherently dangerous or subjected to some harmful or unlawful use. State ex rel. v. McCray, 625.
2. Property which is not a nuisance per se may not be summarily and without notice or hearing, taken or destroyed in order to abate a nuisance. It can be treated as a nuisance only after it is adjudicated to be such. State ex rel. v. McCray, 626.
4. Section 9646 of the Compiled Laws of 1913, which directs the seizure and retention of property alleged to be used as a bawdyhouse, which seizure is without notice and without a hearing to determine whether such place be a nuisance in fact, is unconstitutional in that it directs the taking of property without due process of law and violates the security of persons in their houses by directing an unreasonable seizure of the same. State ex rel. v. McCray, 626.

PARTIES.

1. Action brought to compel the specific performance of a contract for the loan of money to finance the plaintiffs in cropping certain lands which had been mortgaged by them and the mortgages were being foreclosed. A crop mortgage had been given to secure such prospective loan before the planting of the crop, and the loan contract provided that the defendants should advance the money if the real estate mortgages were not foreclosed. The defendant stipulated, however, that judgment might be entered against it in the event the court should determine that the purchaser at the foreclosure sales would not be entitled to any of the crop raised during the year for redemption. The real estate mortgages are not in evidence and neither the mortgagee nor the holder of the sheriff's certificate are made parties defendant. It is *held*:

Where, by stipulation, a party has agreed that judgment may go against him or if in the event certain third parties are determined to have no interest in property which will stand as security for the act the defendant would be required by the judgment to perform, the presence of such third party or parties is necessary to the determination of their interest, if any, and it cannot be decided in their absence. *Meyer v. First Nat. Bank*, 1006.

PARTNERSHIP.

1. Where a tort results in damage to the firm, that is to say where all partners suffer a joint damage, as where a third party converts the property of the partnership, all partners must join as plaintiffs in an action brought to recover damages for such conversion. *Staley v. Bismarck Bank et. al.*, 1264.

PHYSICIANS AND SURGEONS.

1. In an action to recover damages alleged to have resulted from negligence in the treatment of an injured arm, the plaintiff had judgment.

The evidence is examined and *held* to be sufficient to support the verdict. *Warner v. Pence*, 979.

2. Where the injury resulting to the plaintiff is that of a stiff elbow joint which will be permanently rigid unless relieved by an operation, requiring the removal of a portion of a bone, and the expenditure of from four to eight months' time for treatment and of approximately \$600.00 for professional services, after which the arm may be considerably weakened permanently, it is *held* that a verdict for \$5000.00 is not so excessive as to indicate passion or prejudice on the part of the jury. *Warner v. Pence*, 979.

PLEADINGS.

1. A complaint, challenged for the first time upon appeal as to its sufficiency, will be liberally construed and, if any defects therein could have been remedied by amendment in the trial court, will be sustained. *Ryan v. Bresmith*, 710.
2. In the absence of a settled case, and upon the presentation of an objection for the first time in the Supreme Court, a complaint, seeking in equity to rescind and cancel a contract for a deed, followed by a trial, and findings and judgment providing for a strict foreclosure, is not subject to the objection that it alleges a cause of action for rescission alone. *Ryan v. Bresmith*, 710.
3. Amendments to pleadings that serve to present, upon the merits, the real determinative issues, should be liberally allowed in the interests of justice and the expedition of termination of litigation. *Leach v. Nelson*, 1046.
4. A complaint, otherwise alleging a valid enforceable contract, is not subject to demurrer merely because it alleges an erroneous measure of damages. *Ripley v. McCutcheon*, 1130.
5. Where a complaint is so framed as to state a cause of action or causes of action upon more than one legal theory, a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action should be overruled. *Kautzman v. Nat Union Fire Ins. Co.*, 1229.

PROHIBITION, WRIT OF.

1. A writ of prohibition is not a process for the correction of errors. Such writ lies only when there is no jurisdiction in the inferior court or body or when the inferior court or body is about to act in excess of jurisdiction. *Lynch, et. al. v. Dist. Court*, 431.

PUBLIC LANDS.

1. The plaintiff railway company brought action to determine adverse claims to a strip of land which it claims to have selected and appropriated as station grounds under the provisions of Act Cong. March 3, 1875, chap. 152, 18 Stat. 482 (U. S. Comp. §§ 4921-4926). The defendants occupied and claimed title to certain portions of said strip under and by virtue of deeds received through one Pol-

lock, who had obtained a patent from the United States, which, among other lands, purported to convey to said Pollock the whole strip claimed by the railway company in this action. It is *held* that the defendants are the owners of the respective parcels to which they assert title. *G. N. Ry. Co. v. Steinke, et. al.*, 112.

PURCHASER.

See Vendor and Purchaser.

QUIETING TITLE.

1. In an action to determine adverse claims, it is *held* for reasons stated in the opinion, that the trial court did not err in determining the defendant to be the equitable owner of the land and in fixing the priority of liens thereupon. *Mowry v. The Gold-Stabeck Co.*, 764.

RAILROADS.

1. The non-performance by a railroad company of the duty imposed by § 4700 C. L. 1913, (which provides that after January 1st, 1915, it shall be unlawful for any common carrier to erect or maintain on any standard gauge road or sidetrack any coal chute, stockpen, pole, mail crane, stand pipe, hog drencher, embankment or earth or natural rock, or any fixed or permanent structure or obstruction at a distance of less than eight feet from the center line of the track which such structure or obstruction adjoins), is a breach by such common carrier of its duty to the public, and, is therefore, evidence of negligence, for which it will be liable in case, as a result, of such violation of duty, personal injuries are sustained by a child about 8½ years of age. *Clark v. Payne*, 912.
2. Contributory negligence of an 8½ year old boy, killed while riding on a train passing an embankment near track, *held* a question for the jury. *Clark v. Payne*, 912.
3. In an action for the death of an 8½ year old boy, knocked from the side of a car by an embankment, *held* that the questions of negligence and proximate cause of the injury were for the jury. *Clark v. Payne*, 912.

RECOVERY.

1. That the recovery of the owner in this action was not limited to the amount of the recovery of the cropper in the former action. *Stead v. Manhart*, 537.

REPLEVIN.

1. In an action in claim and delivery, the plaintiff must recover on the strength of his own title or right of possession and not on the weakness of his adversary. *Sylvester v. Mackey*, 256.
2. For reasons stated in the opinion it is *held* that the trial court did not err in directing the jury to return a verdict in favor of the defendant for a dismissal of this action, which was instituted by the plaintiff to recover the possession of certain flax. *Sylvester v. Mackey*, 256.

SALES.

1. Defendants purchased certain registered cows and calves from one Walters for \$6,675.00, paying \$2,000.00 cash at the time of purchase, and giving their negotiable promissory note for the balance, secured by a chattel mortgage on the stock. After maturity Walters sold the note to the plaintiff. Default having occurred in the terms of the mortgage, plaintiff brought action to foreclose. The answer admitted all the equities, such as the giving of the note and mortgage and failure to pay the note after its maturity, but interposed the legal defense of breach of warranty, alleging damage in a given amount. Defendants allege that the warranty was to the effect, that Walters, at the time of the sale, represented, stated and warranted that the cattle were in good condition, in perfect health and free from disease, and were in every way all right. It was further alleged that, at the time of the sale, the stock so purchased were infected with tuberculosis. The facts, with reference to the warranty and its breach, and the damages, if any, suffered by defendants thereby, were submitted to a jury. It returned a verdict for plaintiff.

The court, in substance, instructed the jury, that, in order to determine whether there was an express warranty, it must be shown that there was an express, direct affirmation by Walters at or before the time of sale, that the cattle sold were free from the disease of tuberculosis;

It is *held*, for reasons stated in the opinion, that the giving of this instruction, which is fully set out in the opinion, was prejudicial to defendants and was reversible error. *Bank v. Tudor*, 200.

2. In an action to recover the purchase price of a second-hand tractor plowing outfit alleged to have been sold and delivered to the defendant, where the evidence was conflicting as to the place where delivery was to be made—whether upon plaintiff's farm where the tractor was situated when the contract was made or upon the defendant's farm some twenty-five or thirty miles distant—but where there was no dispute as to the obligation assumed by the seller to

put the outfit in fair working condition for plowing; and where the evidence showed that the engine had never been put in fair working condition, it is *held*:

- Delivery, in the sense of change of physical possession from the seller to the buyer, while a strong indication that the parties intend to pass title, is not conclusive of an intention to transfer title immediately. *Lumry v. Kryzmaizick*, 234.
3. Where, after delivery to the purchaser in the circumstances disclosed in the evidence work of a substantial character remained to be done by the seller to put the property in a condition in which it would be of some use to the purchaser, it is a fair inference that the parties did not intend that title should pass until this work was done. *Lumry v. Kryzmaizick*, 234.
 4. Where title has not passed under a contract for the sale of specific property, and where the seller has been guilty of a substantial breach of the contract, the purchaser may defend an action for the price notwithstanding his prior failure to effect a rescission of the contract. *Lumry v. Kryzmaizick*, 234.
 5. The plaintiffs sue to recover the balance due on a \$3,000 promissory note, given for a secondhand fotoplayer. The defense is a warranty of quality and fitness, express and implied, and a breach of the same. The jury found a verdict for defendant for \$1.00. *Held*, that the plaintiffs have had a fair trial and that the verdict is well sustained by the evidence. *Dyer & Bro. v. Bauer*, 396.
 6. Where property is sold, or contracted to be sold, to a vendee, who agrees to keep and pay for the same on condition that it works satisfactorily, the buyer, relying upon such condition, must be honestly dissatisfied with the property. *Olson v. Larson*, 499.
 7. Certain instructions are examined and *held* not to be prejudicial. *Olson v. Larson*, 499.
 8. Evidence examined and *held* that the trial court did not err in refusing to grant a new trial on the ground of insufficiency of the evidence. *Larson v. Friis*, 507.

SCHOOLS AND SCHOOL DISTRICTS.

1. Where certain school electors undertook to divide a certain common-school district, by attempting to organize a part of it into a new district, and, in pursuance of that object, circulated and had signed a petition by fifty-five electors in the territory proposed to be organized into the new school district, which number was two thirds of the whole number of school electors residing in that territory, which were seventy-eight; and where eleven of such petition-

ers withdrew from such petition by signing a remonstrance against the creation of a new district, prior to or on the date of hearing on the petition.

- It is *held* the county commissioners had no authority to make the order dividing the school district and creating the new district, for the reason that, at the time of the making of the order, the petition was not signed by two thirds of the resident electors in the proposed new district. State ex rel. Knox v. Stevens, 47.
2. During the time of the giving the notice specified in § 1148, Comp. Laws 1913, and until the hearing on the petition, any school elector who signed the petition for the proposed new school district, or a petition such as it contemplated by said section, may withdraw his name from the petition. State ex rel. Knox v. Stevens, 48.
 3. Plaintiff's action is to recover the balance claimed to be due under the terms of a written contract, and for extras alleged to have been furnished for the construction of a building to wit: a school house. The defendant interposed a defense to the effect that the building was not constructed in accordance with the terms of the contract, plans nor specifications; that the workmanship was poor, etc. The evidence abundantly established that the building was not so constructed, and that it was very defective. The jury returned a verdict in defendant's favor for a dismissal of the action, and judgment was entered accordingly. Kasbo Const. Co. v. Minto School Dist., 423.
 4. Chapter 197 of the Session Laws of 1919 which provides for the organization of new school districts by the Board of County Commissioners and County Superintendent, upon petition, is construed in its relation to statutory provisions governing the territory embraced in special school districts and to the provisions for attaching territory to and detaching territory from such special districts, (§ 1240, Compiled Laws of 1913, and Chap. 196 of the Session Laws of 1919) and it is *held*:—the authority to organize new districts may not be so exercised as to detach from the special district territory within three miles of the central school. Sorenson, et. al. v. Tobiason, et. al., 924.
 5. For reasons stated in the opinion, it is *held* that Harvey School District No. 38 (common school district) was properly and legally organized under Chap. 197, of the Laws of 1917. State ex rel. v. Strauss, et. al., 927.
 6. For reasons stated in the opinion, it is *held* that the trial court properly dismissed the petitioner's application for a Writ of Certiorari. State ex rel. v. Strauss, et. al., 927.

7. Chap. 197, Laws 1919, which provides for the organization of new common school districts is construed, and it is *held*:
 - (a) This statute did not repeal § 1146, C. L. 1913 relating to the annexation of territory to common school districts.
 - (b) The statute does not authorize the creation of a new common school district from an entire existing common school district and portions of adjacent common school districts. In other words the statute may not be used for the purpose of annexing territory to an existing common school district. *Loucks v. Phelps, et. al.*, 1059.
8. Under the laws of this state a special school district can be organized only from a platted or incorporated city, town or village, or from such city, town or village and territory contiguous thereto. *Harrison School Dist. No. 2 v. City of Minot*, 1189.
9. Where an incorporated city is organized into a special school district all the territory within the city must be included with the special school district. *Harrison School Dist. No. 2 v. City of Minot*, 1189.
10. Where a special school district is composed of an incorporated city alone, and the city limits are extended by the annexation of contiguous territory to the city the special school district is ipso facto enlarged so as to include the territory annexed to the city. *Harrison School Dist. No. 2 v. City of Minot*, 1189.

SCHOOL DISTRICT.

See Schools and School Districts.

SERVANT.

See Master and Servant

SHERIFFS AND CONSTABLES.

1. Where a judgment was entered against a sheriff in amercement proceedings and where the trial judge, at the time of ordering judgment, directed a stay of execution for thirty days within which defendant might move to vacate, and during the pendency of the motion the execution, which had been lost and the failure to return which constituted the basis for the amercement judgment, was found in the custody of the clerk of the district court among excess files kept in a storage vault with a return endorsed thereon by the sheriff, it is *held* sufficient facts appeared to constitute a prima facie defense to the amercement proceedings and that the action of the trial court in granting the motion to vacate the judgment was not an abuse of discretion. *Wilhelm v. Bang*, 240.

SLANDER.

See Libel and Slander.

SPECIFIC PERFORMANCE.

1. As the proof in the instant case does not negative an outstanding interest in the crop, the judgment is not supported by the evidence. *Meyer v. First Nat. Bank*, 1006.
2. In a tenant's action for specific performance of an agreement to finance plaintiff's tenants cropping of certain lands involving possible loss of crops by foreclosure of land mortgage, where proof does not negative an outstanding interest in the crop, *held*, that mortgagee and certificate holders are necessary parties, in view of Comp. Laws 1913, § 7406. *Meyer v. First Nat. Bank*, 1006.
3. This is a suit for the specific performance of a contract and for \$250,000 damages. Paul, the plaintiff, appeals from a judgment cancelling the contract on the ground that it is uncertain, unsealable, void for want of mutuality and nonperformance by the plaintiff. There is little ground for disputing either the law or the essential facts. To state the case is to decide it. *Held*, that the judgment is clearly right and it is affirmed. *Paul v. Leutz*, 1121.

STATES.

1. Pursuant to constitutional requirements, there must exist a legislative appropriation to warrant disbursement by the State Auditor in payment of the expenses of each house. *State v. Poindexter*, 135.
2. A legislative enactment may prescribe the circumstances under which a legislative appropriation may be disbursed. *State v. Poindexter*, 135.
3. Where a statute authorizes officers of the state to sell certain bonds at not less than par and for cash, they may not contract to sell the bonds at a discount or to pay a commission to the purchaser which will reduce the amount received for the bonds to less than par. *Currie v. Frazier*, 600.
4. The evidence showing the capacity in which the Bank of North Dakota held and attempted to dispose of the bonds, the sale of which is in question, is examined and it is *held* that the bank did not become a purchaser of the bonds from the Industrial Commission, but that it held them as custodian for safe keeping. *Currie v. Frazier*, 600.

5. Under chap. 77, Session Laws of 1921, hail insurance warrants are assignable but not negotiable. *First Nat'l Bank v. Olsness*, 758.
6. Hail insurance warrants are payable in full, when called by the state treasurer, out of the hail insurance fund and are not subject to being pro-rated in case of the insufficiency of the fund. *First Nat'l Bank v. Olsness*, 758.
7. Bill for supplies and for expenses of a traveling auditor incurred by the Workmen's Compensation Bureau must be audited by the State Auditing Board pursuant of ¶ "D," chap. 145, Laws 1921 and the general law applicable. *State ex rel. v. Steen*, 1172.
8. So far as such proposed contract may be considered a loan, or the pledging of the state's credit, the Industrial Commission have no power so to do. *Bauernfeind v. Nestos*, 1218.

STATUTES.

1. A legislative enactment, expressing the legislative power of the Legislative Assembly, pursuant to express constitutional provision, concerning the employees of each house and its expenses, is paramount to the independent action of each house, without the concurrence of the other. *State v. Poindexter*, 135.
2. In an action to compel the State Auditor to issue warrants to employees of a special House investigating committee, whose appointment and whose expenses have been authorized by the independent action of the House alone, it is *held*, under the provisions of § 42, Comp. Laws 1913, and chap. 5, Laws Sp. Sess. 1919, that there exists neither legislative appropriation nor legislative authority for the issuance of warrants to such employees. *State v. Poindexter*, 135.
3. Article 26 of the Amendments to the state constitution requires a two-thirds vote of all the members elected to each house of the legislative assembly to effect an amendment or repeal of any initiated measure adopted by the electors. *State ex rel. Truax v. Smart*, 326.
4. The title of all school property of the City of Fargo was vested in the City, for the use of the schools therein, by a special act of the legislature of March 4th, 1885, which act was amended February 2nd, 1913. The same act provided for a Board of Education for the schools of the City, and gave it exclusive control of them, and the further right to purchase, sell, exchange and lease houses or rooms for school purposes and lots or sites for school houses, and to borrow money for school purposes, as provided by the act as amended. *Anderson v. Fargo*, 722.

5. Where plain and unambiguous words are used in a statute the statute is not rendered subject to construction, especially where the words have long been employed in similar legislation in their ordinary sense and where the attempt to find a different meaning requires a resort to speculation. State ex rel. v. Wallace, 803.
6. Where concurrent legislation is resorted to in an effort to show that ordinary words were used in a qualified sense, the limited meaning will not be ascribed to the legislature where the concurrent legislation is not inconsistent with the ordinary meaning of the words in question. State ex rel. v. Wallace, 803.
7. Where a statute grants a specific power or imposes a definite duty, it, also, in the absence of a limitation, by implication confers authority to employ all the means that are usually employed and that are necessary to the exercise of the power conferred or to the performance of the duty imposed. State ex rel. v. Nestos, et. al., 894.
8. Where, concerning the office of the Commissioner of University and School Lands, the statute provided that the Commissioner's term of office should be for two years and should be at all times subject to the immediate control of the board who appointed him, and, where, in the revision and codification of the law in 1895, the statute was changed so as to provide, for the Commissioner, a term of two years subject to removal by the board, and where, upon investigation of the legislative history of the act no legislative intent is disclosed to change the law or the legislative policy, it is *held*:
 - (a) The general presumption obtains that the codifiers did not intend to change the law as it formerly existed.
 - (b) Changes made in the revision of the statute by alteration of the phraseology will not be regarded as altering the law unless there is a clear intent shown so to do.
 - (c) In ascertaining the legislative intent reference may be had to the prior statute.
 - (d) The statute, now sections 285 and 296 C. L. 1913, upon principles of statutory construction, grants to the board an arbitrary right of removal. State ex rel. v. Prater, 1240.

STIPULATIONS.

1. M. had been the owner of certain lands subject to liens of mortgages and a judgment. The mortgages were foreclosed. The judgment creditor, (D.) took assignments of the Sheriff's Certificates and at the expiration of the period of redemption took sheriff deeds. M. continued in possession and sowed crops. His grantees brought

actions to determine adverse claims to the land. In these actions, D. answered, setting up no claim to the crops and no claim for the value of use and occupation. The crops were destroyed by hail in July. In August and September, judgments were entered in the adverse claims actions in favor of the defendant D. without a disposition of the claim for hail insurance, but with the specific understanding that M. would be permitted to harvest such crops as remained. It is *held*:

Where crops, sown by one whose possession is continuous, have been destroyed by hail during the period of his possession and where all claims to title is stipulated in favor of another as owner on condition that the possessor's claim to the crop is recognized, the claim for hail insurance belongs to the owner of the crop. *Simons v. Dowd*, 540.

TAXATION.

1. Chap. 230 of the Session Laws of 1917, which provides for a uniform tax of three mills on the dollar upon moneys and credits "including bonds and stocks" and exempts the property embraced from other taxation, is construed and it is *held* that the term "bonds and stocks" includes all bonds and stocks which would otherwise be subject to taxation in some other form. *State ex rel. v. Wallace*, 804.
2. Chap. 62 of the Laws of the Special Session of 1919, which repeals chap. 230 of the Session Laws of 1917 and which affirmatively exempts moneys and credits "including bonds and stocks" from taxation—exempting from the exemption income derived therefrom and providing that "stocks and bonds" shall remain subject to a capital stock tax—, is construed and it is *held* to exempt all stocks and bonds from taxation other than that provided for in the Act. *State ex rel. v. Wallace*, 804.

TENANT.

See Landlord and Tenant.

TORTS.

1. For reasons stated in the opinion it is *held* that the complaint in this case fails to state facts sufficient to constitute a cause of action, and that the trial court properly sustained a demurrer thereto on this ground. *Tuttle v. Tuttle*, 10.

TRIAL.

1. In an action for damages for personal injuries it is improper, in an argument to the jury, to appeal for an assessment of damages on the basis of what they would take to be injured in the same manner that the plaintiff was injured. *Daniels v. Payne*, 61.
2. In submitting a case to a jury for a special verdict, it is error to read the pleadings, stating the issue of fact, the contentions of the respective parties with reference thereto, and to read to the jury the statutory law upon which the plaintiff relies for recovery. Whether such error in all cases be so prejudicial as to necessitate reversal, however, is not decided. *Daniels v. Payne*, 61.
3. The plaintiff brought an action against defendants for false arrest and imprisonment. Certain issues of fact were submitted to a jury on a special verdict. The court in submitting the special verdict also gave what is regarded as general instructions of law. It is *held* that this was reversible error. *Olson v. Horton Motor Co.*, 490.
4. At the time of submitting a special verdict the court also submitted two forms of general verdict under the same instructions, and in connection with the special verdict. It is *held* the submission of the general verdicts in the circumstances in which they were submitted was reversible error. *Olson v. Horton Motor Co.*, 490.
5. Where a case is submitted for a special verdict the jury should not be informed by instructions as to the effect of answers to questions in such special verdict on the ultimate right or liability of either party. It is proper, however, to give to the jury instructions embodying general rules of law appropriate to the particular questions of the special verdict in connection with which such rules are given. *Asch v. Washburn Lignite Coal Co.*, 735.
6. Error assigned upon alleged prejudicial remarks of counsel in the argument to the jury considered, and *held* not well taken. *Asch v. Washburn Lignite Coal Co.*, 736.
7. This is an action to recover a certain sum claimed to be owing to the plaintiff for threshing defendant's grain, and to foreclose a threshing lien. The defendant claims that the threshing was performed by another, and that the plaintiff is not the owner of the claim in suit. At the trial the parties stipulated in open court that the case shall "be tried in all respects as a jury case." The case was so tried. The jury returned a verdict for the defendant. The court made an order for judgment pursuant to the verdict, and judgment was entered accordingly. On appeal, the plaintiff contends that the trial court should have made findings of fact. For reasons stated in the opinion this contention is *held* to be without merit. *Froescher v. Tabbert*, 905.

8. That the court did not err in its instructions upon the question of value. *Howlett v. Stockyards Nat'l Bank*, 933.
9. For reasons stated in the opinion, the court did not err in permitting the reopening of the case after plaintiff had rested, at plaintiff's request, for the reception of further testimony. *Valker v. Nat. Tea Co.*, 983.

TROVER AND CONVERSION.

1. In such action, it is *held*, for reasons stated in the opinion, that the special verdict of the jury finds support in the evidence. *Burke v. Minnesota Elevator Co.*, 795.

TRUSTS.

1. Where one purchased a house and lot taking the title thereto in his own name with the intention of providing a home for his sister and her children, and, where, at the time of the purchase, he wrote a letter to his sister to the effect that he had bought a home for her, and where, otherwise, pursuant to the oral statements of the deceased, it appears that he intended to give such home to his sister and to convey the same to her if it could be done free from any claims of her husband who had deserted her, it is *held*, for reasons stated in the opinion, that there was not a completed gift of the beneficial interest to his sister and an express trust was not created vesting the legal title in the deceased, as donor, in trust for his sister, as donee. *McWilliams v. Britton*, 975.

VENDOR AND PURCHASER.

1. One purchasing real property may rely upon the public records to determine the existence of mortgage liens, and where such a lien is discharged of record by the person or persons having prima facie authority to discharge it a subsequent purchaser of the property is not bound to inquire as to whether negotiable, secured notes are outstanding in the hands of assignees where there is no record of such assignments. *Rolette County Bank v. Hanlyn, et. al.*, 72.
2. The time specified in a notice for the cancellation of a land contract fixes the time for its cancellation, subject to the statutory requirements. *Roukre v. Hoover Grain Co.*, 247.
3. Plaintiff brought an action to quiet title to certain land, and judgment was entered in her favor. Defendant's appeal is from the judgment. It is *held* for reasons stated in the opinion that the judgment should be affirmed. *Nasset v. Houska, et. al.*, 668.

4. In an equitable action for the foreclosure of a land contract it was not necessary, as a condition precedent, that a written statutory notice of intention to cancel be served. *Ryan v. Bresmith*, 711.
 5. In a judgment providing for strict foreclosure of a land contract, although the trial court did not err in not granting the statutory period of redemption, nevertheless, upon equitable principles it is *held*, that the vendee was entitled upon the facts as found, to a further extension of time within which to meet the defaults found, consistent with plaintiff's rights and crop production. *Ryan v. Bresmith*, 711.
 6. Upon a conveyance by quitclaim of the right, title, and interest of a vendor in a land contract, the grantee therein secures all of the rights of the vendor including the right to enforce payment of the unpaid purchase price. *Semmler v. Beulah Coal Mining Co.*, 1011.
 7. In a land contract containing independent covenants for the payment, upon installments, of the purchase price and for the payment of taxes, the vendee, upon failure to perform such independent covenants, is not in a position to avoid proceedings to enforce the breach of such covenants upon the ground that the holder of the contract is then unable to convey title as required by the contract. *Semmler v. Beulah Coal Mining Co.*, 1011.
 8. Where the assignee of the vendee's land contract, in an action to quiet title, asserts that proceedings in cancellation of the contract for failure to pay installments of the purchase price and taxes, are invalid because the assignee of the vendor can not convey title by warranty as required by the contract, it is *held*, for reasons stated in the opinion, that the assignee of such vendee, at the time of the cancellation proceedings, was not required by the contract then to be able so to perform. *Semmler v. Beulah Coal Mining Co.*, 1011.
 9. The following language appeared in a written contract for deed: "Either party hereto shall fail to refuse (except for imperfect title) to comply with the provisions of this contract on his part to be performed, shall forfeit or pay to the other party the sum of \$2,000, which sum is hereby fixed and agreed upon as liquidated damages to be sustained by either party from failure or default on the part of the other."
- It is *held* defendants being in possession, exercising dominion over the land described in the contract, and also being in default are not in position to invoke this clause of the contract. *Am. Loan & Inv. Co. v. Borass*, 1036.
10. The vendor in a contract may maintain an action to recover against the vendee, the amount of an unpaid installment or installments, which are due, and for all past due interest. *Am. Loan & Inv. Co. v. Borass*, 1036.

11. It is *held* defendants being in possession, exercising dominion over the land described in the contract, and also being in default are not in position to invoke this clause of the contract. *Am. Loan & Inv. Co. v. Borass*, 1086.
12. The vendor in a contract may maintain an action to recover against the vendee the amount of an unpaid installment or installments, which are due, and for all past due interest. *Am. Loan & Inv. Co. v. Borass*, 1041.

VENUE.

1. Where a complaint alleges a distinct cause of action against a private defendant and another, also, against a domestic corporation, and where the action is not brought in the county of the residence of either defendant, it is *held*, construing Subds. 6 chap. 3 Laws 1919 and § 7417 C. L. 1913, that a change of the place of trial to the county of the residence of the private party and of the corporation may be permitted upon the joint demand of both defendants. *Farmers Sec. Bank v. Springen, et. al.*, 364.

WARD.

See Guardian and Ward.

WATERS AND WATER COURSES.

1. A natural drainway serving the purpose alone of draining surface waters, but not otherwise possessing the constituent elements of a water course is not subject to the principles of law applicable to a water course. *Henderson v. Hines*, 152.
2. The common law principles applicable in this state and the conditions best suited to land development require rejection of the easement theory of the Civil Law imposing a servitude and property right upon lower lands subject to the reception of surface waters from a dominant tenement. *Henderson v. Hines*, 152.
3. The right of both upper and lower landed proprietors are fully protected under the rule of law that permits the land owner to use and enjoy his land and dispose of hostile surface waters thereupon subject to the application of the principle "*sic utere tuo.*" *Henderson v. Hines*, 152.
4. Under such principle of law, a duty is imposed upon the land owner which renders him liable for his negligent act in constructing an embankment or obstruction across a natural drainway so as to impound thereby or dam up flood waters upon the land of the upper proprietor. *Henderson v. Hines*, 152.

5. Where a natural drainway serves purposes of conveying surface waters from a drainage area comprising some 168 acres in the city of Dickinson and a Railway Co. constructed an embankment and other obstructions in such drainway and installed, in lieu thereof, culverts for the purpose of providing an escape for such surface waters, it is *held* that the question of its negligence under the principles of law stated is a question of fact for the jury. *Henderson v. Hines*, 152.
6. Where the jury, pursuant to special questions, found that the storm which occasioned the damage was an unusual and extraordinary storm and that culverts installed by the city and which connected with the Railway culverts were of insufficient capacity to handle the surface waters resulting, it is *held* that the general verdict rendered does not establish the negligence of the Railway Co. and a new trial should be granted. *Henderson v. Hines*, 153.

WILLS.

1. In this state a will cannot be proved as a lost or destroyed will unless the same is proved to have been in existence at the death of testator, or is shown to have been fraudulently destroyed during his lifetime. *Merrick v. Prescott*, 195.
2. In the instant case it is *held* that a will alleged to have been fraudulently destroyed during the lifetime of the testator is not shown to have been so destroyed. *Merrick v. Prescott*. 195.
3. In proceedings contesting the probate of a will, where both the County Court and the District Court, having found mental incapacity of the testatrix and undue influence, disallowed the probate of the will, it is *held*, that the findings of the District Court, being in place of a verdict of a jury, are presumed to be correct and will not be disturbed unless clearly opposed to the preponderance of the evidence. *Reidlinger v. Feil*, 908.
4. The will is construed and it is *held* to disclose an intention on the part of the testator to fix the amount of the gift to his wife at one-third of the estate, disregarding the expenses of administration. *In re Murphy's Will*, 1267.
5. A residuary legacy, under Section 5720 of the Compiled Laws of 1913, embraces only that which remains after all bequests of the will are discharged; and a general legatee is not required to contribute to the expenses of administration where the contribution would enhance a residuary legacy and decrease a general legacy. *In re Murphy's Will*, 1267.
6. Where a provision is made for the widow which is both a legacy and a devise, and where the amount of the gift is dependent upon the

value of the estate, including expenses, dividends and accretions, the widow is not entitled to interest under Section 5732, Comp. Laws 1913. In re Murphy's Will, 1267.

WITNESSES.

1. In an action to determine adverse claims where no one of the parties is a personal representative, the heir or next of kin of a deceased person, testimony concerning transactions had with such deceased person is not rendered inadmissible, pursuant to § 7871 C. L. 1913. *Mowry v. The Gold-Stabeck Co.*, 764.
2. Correspondence between the defendant and his agent is not privileged. *Gunther v. Baker*, 1071.
3. Under Sec. 3535, Comp. Laws, 1913, providing that witnesses are entitled to receive for each day's attendance before the District Court the sum of two dollars, a witness called to testify in a number of cases at the same term is entitled to receive in a particular case the statutory fee for only the number of days he was actually in attendance before the court for the purpose of testifying in that case. *Schwartz v. Nat. Union Fire Ins. Co.*, 1296.
4. Under Sec. 3535, Comp. Laws, 1913, providing that witnesses are entitled to receive ten cents, one way for each mile actually travelled, witness coming from without the state is entitled to receive the statutory sum for the number of miles actually travelled within the state. *Schwartz v. Nat. Union Fire Ins. Co.*, 1297.
5. An attorney appearing in a case before the Court as counsel for one of the parties, even tho he is called as a witness in said cause, is not entitled to witness fees. *Schwartz v. Nat. Union Fire Ins. Co.*, 1297.
6. A person called as a witness who is plaintiff in another similar action and is present in court awaiting trial of said action is entitled to witness fees for his actual attendance in court on account of the case in which he testifies, the same as any other witness. *Schwartz v. Nat. Union Fire Ins. Co.*, 1297.

WORK AND LABOR.

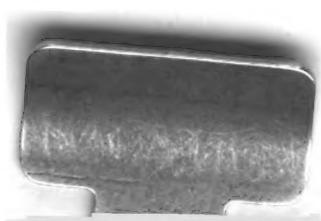
1. Plaintiffs contracted to construct a well under a special contract. They failed to substantially perform the contract, and voluntarily abandoned it, over the protest of the owner, before they had constructed a well at all. It is *held*, for reasons stated in the opinion, that no recovery can be had on quantum meruit for the value of the labor furnished and the pipe put into the ground. *Kupfer v. McConville*, 609.

WRIT OF CERTIORARI.

See Certiorari.

WRIT OF PROHIBITION.

See Prohibition.



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